Chapter 2

The background to the Bill: freedom of information in Australia and overseas

Australia

2.1 The attention that freedom of information legislation has attracted in Australia affords some confidence that interest in the issue is now firmly based, and is likely to grow. The occasional awareness of freedom of information that existed as recently as a few years ago can be contrasted with the widespread conviction now held throughout the community that legislation is a necessary reform. This impression is confirmed by the number, range and substance of submissions received by this Committee.

2.2 Although openness, accountability and responsibility are objectives that have traditionally been pursued in Australia since parliamentary government was established, it is only since the enactment of the United States Freedom of Information Act 1966 that we have looked upon legislation as a means of achieving those objectives. That legislation was first discussed prominently in 1967 in an article in the *Australian Law Journal*, 'Public Access to Government Documents', by Professor Enid Campbell.[1] In 1970, the first serious proposal for enactment of similar legislation in Australia was made by the Council of Commonwealth Public Service Organisations (now the Council of Australian Government Employee Organisations), in a lengthy submission to the Prime Minister.[2] The Council combined this proposal with other proposals, notably, the relaxation of restrictions which existed at the time proscribing public comment by government officials, and the repeal of section 70 of the Crimes Act and its replacement by criminal prohibitions against the unauthorised release of a few specific categories of information. Around this time secrecy and freedom of information also received isolated treatment in a few speeches and editorials.[3] However, most discussion concentrated on the role that public comment by government officials would have in ensuring openness.

2.3 An early assault on government secrecy came in a book, *Secrecy: Political Censorship in Australia*, by Jim Spigelman, published in 1972. This book, which focused much public attention on the disadvantages of unnecessary secrecy in government, was less concerned with legislative solutions to the problem and more with the distortions that secrecy produces in political and administrative

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[1] E. Campbell, 'Public Access to Government Documents', *Australian Law Journal* 41, July 1967, pp. 73–89. The idea of legislation also received a fillip during the visit to Australia in July 1972 of the United States consumer advocate Ralph Nader, *Canberra Times*, 10 July 1972, p. 2.

[2] Council of Commonwealth Public Service Organisations, Submission to the Prime Minister and the Public Service Board relating to Official Secrecy and Restrictions upon Freedom of Expression in the Commonwealth Public Service, Canberra, 1970, 17 pages.

[3] See for example Clyde R. Cameron, M.P., Official Secrecy, Open Government, and Making Democracy Democratic, paper presented to the South Australian Institute of Personnel Management on 17 September 1972; J. Bennet, Open Government, paper presented to the 1973 National Convention of Councils for Civil Liberty on 29 September 1973; *Australian*, 7 February 1967; *Financial Review*, 13 February 1967; *Canberra Times*, 9 October 1967 and 1 September 1970.

management. Three years later Mr Spigelman outlined the advances which he thought had been made in the intervening period towards more open administration in a paper presented to a seminar on 'open government' organised by the Royal Commission on Australian Government Administration.[4]

2.4 A commitment by a major political party to the enactment of freedom of information legislation was first made in the 1972 election campaign. The then Opposition Leader, Hon. E. G. Whitlam, declared that his party's aim for Australia was 'a less secret society, a more open society, a more co-operative society, a better informed and involved society'.[5] In his policy speech he stated:

> A Labor Government will introduce a Freedom of Information Act along the lines of the United States legislation. This Act will make mandatory the publication of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions. Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies.[6]

2.5 On 10 January 1973, soon after the Labor Government was elected to office, the Attorney-General, Senator (now Mr Justice) Murphy, announced that Cabinet had authorised him to prepare legislation along the lines of the United States Freedom of Information Act, subject to such modifications as would be required to adapt the United States system to the Australian constitutional and administrative structure. The first step in this process was the establishment of an interdepartmental committee ('the 1974 IDC') to report on the necessary modifications. Represented on the 1974 IDC were the Attorney-General's Department, the Departments of Prime Minister and Cabinet, Treasury, Defence, Special Minister of State, Foreign Affairs and the Public Service Board. In addition, the Government employed Mr A. Mondello, from the United States Department of Justice as a consultant to advise it on the operation of the United States Act.

