

## TWENTY YEARS OF OPEN GOVERNMENT – WHAT HAVE WE LEARNT?

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May I begin by expressing my personal delight to see so many people, including friends and colleagues, present and former, here tonight. The topic that I have chosen to address, the development of open government in Australia, is a topic that in one way or another has brought me into contact over the years with many people in this theatre. Those here also include contributors to the Chair that I now hold. I am delighted, in this audience, to be able both to share my reflections and to mark my appointment to the Alumni Chair.

The only disquieting circumstance for me has been that the nicely-crafted letter of congratulation I received from the University noted that they would start talking with me about my retirement shortly before my 55<sup>th</sup> birthday, which is not too far away. So, this may be a unique occasion, when I can share with you both an inaugural and a valedictory lecture.

The choice of topic was, for me, an easy one. The campaign for open government was the first topic on which I developed an academic and professional interest. That was at a time, in the early 1970s, when the concept of open government did not enjoy widespread acceptance. The mood was aptly captured a little later by Sir Arnold Robinson's explanation to Sir Humphrey Appleby – "Open government is a contradiction in terms. You can be open – or you can have government".<sup>1</sup> Sir Humphrey agreed: the word "secretary", he noted, is after all a derivative of "secret".

In Australia that parody was reality. Jim Spigelman, now Chief Justice of NSW, would in 1972 publish a book, *Secrecy: Political Censorship in Australia*,<sup>2</sup> containing nearly 200 pages of examples of secret documents that are nowadays on the public record – the Department of Social Services internal manual, proceedings of the Loan Council, public service employment statistics, the register of health funds, consumer test reports, the price of wheat sold to China, Aboriginal health surveys, membership of Cabinet committees, and countless departmental and interdepartmental reports on Australian society. Many government spokespeople were quick to defend that secrecy.

The first assurance of change was a promise by the new Whitlam Government in 1972 to enact a freedom of information Act along the lines of the 1967 United States law. The realisation of that promise, ten years later, was a confirmation that government was

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<sup>1</sup> J Lynn and A Jay, *The Complete Yes Minister* (BBC, London, 1984) 21.

<sup>2</sup> J J Spigelman, *Secrecy: Political Censorship in Australia* (Angus & Robertson, Sydney, 1972). See also the list of documents denied to Senator Missen, in response to questions placed on notice: Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (AGPS, Canberra, 1979) Appendix 5.

changing, but of how difficult it was to accomplish that change.<sup>3</sup> The intervening development of the legislative model told the story. An interdepartmental committee appointed by the Government to develop a legislative model took nearly two years to prepare its report of 18 pages.<sup>4</sup> Sent back to the drawing board, it returned two years later with a report that had grown to 100 pages.<sup>5</sup> The Senate Standing Committee on Legal and Constitutional Affairs then took control of the reform agenda, conducting hearings around Australia, receiving submissions in support of a stronger law from over 125 individuals, public interest groups, unions and professional associations, and delivering finally a report of over 500 pages,<sup>6</sup> heralded at the time as one of the finest products of the Senate committee system. The momentum was sustained when six government senators crossed the floor to vote with the Opposition in favour of a stronger FOI law.

The platform for open government had been laid. The structure has since been erected steadily, federally and in every State in Australia. The contrast, between secrecy in the 1970s and openness in the current age, is marked, as examples illustrate.

- In 1975, in response to one of a number of routine and rather meaningless requests that I sent to government agencies, the Auditor-General refused to disclose to me a copy of its hiring contract for office pot plants. Two decades later, the Auditor-General is a leading campaigner against commercial confidentiality in government.<sup>7</sup>
- In 1972, to speak at the annual dinner of the *Federal Law Review* on the topic of government secrecy, we invited Richard Carleton (then in Canberra at the ABC – presently back in Canberra at the Supreme Court). He was denied permission by his employer. Now, public servants make a prominent and valuable contribution to public debate in seminar presentations, published articles, media interviews and parliamentary inquiries, at times raising critical questions about government policy.<sup>8</sup>
- In 1979 one informed critique of annual departmental reports was that they contained differences in content and presentation that were “surprising and often vexing”, reflecting mainly the “initiative, energy and imagination of whoever [was] responsible for compiling the reports each year”.<sup>9</sup> Now, roughly 100 agencies each year are

<sup>3</sup> The history is summarised in Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (AGPS, Canberra, 1979) chapter 2; and G Terrill, *Secrecy and Openness*, (Melbourne University Press, Melbourne, 2000) chapter 6.