2.6 Little happened until September 1974 when the 1974 IDC published a report, *Proposed Freedom of Information Legislation*.[7] Although the report was brief, in many important respects it contains the foundation for the scheme that is now contained in the Bill introduced in the Parliament in 1978. Under that scheme, any person has a right to seek access to a document without showing special interest or need; a document must be released unless it falls within an exempt category and in respect of many documents an appeal may be made to the Administrative Appeals Tribunal against a decision that a document is exempt. An exempt document may as a matter of discretion be released and the Act is to have only a prospective operation.

2.7 The 1974 IDC found that the scheme of the United States Act should be modified to suit the Australian constitutional and administrative structure, in two respects:

(a) to ensure the confidentiality of Cabinet discussions and of consultations between Ministers; and

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[4] Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, pp. 157–163.

[5] Quoted in a speech delivered by Mr C. R. Macdonald, Managing Director of David Syme and Co. Limited, publishers of *The Age* to the Perth Press Club, 14 August 1978. Submission no. 84, appendix 2, p. 1.

[6] Australian Labor Party, *Policy Speech 1972*, Standard Publishing House, Sydney, 1972, p. 38.

[7] Australia, Attorney-General's Department, *Proposed Freedom of Information Legislation: Report of Interdepartmental Committee*, AGPS, Canberra, 1974.

(b) to maintain the authority of Ministers over departments for which they are responsible.[8]

To this end it proposed that in respect of departments the decision whether to claim an exemption for a document should be vested in the responsible minister, and that in respect of certain categories of documents (substantially identical to those in the existing Bill) a certificate issued by a minister that a document is exempt should be conclusive. In the light of later proposals and developments, it is interesting to note the stance adopted by the 1974 IDC towards Cabinet documents. While it was of the opinion that the minister's certificate classifying a document as a Cabinet document should be conclusive, the Committee expressly reserved this as a question that ministers 'may wish to consider'.[9]

2.8 Only seven submissions commenting on the 1974 IDC Report were received by the Government, although generally it attracted much criticism, partly for its brevity, partly for its failure to discuss important procedural amendments that were made to the United States Act in 1974, and also for what were seen as restrictive provisions that were not contained in the United States Act (for example, conclusive certificates and prospective operation). One editorial summarised the complaints of many in saying that the report was 'unimaginative, bereft of practical detail, and short of supporting argument'.[10] In the event, the Labor Government took no action on the Report before the 1975 election. However, it is interesting to note that several of the recommendations of the 1974 IDC were not subsequently adopted, a fact which evidences the changing attitude about freedom of information, and perhaps also the effect that public comment and criticism have had on the development of proposals. The proposals since rejected are:

(a) that the decision to claim exemption be vested in the responsible minister;

(b) that there be an exemption for drafts of documents or documents not brought into the final form for the purpose for which they were prepared;

(c) that the Act not require each department to publish a description of its organisation and functions and its manner of doing business; and

(d) that a request must be made to the department which originated a document.

In addition, the exclusion of prior documents from the operation of the Act was unqualified under the 1974 IDC's proposals. As well, it was unenthusiastic about recommending the need for publication and indexation of internal law. A further change from the IDC's proposals is the tightening of some of the exemptions, such as that protecting law enforcement.

2.9 While the 1974 IDC Report was being debated, the Royal Commission on Australian Government Administration commenced a study of the issue. Initially a seminar on 'open government' was held, and later a specific study within the Commission on freedom of information legislation was instituted, and a consultant hired to assist in this regard. A draft bill was prepared, which was published, together with an Explanatory Memorandum, as a Minority Report of Commissioner Paul Munro.[11] The Commission itself felt it was inappropriate

[8] ibid., p. 2.
[9] ibid., p. 6.
[10] *The Canberra Times*, 6 December 1972, p. 2. For further comment see Coombs, *Appendix, Vol. Two*, cited footnote 4, pp. 157–190; *Rupert*, nos. 1, 2.
[11] Coombs, *Appendix, Vol. Two*, cited footnote 4, pp. 1–156.

either to endorse or to recommend a specific draft bill. However it did urge greater openness and freedom of access to information about governmental processes, and agreed that legislation could well contribute to those objectives. It noted:

> We consider every reasonable attempt should be made to provide individuals and community groups with access to much information which until now has been the privileged possession of ministers and public servants.[12]

2.10 The draft bill supported by Commissioner Munro (which is popularly titled the 'Minority Report Bill') goes much further than either the IDC Reports or the Government's Bill in requiring agencies to respond to public requests for information. In its procedural aspects, the Minority Report Bill also parallels more closely the provisions of the United States Act than does the Government's Bill. The main differences between the Minority Report Bill and the Government's Bill can be summarised as:

(a) besides being more narrowly drafted, some of the exemptions also list criteria favouring disclosure that must be considered by an agency;

(b) none of the exemptions is conclusive, and the Administrative Appeals Tribunal has a general power to order that any exempt document should be released in the public interest;

(c) a general index of available documents has to be prepared by each agency;

(d) requests have to be answered within ten working days, and charges are regulated by criteria in the Act; and

(e) a wider range of powers is conferred upon the Tribunal, for instance, to order that costs be awarded against the government, or that no charge be levied for a document which the Tribunal has decided is not exempt.