<sup>4</sup> Attorney-General’s Department, *Proposed Freedom of Information Legislation: Report of Interdepartmental Committee* (AGPS, Canberra, Sept 1974).

<sup>5</sup> *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl Paper No 400 of 1976.

<sup>6</sup> Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (AGPS, Canberra, 1979).

<sup>7</sup> Eg, Australian National Audit Office, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No 38 (May 2001); P Barrett, “Access to Contractors’ Records”, Speech to CPA Australian National Public Sector Convention, 29 March 2001 [www.anao.gov.au/speeches](http://www.anao.gov.au/speeches).

<sup>8</sup> Eg, see the speech (widely reported at the time) on “The Australian Economy” by Mr S Grenville, Deputy Governor of the Reserve Bank of Australia, on 23 March 2001, about the effect of the GST on the Australian economy: [www.rba.gov.au/speeches](http://www.rba.gov.au/speeches).

<sup>9</sup> D H Borchardt, *Australian Official Publications* (Longman Cheshire, Melbourne, 1979) at 90; see also *Report of the Royal Commission on Australian Government Administration* (AGPS, 1976) at 75-76.

sufficiently proud of and satisfied with their reports to enter them in the Annual Reports Award contest conducted by the Institute of Public Administration.

- In 1977 the notice of revocation that gave rise to the *Brian Lawlor* case, said no more than that – “Recent enquiries ... have revealed that your company is not ... a fit and proper person to hold a warehouse licence. Accordingly, you are advised that [it] is revoked.”<sup>10</sup> Now, it is customary for letters of notification and statements of reasons to be much fuller.
- In the 1970s the Australian Security Intelligence Organisation had no published telephone number or mailing address, being known enigmatically as Attorney-General’s Department “D” Branch. Now, ASIO has even a website that outlines the rights people have to be informed of and to challenge adverse security assessments.<sup>11</sup>
- In 1983 this university actively defended in the Administrative Appeals Tribunal the refusal of the ANU History Department to provide honours graduates with their component marks and examiners’ comments.<sup>12</sup> Now, even at the ANU, students do not have to resort to legal proceedings to elicit basic information of that kind.
- Open records systems have now been established widely across government, and even beyond. An example which illustrates how starkly traditions can change is that of adoption records. Prior to the 1980s the thousands of biological parents who placed children for adoption around Australia did so in an expectation, a guarantee, of lifetime confidentiality. In time, the right to know challenged that assurance, and legislation was enacted around Australia conferring upon adopted children a qualified right to access their adoption records.<sup>13</sup> That change disturbed not only deeply-rooted record practices, but also the private and personal assumptions on which they were based; it is a change, however, that society has accepted and handled in a mature way.

The *Freedom of Information Act 1982* (Cth) was a part, a small but vital part, of the revolution in government and thinking that occurred in Australia. The Act thus serves as a barometer of sorts for measuring the strength of government commitment to openness. I want to return to that issue – problems with the FOI Act, and contemporary challenges to open government – but before doing so it is important to paint a fuller picture of the current structural basis for open government in Australia. I will look at three areas of structural support – legal doctrine, the framework of government, and our philosophy of government.

Firstly, **legal doctrine**. For much of our history the law was an ally for government secrecy. The discretionary right of government to decide what documents or information should be released was unchallenged by the common law. Government control of official documents was regarded as a proprietary right of kinds. In legal proceedings the doctrine of Crown privilege conceded to government a conclusive right to decide whether

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<sup>10</sup> *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at 170.

<sup>11</sup> [www.asio.gov.au](http://www.asio.gov.au).

<sup>12</sup> *Re James and Australian National University* (1984) 6 ALD 687.

<sup>13</sup> Eg, *Adoption Information Act 1990* (NSW).

disclosure of a document would be contrary to the public interest.<sup>14</sup> The immunity of the Governor-General from prerogative writ review was partially explained by the principle, enunciated by Justice Dixon in 1951, that “The counsels of the Crown are secret”.<sup>15</sup>

That tradition was curiously at odds with other features of the legal system. Courts, in their own proceedings, have always subscribed resolutely to a principle of open justice. Before a decision is made by a court, all relevant evidence and submissions must be presented in an open, public forum, with each party entitled to scrutinise and comment on the views of the other. The process culminates in a published, reasoned judgment by the court. Why, against that tradition and experience, courts should so easily have accepted that executive decisions could be made by a process that contradicts every feature of the judicial process is intriguing. Another rubric of judicial philosophy, the separation of powers, is also potentially at odds with a regime of government secrecy. The constitutional role of a court in ensuring executive accountability is hampered by secrecy and confidentiality.

And, so it happened, unsurprisingly, that in an age of administrative law review the tradition and outlook of the law would give rise to a different trend. A philosophy of open government is now firmly stamped in many doctrines of public law. The change was heralded by an historic decision of the High Court in 1978 in *Sankey v Whitlam*,<sup>16</sup> in which the Court redefined the doctrine of Crown privilege, now known as public interest immunity, a change that itself reflects a different emphasis. Thereafter, the High Court held, courts and not the Executive would finally evaluate whether the public interest required that government documents be produced for use in court proceedings. Two years later, in *Commonwealth v John Fairfax & Sons Ltd*,<sup>17</sup> Justice Mason drove the stake further by articulating a principle, to be applied as appropriate, that restraints on publication of government information which serve no purpose other than protecting the government from review and criticism are unacceptable in a democratic society.

Developments in administrative law have since gone a step further, by casting an obligation on government to provide a full account to any person who may be aggrieved by a government administrative decision. This happened chiefly in two areas – natural justice, and reasons for decision. The obligation to observe natural justice is at heart an obligation to disclose information and to invite a submission from a person against whom an adverse decision may be made. Over the last twenty years the obligation has been extended to nearly every category of administration decision and government regulation, and the obligation of disclosure has also become more particularised and more onerous. As to reasons for decision, courts were quick to highlight the profound importance of the new statutory obligation to provide a reasoned decision. As Justice Deane observed poetically, the obligation to provide a written statement of reasons effected “a quiet revolution”, it “lowered a narrow bridge over the moat of executive silence”.<sup>18</sup>

Significant developments in legal doctrine continue to unfold. The implied constitutional protection for political communication, recognised by the High Court in 1992, was

<sup>14</sup> *Duncan v Cammell Laird & Co* [1942] AC 624; *Lanyon Pty Ltd v Commonwealth* (1974) 3 ALJ 58 at 60.

<sup>15</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179.

<sup>16</sup> *Sankey v Whitlam* (1978) 142 CLR 1.

<sup>17</sup> (1980) 147 CLR 39.

<sup>18</sup> *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 156.

fashioned in part as a constitutional protection for an open information flow between government and the community.<sup>19</sup> Another decision of recent note was the decision of the High Court in *Egan v Willis*,<sup>20</sup> holding that an upper house of Parliament has a right to demand the tabling of documents and to suspend a Minister who fails to comply with such a resolution. The advent of freedom of information legislation was noted by the Court as a factor in support of that conclusion.<sup>21</sup>

If we move from legal doctrine to the **framework and practices of government**, a similar transformation can be depicted. It is in the nature of government to prefer confidentiality and secrecy for its internal operations, just indeed as it is in the nature of most organisations, and most people in their personal dealings, to avoid the glare of publicity. However, the government predilection for secrecy could also be rationalised and justified in different ways, to the persuasion at least of those on the inside. Foremost among the reasons given for keeping under lock and key the immense storehouse of information held by government agencies was that the first obligation of the public service was to the elected government of the day. It was ministers who exercised the prerogative of deciding when and how information should be released.

Those pressures and constraints on government have not gone away. The self-protective reticence of the public service to disclose documents is perennial. Moreover, politics continues to be a tough game, in which short term advantage can justify most departures from standards that are espoused in another context.

But in other ways the framework and practices of government have changed and are inimical to the former age of secrecy. The citadel still stands, but now has different walls and is differently managed. We now have Ombudsman, FOI units, parliamentary committees and others who provide a much-needed counterweight. The personnel composition of the government administration is different also. It is not the career for life that it once was, but is staffed more by people who move in and out of government and whose acculturation is neither as prolonged nor as intense as it once was. Proportionately, statutory authorities now perform more functions and employ more of the public service than hitherto. In developing information disclosure practices, they are not as constrained by considerations of responsible government as much as executive departments are.

The web is transforming government, just as it is transforming the rest of society. When the net is working, an immense range of government publications are accessible at the push of a button. The web sites of government agencies illustrate too how the language and

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<sup>19</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139 per Mason CJ: “the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters”; see also Deane & Toohey JJ at 176, and Gaudron J at 211-212. See also P Bayne, “Freedom of Information and Political Free Speech” in T Campbell & W Sadurski (eds), *Freedom of Information* (Dartmouth, England, 1994) 199.