2.11 The Liberal–National Country Party Government elected in December 1975 had also declared itself in favour of freedom of information legislation. The Prime Minister, Rt Hon. J. M. Fraser, explained this support at an address to mark the 50th anniversary of *The Canberra Times* on 22 September 1976:

> If the Australian electorate is to be able to make valid judgments on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?[13]

The Prime Minister also announced that another interdepartmental committee had been established to study and report on policy proposals for legislation. The same departments and authorities were represented on this IDC ('the 1976 IDC') except that the Department of Administrative Services replaced the Department of Special Minister of State.

2.12 The Report by the 1976 IDC, entitled *Policy Proposals for Freedom of Information Legislation*, was tabled in November 1976.[14] This Report discussed in detail the procedural aspects of the legislation and included much explanation and justification of the proposals in the Report. Again, only a few submissions on the Report were received by the Government, although from general observation the Report generated much more interest in the community at large.

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[12] Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman) *Report*, Parl. Paper 185/1976, Canberra, 1977, para. 10.7.22, p. 350.

[13] *The Canberra Times*, 23 September 1976, p. 2.

[14] Australia, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parl. Paper 400/1976, Canberra, 1977.

By and large comment seems to have been critical, claiming that legislation along the lines of the Report would unnecessarily restrict the public right of access to documents and would be weighted more in favour of administrative convenience.[15] The 1976 IDC was criticised in particular for its failure to articulate the reasons why legislation is necessary. The most that was offered was a brief comment as to the basic premise from which the 1976 IDC worked:

> The basic premise from which consideration of the issue in Australia must begin is that in a parliamentary democracy the Executive Government is accountable to the Parliament and through the Parliament to the people. An informed electorate is able to exercise a more informed choice at the ballot box. But more than that, openness of access to information . . . 'promotes an aware and participatory democracy'. Many authorities could be quoted in similar vein. There is no need to labour the point; there is no real dispute about the principle.[16]

This view was criticised by some on the ground that a Bill should be premised upon a more realistic appreciation of the objectives to be served by legislation.

2.13 More time was spent by the 1976 IDC in defending the much-criticised remarks in the 1974 IDC Report to the effect that legislation should be tailored to accommodate the Australian constitutional and administrative structure. The 1976 Report stated that legislation 'must take into account the special position of Ministers and the role, subordinate to that of the Ministers, of public servants'.[17] Reference was made in this Report to the doctrines of collective and individual ministerial responsibility, a non-partisan public service, and the fact that documents to which the Act applies will include material that is capable of being used for political purposes.

2.14 It is clear that a preoccupation with Westminster conceptions of government is a theme that unites the two IDC reports on the one hand, and the present Bill and its accompanying explanations on the other. Of equal importance in all three documents is a desire to develop legislation that does not impose an unreasonable administrative burden on the resources of agencies, and which avoids the large administrative dislocations that have occurred in some United States agencies. Consequently, the present Bill is based substantially upon the 1976 IDC report. Only a few differences exist, chiefly that:

(a) some of the exemptions are altered or narrowed, mainly those for internal working documents, law enforcement, certain documents concerning operations of agencies, and documents to which secrecy provisions of enactments apply; and

(b) a 60-day limit is imposed within which requests must be answered.

2.15 The present Bill was introduced into the Parliament on 9 June 1978. It was described by the Attorney-General as 'a unique initiative . . . [that] will establish for members of the public legally enforceable rights of access to information in documentary form held by Ministers and government agencies'. It was pointed out that 'this is the first occasion on which a Westminster style government has brought forward such a measure',[18] and that 'the Bill represents

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[15] See for example J. McMillan, 'Freedom of Information in Australia: Issue Closed', *Federal Law Review 8*, September 1977, pp. 379–434.