<sup>20</sup> *Egan v Willis* (1995) 195 CLR 424, discussed in J McMillan, “Parliament and Administrative Law” in G Lindell and R Bennett, *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 372-374; and C Mantziaris, “Egan v Willis and Egan v Chadwick”: Responsible Government and Parliamentary Privilege”, *Research Paper No 12*, 1999-2000, Dept of Parliamentary Library, Canberra, 1999.

<sup>21</sup> (1995) 195 CLR 424 at 452 per Gaudron, Gummow & Hayne JJ; see also McHugh J at 476-477, and Kirby J at 501-502; cf Callinan J at 510-511.

precepts of public service have been revised. Most agencies publish customer service charters that detail customer complaint procedures, and that routinely mention openness and reasoned decision-making among the service standards to which the agencies proclaim their commitment.

Another far-reaching change is the outsourcing of government functions and service delivery. Mostly what is said about outsourcing in public law circles is that it removes government operations from the accountability matrix, and so (unacceptably) it does. But outsourcing has an impact at different levels, and at one level at least it is antithetical to a custom of government secrecy. Very simply, outsourcing is possible only because we now have open government: it would not have been possible in an earlier age when the distinction between those were part of government and those who were not was a distinction between night and day. If I take my own situation as an example, through my consultancy work for a private law firm that has been appointed to government legal panels, I see a great range of confidential government documents. Though the access is preferential and restricted, it is access nonetheless, and it is conducive to a more vibrant interchange of ideas between the public and private sectors.

The **third** structural support for open government nowadays is a more complex philosophy of government. The importance of information has long been recognised: familiar and long-standing aphorisms which capture that point include, that “information is the currency of power”, “the lifeblood of democracy”, that “knowledge governs ignorance”, and “the public has a right to know”. But in a system of secret government the implications of those terms was never unravelled. Secrecy was one-dimensional, it involved the suppression of information.

Yet as Greg Terrill, in a marvellous book on the history of open government in Australia has observed, “openness is more than the obverse of secrecy”.<sup>22</sup> Open government is multi-dimensional: it is more than the disclosure of hitherto secret information; it is also about how society is governed, who participates in government, how decisions are made, and how information is managed. In a system of open government we can begin to view information not just as an object – a document, a report, a press release – but, as Greg points out, as a dimension of all government activity.<sup>23</sup> Every relationship in and with government involves and is often built upon a flow of information.

Those are still radical notions within government, as illustrated by the fact that every attempt federally to develop a comprehensive information policy across all facets of government has foundered.<sup>24</sup> But the gusts of change have raised some dust. If we start, firstly, at the level of grand theory we find that most of the themes in contemporary political theory – civic republicanism, deliberative democracy and the like – give more emphasis than formerly to access to information as an essential condition for democratic

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<sup>22</sup> Terrill, above n 3 at 235.

<sup>23</sup> Terrill, above n 3 at 5; see also C Hazelhurst, “The Information Dimension” in C Hazelhurst & J R Nethercote (eds), *Reforming Australian Government – The Coombs Report and Beyond* (ANU Press and RIPA (ACT), Canberra, 1977).

<sup>24</sup> Eg, Office of Government Information Technology, *Management of Government Information as a Strategic Resource – Report of the Information Management Steering Committee on Information Management in the Commonwealth Government* (1997); Terrill, above n 1 at 4, and chapter 9 (discussing the efforts of the Coombs Royal Commission on Government Administration, to develop an information policy).

deliberation on public policy.<sup>25</sup> While some of the newer theory is not always easy to comprehend, in essence it means that the channels of communication and information disclosure go in multiple directions, not just vertically.

There are many formal and informal examples in government that illustrate how this notion has taken hold. At the *informal* level, open government is sustained, if I can again use Greg Terrill's words, by the fact that many government employees "practise a mild form of civil disobedience".<sup>26</sup> More formally, whistleblowing – disclosure by an employee that is not sanctioned by a superior – gains legislative recognition in most Australian jurisdictions.<sup>27</sup> It is also common nowadays for decision-making models within government to incorporate consultative procedures and public participation.