[16] *Policy Proposals for Freedom of Information Legislation*, cited footnote 14, para. 3.4, p. 13.

[17] ibid., para. 4.13, p. 19.

[18] Australia, Senate, *Hansard*, 9 June 1978, p. 2693. The Australian Bill was not in fact the first introduced in a Westminster country, but was preceded by Bills introduced in two Canadian provinces, Nova Scotia and New Brunswick. See pp. 20-21 of this Chapter.

a major step forward in removing unnecessary secrecy from the administrative processes of government'.[19]

2.16 Only two developments of note have occurred since the Bill was introduced. First, the Freedom of Information Bill and related aspects of the Archives Bill 1978 were referred for consideration to this Committee on 28 September 1978. Secondly, late in 1978, the Attorney-General's Department published a booklet entitled *The Freedom of Information Bill 1978 Background Notes* that contained the Bill, the Explanatory Memorandum, the Attorney-General's Second Reading Speech, and also a short summary of the main criticisms that had been made of the Bill together with the Department's replies to those criticisms.[20]

2.17 In many ways this booklet is an unusual, if not unprecedented, step in relation to a Bill. Its publication and the reference of the Bill to this Committee reflect the large degree of public interest that freedom of information legislation now commands. Compared with some years ago when the idea of legislation was mooted in a few academic articles and editorials, the prospect of legislation is now well known, understood and discussed widely throughout the community. We have earlier referred to the large number of submissions received by this Committee from individuals and major community action groups in Australia. In addition there have been 100 or more press discussions of freedom of information legislation during the last several years, and numerous treatments of the issue on television, radio, and at public seminars and conferences. Active freedom of information lobbies exist in most State capitals and it is apparent from submissions to the Committee, that a detailed 'Briefing Kit' on the Bill prepared by one of the lobbies (the Freedom of Information Legislation Campaign Committee (FOIL)) has been widely distributed and used throughout the community. There have also been attempts in some quarters to monitor government secrecy: for example, the thirty-five questions asked by Senator Missen in the Senate which questioned the non-disclosure of government documents and whether such non-disclosure was compatible with the Freedom of Information Bill (these questions and the answers provided thereto are published in tabular form as Appendix 5 to this Report); and a column published for some time in the *Sydney Morning Herald*, entitled 'Things They Won't Tell You'.[21]

2.18 The final Australian development to which we will refer has occurred in the States. In New South Wales the Government Administration Review headed by Professor Peter Wilenski of the University of New South Wales devoted a chapter to freedom of information in its Interim Report *Directions for Change*.[22] Noting that the issue was an important one that deserved wide public debate, the Report indicated that a Green Paper incorporating a draft bill would later be published by the Review. It was also proposed that, in the interim, the Government should make a statement in favour of greater access to information by citizens and issue broad guidelines to agencies detailing how this should operate. Neither the statement nor the Green Paper has been published.

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[19] Australia, Senate, *Hansard*, 9 June 1978, p. 2699.

[20] Australia, Attorney-General's Department, *The Freedom of Information Bill 1978. Background Notes*, AGPS, Canberra, 1978.

[21] *The Sydney Morning Herald*, June 10, 14, 15, 19, 22, 27; July 4, 7, 18, 24; and August 5, 18, 26, 31, 1978.

[22] Australia, New South Wales, Government Review of New South Wales Government Administration (Professor Peter Wilenski, Commissioner), *Directions for Change: An Interim Report*, Government Printer, New South Wales, 1978, Ch. 21, pp. 285–299.

2.19 In South Australia a Working Party on Freedom of Information was established in 1978, comprising representatives of a few government departments. A discussion paper by the Working Party was published in early 1979.[23] No action of this kind has been taken in the other States, although promises to enact legislation have been made by a few of the leaders of major parties.[24]

Overseas developments

2.20 Government papers on freedom of information, both local and international, have customarily drawn a distinction between three types of constitutional settings in which legislation has been introduced. First there are countries where it is said that the legislation should be viewed from an historical perspective. Into this category fits Sweden, which has legislation dating back to 1776, and other Scandinavian countries—Finland, Norway and Denmark—with which Sweden has historical and cultural links. The second category is reserved for the United States of America, where the Constitution requires a strict separation between the legislative and executive arms of government. Countries with a Westminster style government, principally Australia, Britain and Canada, are said to constitute the third category. There the Executive is drawn from, and is directly answerable, accountable and responsible to, the Parliament.

2.21 This distinction is usually drawn for the purpose of arguing that freedom of information legislation is a reform less suited to countries with a Westminster style government than it is to other countries. We examine these arguments fully in Chapter 4, and for the moment we merely note some aspects of the operation of freedom of information legislation in other countries.[25]

2.22 *European countries.* The first point to note about a country like *Sweden* is that it does have a Cabinet system of government similar to ours, based upon a parliamentary executive, although it does not have other features of Westminster government. In particular, there is no similar convention of individual ministerial responsibility for the work of civil servants. Most officials work in administrative boards which carry out the normal administrative work of administering schemes, executing the law, and commenting on proposed policies. These boards are largely autonomous and independent of central ministerial control. The departments of State presided over by ministers are very small and are substantially policy oriented.

2.23 The only significant difference then, between Sweden and Australia is that some protection may need to be given in Australian information legislation to the confidentiality of the relationship between ministers and public servants, any of whom may theoretically act in the role of ministerial adviser. The only other relevant difference between the countries could be the fact that Sweden is now well accustomed to such legislation: a difference related to the difficulty, and not the advisability, of enacting it in another country.

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[23] Australia, South Australia Premier's Department, *Issues Paper on Freedom of Information*, December 1978.

[24] e.g. Mr M. Bingham, leader of Tasmanian State Opposition, Policy Speech 1976, reported in *The Examiner*, 24 November 1976, p. 10.

[25] For a fuller discussion of foreign developments and citation of other references see J. McMillan, 'Making Government Accountable: A Comparative Analysis of Freedom of Information Statutes—Parts I, II and III', *New Zealand Law Journal*, vols. 11, 12 and 13, June-July 1977 pp. 248–256, 275–280, 286–296; Canada, Commission on Freedom of Information and Individual Privacy, *Public Access to Government Documents: A Comparative Perspective* (Research Publication 3, Dr D. C. Williams, Chairman), The Commission, Ontario, November 1978; I. Galnoor, *Government Secrecy in Democracies*, Harper & Row, New York, 1977.

2.24 Although the earliest Swedish law on openness in government was enacted as long ago as 1776, the present law was enacted in 1949. Called the Freedom of the Press Act, it is one of four Acts which together comprise the Constitution.[26] As such, it is an entrenched law which can only be amended by special process (by two successive Parliaments with an intervening general election). The Act deals generally with securing the independence of the Press, confidentiality of journalists' sources and the right of individuals to contribute anonymously to newspapers. The Act also regulates the main features of the access laws, such as the basic procedure to be observed when a request is made, the right of appeal, the classification system, and the four areas in which exemptions may operate. The exemptions relate to first, the 'security of the realm and its relations with foreign powers'; secondly, 'official activities for inspection, control or other supervision'; thirdly, protection of the 'legitimate economic interest of the State, communities and individuals'; and fourthly, 'the maintenance of privacy, security of the person, decency and morality'. These broad areas are particularised in an ordinary Act, called the Secrecy Law, which is a codified enactment referring to upward of 250 different classes of document which are exempt from disclosure, and incorporating by reference regulations which also spell out long lists of particular categories of documents that are exempt. By contrast with the Australian Bill, which defines fourteen or so broad categories of exemption, many of the Swedish exemptions descend to an unusual degree of particularity: for instance, documents prepared by parole officers on prison inmates; and documents which touch on 'naval stations as well as wharves and vessels intended for the armed forces, military airports as well as airplane workshops and airplanes intended for the armed forces, military positions and mine defences'.

2.25 Several other points about the Swedish law are worth noting. First, there is no exemption as such for internal working documents. However these are given a substantial degree of protection since the Act only applies, in general, to completed documents (such as documents sent from one authority to another), not to internal notes, drafts and tentative working papers. Even so, public access is gained at a preparatory stage to most policy proposals, budgetary plans, submissions and reports as any matter to be submitted to Cabinet is first circulated for comment (pursuant to a constitutional requirement) to all relevant authorities and ministers. Secondly, most appeals against denial of access are made not to an administrative court but to the Ombudsman. In 1972, for example, the four parliamentary Ombudsmen received 100 complaints, compared with twenty-five appeals to the Supreme Administrative Court. Thirdly, there is no uniform archival rule. Instead most exemptions contain their own limitation on the maximum period for which the documents described therein can be withheld. This varies from 70 years in some cases (such as information of a highly personal nature) to 2 years in others (such as Cabinet minutes that do not deal with sensitive issues such as national security). The final comment concerns the success of the law. Now well entrenched in Swedish public administration, it is regarded by some as 'indispensable', and is said by a former Ombudsman to be 'much more important than the ombudsman office'.[27] However the law is used primarily by the Press, who are permitted to inspect the contents of filing cabinets related to topics they are researching, and for whom incoming documents are laid out daily in public reading rooms where they can be inspected.