I shall mention two very different examples that illustrate how, from a theoretical base, it is progressively easier to validate methods of information disclosure that were formerly regarded as unacceptable. The first example is of a book published last year, without controversy, by Meredith Edwards, describing frankly how, during her period within government as a senior policy adviser, policies emerged on child support, HECs and AUSTUDY.<sup>28</sup> Not too long ago, any book providing an inside account was more likely to attract legal proceedings to restrain or punish publication.<sup>29</sup> My guess is that legal proceedings of that kind are now less likely, in part because people are not as easily convinced that it is wrong to publish the recent historical record long before the thirty year archival period<sup>30</sup> is reached.

My second example relates, curiously, to the "children overboard" affair. One must start by noting that the recent events do not show government in a good light. On any view of the story it is clear that an information blockage occurred at some stage or other within government, that the public was grievously misinformed as a result, and that wherever the blame lies within government, that government itself surely is to blame. There is a picture emerging too of open government objectives being sabotaged by poor document recording practices – "hear no evil, see no evil, and record nothing in writing" – and by the unregulated and unaccountable role of ministerial staff.<sup>31</sup> It is tempting, in the eye of the storm, to conclude that conditions are the worst we have ever seen. But, as to one aspect at least, the sobering lesson is that we now know as much as we do because numerous public servants, from the middle to the top, each frankly gave part of the story to a parliamentary committee (indeed, some gave two stories). This is in sharp contrast to another famous incident, in 1975, when 11 senior public servants summonsed to the Bar of the Senate to

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<sup>25</sup> Discussed in S Zifcak, "Freedom of Information: Back to Basics" in R Creyke & J McMillan, *Administrative Law – The Essentials* (AIAL, 2002: in publication).

<sup>26</sup> Terrill, above n 1 at 6-7.

<sup>27</sup> *Protected Disclosures Act 1994* (NSW); *Whistleblowers Protection Act 1993* (SA); *Whistleblowers Protection Act 1994* (Qld); *Public Interest Disclosure Act 1994* (ACT); *Public Service Act 1999* (Cth) s 16.

<sup>28</sup> M Edwards, *Social Policy, Public Policy: From Problem to Practice* (Allen & Unwin, 2001).

<sup>29</sup> Eg, see *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 (the Crossman Diaries case); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (NSW Sup Ct), and (1988) 165 CLR 30 (High Ct) (the "Spycatcher" case); see also Y Cripps, *The Legal Implications of Disclosure in the Public Interest* (1986).

<sup>30</sup> *Archives Act 1983* (Cth).

<sup>31</sup> Eg, see two analyses in "The Public Sector Informant", published in *The Canberra Times*, March 2002, by J Nethercote, "Exposed: the system at work" and by J Waterford, "Taking on water but not in danger of sinking".

answer questions about the overseas loans affair followed their ministerial instructions to provide only their name, rank and serial number.<sup>32</sup>

I now come back to the Freedom of Information Act. The Act was a part of and underpinned some of the trends that I have described. It was, in my view, an Act of fundamental or constitutional importance. The core objective of the Act was to replace three ingrained principles of government: that it was the prerogative of government to decide what information to release; that a person seeking access to official documents bore the onus of explaining and justifying why access should be granted; and that the decision whether to release was discretionary and not guided by any objective criteria. The echo of those three principles is still audible at times, but substantially they have been buried, by the FOI Act, by a mass of legal doctrine, by changed governmental practice, and by a different philosophy of government.

That is not to say that government is as open as it should be. In any month allegations swirl in the media of illegitimate political secrecy, on matters as varied as the management of detention centres and foreign investment takeover approvals.<sup>33</sup> We will never supersede what I described earlier as the self-protective reticence of the public service, nor the toughness of politics. Nor, of course, does every allegation of secrecy tell the full story. Sometimes they merely show the Sandman (Sandy) says of the Sunstruck Guest House, “Closed doors, create interest”.

But it is the task of the FOI Act to limit secrecy and, as its objects clause declares, “to extend as far as possible the right of the Australian community to access to information in the possession of the Government”.<sup>34</sup> How suited is the Act to achieving that objective?

In answering that question we should recall that the Act is the sum of many parts: how it is drafted; how it is interpreted by courts and tribunals; how it is administered by government agencies; and whether it is supported by government. There is much that can be said on each of those themes, and much that has been said in the 200 page report on the Act in 1995 by the Law Reform Commission and the Administrative Review Council,<sup>35</sup> in a 250 page report three months ago by a Queensland parliamentary committee,<sup>36</sup> in similar

<sup>32</sup> Senate, *Debates*, 16 July 1975 at 2762-2763.