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[26] Translated versions of the Scandinavian legislation are printed in S. V. Anderson, 'Public Access to Government Files', *The American Journal of Comparative Law* 21, 1973, pp. 450–463 (Sweden), pp. 463–468 (Finland), pp. 468–473 (Norway and Denmark).

[27] S. V. Anderson, *The American Journal of Comparative Law*, cited footnote 26, p. 427, footnote 40.

2.26 There is less to be said about the other European statutes on openness, which are of more recent enactment than the Swedish law and have failed to create the same degree of public interest. *Finland's* Law on the Public Character of Official Documents, which was enacted in 1971, contains many procedural similarities to the Swedish law; individuals may browse through any public documents without first having to identify those they are interested in; the internal journals (indexes of public documents) are open to inspection; and it is as much an offence to withhold public documents as to disclose secret ones. The major difference is the exemptions which are few in number and broad in scope. For example, documents prepared by a defence agency and relating to some aspect of military activities or organisation.

2.27 A similar situation prevails in *Norway* and *Denmark*, each of which enacted a law on publicity in administration in 1970. Both laws contain broad exemptions. In Denmark, for example, documents can be withheld out of consideration to 'the public's economic interests' or 'where secrecy is required by the special character of the circumstances'. In Norway access can be refused 'because publicity will thwart public regulation and control measures or other necessary requirements or prohibitions, or endanger their accomplishment'. Another major reason attributed to the lack of use by the Danish press and public of the law is that departmental registers of documents are not available. The final point to note about each country is that an appeal against a denial can be taken either to an administrative court or to the Ombudsman.

2.28 Three other European states have also taken recent steps in the direction of providing a public right of access to official documents. *Austria* in 1973 enacted a Federal Ministries Bill including clauses (inserted during the committee stage) requiring ministries and (indirectly) authorities to provide information to the public on request, subject to the obligation of civil servants to observe official secrecy. Although this obligation appears all encompassing, the Federal Government and the Federal Chancellery have issued guidelines setting out broadly the procedures and exemptions that should be observed in making information available to the public.

2.29 Consequent upon the recommendation of a Commission for the Coordination of Administrative Documentation in 1973 that the public's right to communication and information should be guaranteed by the legislature, 'for only intervention by the latter could make the impact necessary for the reversal of the most deeply rooted administrative habits',[28] a statute inspired by the United States Act was eventually enacted in *France* in 1978. One innovative feature of the Act is the creation of a Commission on Access to Administrative Documents which is responsible for supervising the implementation of the law; advising ministries on regulations they will prepare; listing the specific documents within each exemption which must be kept secret; proposing suitable amendments to the laws and regulations; and receiving complaints from individuals and giving an opinion thereon to the competent authority.

2.30 The latest European country to have adopted such legislation is *The Netherlands*. An Openness of Administration Act, approved in 1978, is expected to commence operation in mid-1979. This law has the same strength and weakness as most of the other European laws: appeal against denial to the Supreme Administrative Court, yet broad exemptions which confer upon the government

[28] L. Fougere, Freedom of Information and Communication to Persons of Public Documents in French Theory and Practice: Present Situation and Plan for Reform, paper presented at a Colloquy of the Council of Europe on Freedom of Information held at the University of Graz from 21–23 September 1976. Available at the Department of Attorney-General's Library.

a broad discretionary power to withhold information. (For instance, information 'shall not be divulged if it might (a) endanger the unity of the Crown or (b) damage the security of the State'). There are two innovative features, however, that differ from provisions in most other statutes. First, the Act confers a right to the information in administrative documents, whereby although the actual document would not be disclosed an official would communicate the information contained therein. Secondly, the Act requires that after the first three years, and thereafter at five-yearly intervals, two nominated ministers shall prepare a report on the implementation and operation of the Act, which incorporates the findings of government bodies, scholars and representatives of the media and public service organisations.

2.31 Finally, we note in passing that investigations into freedom of information proposals have also been looked at by both the Council of Europe's Legal Affairs Committee and the Human Rights Commission, although no concrete proposals have as yet been forthcoming.[29]

2.32 *United States of America.* It is curious to note that, although the United States Freedom of Information Act has often been distinguished by Australian governments because of the different constitutional arrangements in the United States, it is also the one to which we most frequently look for a model. The United States Act was enacted in 1966, and commenced operation on Independence Day 1967, after successive Congressional inquiries during 1955–1966 had concluded that existing provisions in the Administrative Procedure Act 1946 requiring administrative disclosure were inadequate. In the first few years, operation of the Act was marked by disputes between officials and members of the public who alleged that both the letter and spirit of the Act were routinely violated. Critics such as Ralph Nader claimed that legislation 'which came in on a wave of liberating rhetoric is being undercut by a riptide of agency ingenuity'.[30] Complaints were made in particular about the number of documents withheld (as many as 60% of documents requested in some agencies, together with almost all of the one billion (US) or more classified documents); the delay by agencies, which averaged thirty-three days for response to an initial request and an additional fifty days for a decision on an internal appeal; the fees, which varied from $3–$7 per hour for search costs, and from 5c–$1 per page for copying costs; and the high and non-reimbursable court costs, which contributed to the fact that of 2200 denials in the first four years only 100 appeals were heard, although seventy-five of this number succeeded in whole or in part.[31]

2.33 In recent years the United States Act has been the subject of recurrent inquiries by Congressional Committees.[32] These have occurred mainly in those areas where traditionally sensitive interests fail to be protected by government

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[29] T. Riley, 'Freedom of Information—An International Movement', *Contemporary Review* 234, 1357, February 1979, p. 75.

[30] R. Nader, 'Freedom from Information: the Act and the Agencies', *Harvard Civil Rights—Civil Liberties Law Review* 5, 1, 1970, p. 5.

[31] United States, House of Representatives Committee on Government Operations (C. Holifield, Chairman), *Administration of the Freedom of Information Act*, House of Representatives Report no. 92-1419, U.S. Government Printing Office, Washington, 1972.

[32] See e.g. United States, House of Representatives, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits: Twenty-fifth Report of the Committee on Government Operations*, Report no. 95-1382, Washington, July 1978; United States, Senate, *The Erosion of Law Enforcement Intelligence and Its Impact on Public Security: Hearings before Senate Committee on the Judiciary Sub-Committee on Criminal Laws and Procedures;* United States House of Representatives, *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings before Sub-Committee of the Committee on Government Operations;* cf. discussion by K. P. O'Connor, Submission no. 88 incorporated in *Transcript of Evidence*, pp. 530–545.

confidentiality, mainly national security, trade secrets, and law enforcement. Some proposals for alteration in the administration of the Act have been made, particularly in the handling or administration of requests for information submitted to the government by private corporations. Claims have also been made by some government witnesses appearing before the Congressional inquiries that private citizens and foreign governments now question the ability of agencies to protect confidential information in the areas of law enforcement and national security. Concern has also been expressed by some agencies about the increasing costs of the Act, and indeed an inquiry on this matter was undertaken by the United States General Accounting Office. Further reference is made to these matters in later chapters of this Report.

2.34 In reaction to the criticism Congressional committees held further hearings on the Act in 1972–74, and in 1974 the Act was substantially amended. (It is noteworthy that these 1974 amendments were finally passed when both houses of Congress overruled a Presidential veto.) Many Australian critics claim our Bill should be amended along similar lines to include provisions imposing strict time limits, regulating fees, reforming the exemptions, protecting national security and law enforcement, and providing for reimbursement of legal fees to successful appellants. The Act was again amended in 1976 in order to reform an exemption that had been strictly interpreted by the Supreme Court. Indeed many commentators regard these amendments as one example of the strong protective interest that Congress evinces in the Act. They point out that rarely does Congress act as swiftly to amend a law that has received a restrictive interpretation; and that in few areas does it react so critically against alleged attempts by the Administration to thwart the philosophy underlying the Act.