<sup>33</sup> Eg, see the recent Editorials in *The Australian*: “Governments must lift the veil of secrecy”, 6 Feb 2001; “Let the people in on the truth of Woomera”, 29 Jan 2002; “Our culture of secrecy must be challenged”, 5 Feb 2002. For other reports, see K Lawson, “Howard Government the most secretive in years: handbook”, *The Canberra Times*, 19 Sept 2001 at 3; R Garran, “Defence force in a secrecy bunker”, *The Australian*, 27-28 Oct 2001 at 4; S Brown, “Not in the public’s or Parliament’s interest: the Howard Government has been the most secretive in Australia’s history”, *The Canberra Times*, 5 Nov 2001 at 9; A Wood, “Doped: billion-dollar business business welfare”, *The Australian*, 13 Dec 2001 at 6; Editorial, “The right to the true story”, *The Age*, 30 Jan 2002.

<sup>34</sup> *Freedom of Information Act 1982* (Cth) s 3.

<sup>35</sup> Australian Law Reform Commission/Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77/ARC Report No 40 (AGPS, Canberra, 1995). See also Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation* (AGPS, Canberra, 1987).

<sup>36</sup> Legal, Constitutional and Administrative Review Committee (Qld Parl), *Freedom of Information in Queensland*, Report No 32 (Dec 2001)

reports over the last ten years in every other Australian State,<sup>37</sup> and in the Commonwealth Ombudsman's own motion report on FOI administration in 1999.<sup>38</sup> Suffice it to say that some criticisms emerge commonly and trenchantly in those reports. They include:

- FOI works well in facilitating public access to personal affairs information, but not to information at higher levels or that is more politically sensitive;
- there is a misuse by government agencies of two exemptions in particular, the Cabinet documents exemption and the commercial affairs exemption
- decisions by courts and tribunals that give a conservative interpretation to the Act (such as the decision in *Howard*) are seized upon and overused by agencies
- the coverage of the Act has not kept pace with developments in government, notably outsourcing, with the result that some record holdings now escape the coverage of the Act
- there is an uneven culture of support for FOI across government
- administration and oversight of FOI administration is too decentralised
- gaining access can be prohibitively costly,<sup>39</sup> and
- gaining access can also be arduous and slow.

From amongst those problems there are three broad issues I select for comment,<sup>40</sup> with some reflection on the FOI campaign objectives of the 1970s.

**First**, the essence of FOI administration is the resolution of competing pressures – for example, between those who want disclosure and those who don't, or between the allocation of resources to FOI or to other administrative demands. The right of a person to appeal externally against a denial of access to a tribunal or court is one valuable way of applying a pro-FOI pressure to government, but external review can be intermittent and unpredictable. Pro-FOI pressures need also a broader and more permanent base *within* government. This point has been taken up by many of the committees that have reviewed the FOI Acts, recommending that there be a permanent FOI Commissioner (as in Queensland and Western Australia), fully-staffed FOI units within agencies, and a network

<sup>37</sup> Legal and Constitutional Committee (Vic Parlt), *Report upon Freedom of Information in Victoria*, 38<sup>th</sup> Report (Nov 1989); Legislative Council Select Committee (Tas Parlt), *Freedom of Information* (Feb 1997); Ministry of Justice (WA), *Review of the Freedom of Information Act 1992* (Oct 1997); South Australian Legislative Review Committee, *Report of the Legislative Review Committee Concerning the Freedom of Information Act 1991* (Sept 2000); Standing Committee on Justice and Community Safety of the Australian Capital Territory Legislative Assembly, *The Freedom of Information (Miscellaneous Amendment) Bill 1998*, Report No 17 (Aug 2001); NSW Ombudsman, *Special Report to Parliament by the Office of the NSW Ombudsman Proposing Amendments to the Freedom of Information Act 1989*, Report No 1/94 (March 1994).

<sup>38</sup> Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies* (1999); and R McLeod, "Freedom of Information" (2000) 25 *AIAL Forum* 1.

<sup>39</sup> See C Harvey, "Information laws open to manipulation", *The Australian*, 11 Dec 2001 at 3.

<sup>40</sup> For recent analyses and critiques of the operation of freedom of information laws in Australia, see P Bayne & K Rubinstein, "Freedom of Information and Democracy: A Return to the Basics?" (1994) 1 *Aust Journal of Admin Law* 107; G Terrill, "Individualism and Freedom of Information Legislation" (2000) 87 *Freedom of Information Review* 30; R Fraser, "Freedom of Information: Commonwealth Developments" (2001) 9 *Aust Journal of Admin Law* 34; R Snell, "Rethinking Administrative Law: A Redundancy Package for Freedom of Information" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (AIAL, Canberra, 1999) 84.

of FOI units across government. This point was ill-understood in the campaign many years ago for FOI legislation, where the campaign focus was more on securing a law that was well-drafted rather than a system that was well-administered.

In one other respect the need for effective counter pressures against secrecy may be ill-appreciated even now. Some of the most intense political disputes concern the disclosure of information, as the “children overboard” affair reminds us. Moreover, within government there are some very tough-minded ministers. Any tribunal which has to confront a minister on a sensitive issue of document disclosure should enjoy security of employment. In my view, at least some tribunal members need a long and secure tenure in office, if for no reason other than to safeguard the robust administration of the FOI law.<sup>41</sup>

**Secondly**, there is the issue of the cost of FOI, a potential problem that was recognised but studiously circumvented in the FOI campaign. There is an unavoidable dilemma: a high cost regime can be used by government to deter requests and to corrode the Act; but, on the other hand, individual document requests can consume an enormous amount of administrative time to process, and the volume of requests will be cost sensitive. The scale of FOI fees is an important issue, but alone will not resolve that dilemma.

We are driven back to the point, that we so often are in public administration, that the answer lies as much in the wise of discretion. For that to occur there must be an administrative environment that gives room to move, which understands that FOI is part of the cost of running a democracy, and that it is backed up by bodies such as an FOI Commissioner. It may, furthermore, be easier to gain acceptance of some FOI resource costs if they are viewed not merely as an FOI issue, but as an element in a more broadly-framed government information policy.

**Thirdly**, I come to the most challenging issue of all. A recurring theme in the history of FOI laws around Australia is that governments gradually lose their initial enthusiasm for FOI. One of the truisms of FOI law reform is that it is brought in on a wave of government enthusiasm against public service scepticism, yet the public service then learns to live with the FOI law at about the same pace that government antagonism grows. Government resistance can be manifested in many ways, such as the increase in FOI charges, the failure to implement recommendations for legislative reform, and hard-line attitudes on document exemption claims.

This has been less of a problem in a US-style system where there is a strict separation between legislature and executive, because the culture of support for FOI within the Congress usually grows stronger over time. By contrast, I fear that Australian FOI proponents, in explaining with such conviction that the system of responsible government should not be an obstacle to FOI, overlooked that responsible government would re-emerge as an obstacle further down the track because of the control which governments have over both the parliament and the executive. I think we need to draw from the US experience and to build a non-aligned culture of support for FOI within the legislature. I well appreciate the difficulty of focusing Parliament’s attention on such an issue, given the intense political rivalries that dominate parliamentary proceedings. But we should give further thought to this issue. At a minimum there should be a parliamentary committee

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<sup>41</sup> Cf Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (Canberra, 1995) 81-84.

with a dedicated focus on information as a dimension of all government activity. Perhaps, too, it may be feasible to develop constitutional conventions or standards of a sort in support of FOI, that are endorsed by parliamentary resolution at the beginning of each session.

To those problems and challenges one could add many others – two that I have mentioned only fleetingly are the increased reliance on commercial confidentiality claims,<sup>42</sup> and the remarkable growth in the size of ministerial offices, operating as an unaccountable filter on the information stream. But in the last few minutes I want merely to note and to put those problems to one side, and to ask a different question that should be asked in any retrospective analysis of open government. Has open government itself given rise to any problems?

At a broad level it is certainly true that an open society is a more critical society, a more demanding society. It is often said in justification of open government that it will restore faith in the institutions of government. Ultimately that is correct, in my view, but institutions that are exposed to the public gaze are also exposed to cynicism and, at times, to captious and ill-founded criticism. That is not an argument against openness: it is simply a reminder of the adage that freedoms should be enjoyed wisely.

In two respects, however, I do question whether the objectives of open government have been misread or misapplied. The first concerns an issue that I have taken up in other forums, as to whether the criteria for lawful decision-making in administrative law have been extended too far and become unrealistic. That concern overlaps with the open government issue at some points, chiefly in relation to natural justice. The doctrine of natural justice imposes on government an obligation to initiate disclosure, to disclose adverse information to a person or corporation before an administrative decision is made that adversely affects their rights or interests. Failure to comply strictly with that obligation results in the most dramatic of all consequences for government, a finding of invalidity, an erasure – as it were – of the historical record. Taken too far and applied too strictly, natural justice can impede prevent policies being formulated or decisions made.

A point which stands out in nearly all recent natural justice cases is that a full hearing was in fact given at some point prior to the final decision being made. Between the hearing and the final decision other documents were prepared, and as often as not the natural justice breach arose from some comment or observation made during that internal deliberation phase. Generally speaking the documentation will later be available under FOI, but the

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<sup>42</sup> Eg, see two reports by the Senate Finance and Public Administration References Committee, *Government Contracting Out – Second Report* (May 1998) and *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts* (June 2000); Australian National Audit Office, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No 38 (May 2001); Public Accounts and Estimates Committee (Vic Parl), *Inquiry into Commercial in Confidence Materials and the Public Interest*, Report No 35 (March 2000); M Paterson, “Commercial in Confidence Claims, Freedom of Information and Government Accountability – A Critique of the ARC’s Approach to the Problems Posed by Government Outsourcing” in R Creyke & J McMillan (eds), *Administrative Justice – The Core and the Fringe* (AIAL, Canberra, 2000) 243; W de Maria, “Commercial-in-Confidence: An Obituary to Transparency” (2001) 60 *Aust Journal of Public Admin* 92. Note also the Senate Resolution of 20 June 2001 requiring Ministers at 6 monthly intervals to table in the Senate a list of contracts above \$100,000 entered into by FMA Act agencies, specifying whether the contract contains confidentiality provisions and a justification therefore.

issue is whether the validity of the entire process should hinge on a model of open decision-making that is becoming legally complex and unpredictable.

Two quick examples. One is of the famous Hindmarsh Island Bridge case<sup>43</sup> in which the notice of a public hearing, inviting submissions, was found on reflection by the Court to be defectively narrow. The notice seemed not, however, to have misled the 400 or so people who had comprehended the scope of the inquiry and responded with a written submission. The second example is of a recent case, *NIB Health Funds Pty Ltd v Private Health Insurance Administration Council*,<sup>44</sup> in which the Council, in unsuccessfully defending its decision on health fund levies, had each member of the Council give sworn cross-examined evidence to the Court on what they individually took into account. My comment is that deliberative councils, peer review bodies and representative committees can themselves be a form of openness and public participation in government. We can undermine the objectives and dynamics of that process if we go too far in inferring invalidity and breaches of natural justice from what individual members may have thought or said during debate.

My second concern is related also to that issue of public participation in government decision-making. The limited purpose of public participation in government decision-making is to add an extra voice at the table, and to allow a fluid interchange of ideas and people across the public/private divide. But, as that idea gains gradual acceptance, we increasingly see models of decision-making being proposed in which non-government organisations, both from the private sector and the public interest community, assert a right to set the agenda, to prepare a range of options from which government is required to choose, or in some examples to exercise an effective veto over a proposed government decision. One form in which that claim is increasingly made is that governments are bound to act consistently with the rulings and findings of international organisations.

My concern, in short, is that demands for openness and public participation in government should not be transformed into proposals to take away from government the responsibility for making decisions and to transfer that role to others who are neither democratically appointed nor subject to freedom of information laws. In the early days at least of public interest advocacy that was never the objective: the more limited objective was, as I've said, to ensure that before government made a decision it disclosed the agenda and heard the informed voice of others, not that it lost its authority to make decisions. We should not lose sight that the original objective was to change how decisions are made, not who makes those decisions.

May I conclude. Twenty years of open government, and we have learnt a great deal. There is hardly an aspect of government and society that has not been touched by the development of open government in Australia. Yet, if asked to crystallise twenty years into a single observation, I would respond as follows. Openness can be portrayed as an end in itself, a worthy human value. *But*, there is a dualism. Openness, in addition, is an essential plank of the platform for realising other social and political objectives. Without openness, executive accountability cannot properly be realised. Without openness, administrative justice is diminished. And without openness, democracy is destabilised. In the clash of ideals that mark out the terrain of legal and political debate about how our

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<sup>43</sup> *Norvill v Chapman* (1995) 1333 ALR 226.

<sup>44</sup> [2002] FCA 40.

society should be governed, a campaign to maintain open government should remain a central objective.