2.35 To this extent it is correct to explain the United States Freedom of Information Act in the context of the constitutional arrangement of government; that is, a Legislature which is completely separated from the Executive will naturally promote and support measures by which it can assert its dominance and control over the Executive. However, to evaluate the United States Freedom of Information Act solely in this philosophical light, as some Westminster commentators would do, is to misunderstand the reasons why that Act is now regarded as essential, and regarded by some as perhaps the most important item of administrative law legislation in operation. The Act does not serve to enhance legislative control of the Executive (which in Westminster countries is said to exist via the parliamentary executive and conventions like that of ministerial responsibility). It serves primarily to enhance *public* control of the Executive, something which, in the absence of information legislation, is no more of a reality in the United States than in Australia. Consequently, the public has been the greatest beneficiary of the Act, making about 150 000 requests in 1976 under both it and the Privacy Act. The great majority of requests are met, and the information thereby gained has apparently had a large impact in enabling public control of, and participation in, government programs and decision making.[33]

2.36 In recent years other statutes have been enacted which complement the United States Freedom of Information Act. The main statute is the Privacy Act 1974, which regulates the acquisition, storage, retention, correction and dissemination of personal files. Generally speaking, an individual has broader rights of

[33] H. C. Relyea, 'The Provision of Government Information: the Federal Freedom of Information Act', *Canadian Public Administration* 20, 2, Summer 1977, pp. 317–341.

access to personal files under this Act than under the Freedom of Information Act. Another important point is that, although the Privacy Act prohibits the indiscriminate disclosure of personal files, it cannot be used as a bar to the disclosure of information that is available under the Freedom of Information Act. The other United States statutes are the Fair Credit Reporting Act 1970, which confers a right of access to the records of consumer reporting agencies; the Family Educational Rights and Privacy Act 1974, which gives adults access to personal records maintained by educational institutions that are the recipient of federal funds; the Federal Advisory Committee Act 1972, which opens to the public the meetings of advisory committees; and the Government in the Sunshine Act 1976, which opens to the public the meetings of the governing bodies of many independent statutory authorities, particularly the regulatory agencies.

2.37 *Commonwealth countries.* The first recognisable step towards legislation in a Commonwealth country was taken by *Canada* in February 1973, when the Government tabled in the Parliament and issued to departments by way of a Cabinet directive a set of guidelines titled 'Notices of Motion for the Production of Papers'. The guidelines provided that any paper or document 'should' (not 'must') be tabled, unless it fell within one of sixteen exemptions. It also came to be used as a guide in answering requests from the public. The exemptions safeguard the familiar interests protected by freedom of information legislation, but most were so broadly expressed that they went further than this: for instance, 'Internal departmental memoranda', 'Papers that are private or confidential and not of a public or official character', and 'Legal opinions or advice provided for the use of the Government'. One notable feature of the guidelines was the rules on release of reports by outside consultants: those which are comparable in nature to a Royal Commission report should be released, and in other reports consultants should separate recommendations from factual and analytical data in order that the latter may be released.

2.38 In 1973 this Cabinet directive was referred for consideration to the Standing Joint Committee on Regulations and Other Statutory Instruments, along with a private member's Right to Information Bill which had been introduced into the House of Commons on various occasions, in several forms and each without success, by Mr Gerald Baldwin. Hearings were held by the Standing Joint Committee in 1974 and 1975, and a report tabled in December 1975 endorsing in principle the concept of freedom of information legislation. The report was approved by the House of Commons in February 1976. A government commitment to legislation of some sort was subsequently made in a Green Paper, *Legislation on Public Access to Government Documents,* which was tabled in June 1977.[34]

2.39 The Green Paper did not favour legislation along the lines of the United States model, and proposed differences in three respects. First, the proposed exemptions would be more broadly expressed, and prefaced by qualifications such as disclosure 'might be injurious to' rather than, say, 'could be reasonably expected to'. Secondly, a minister's decision would be final and no appeal to the courts would be allowed. Instead, an Information Commissioner would be established, with powers to investigate on behalf of individuals and provide advice to departments. Thirdly, none of the procedural requirements found necessary in the United States in 1974 was to be included.

[34] Canada, Department of Secretary of State, *Legislation on Public Access to Government Documents*, Government Printer, Ottawa, 1977.

2.40 In December 1977 the Green Paper was referred to the Joint Committee for study; it reported in June 1978. In general, the Committee favoured a strong law bearing more similarity to that in the United States, but based also in part on the provisions in both the 1976 IDC Report and the Minority Report Bill of the Coombs Commission: narrow exemptions and strong procedural and enforcement provisions. The recommendations on appeals combined both the alternatives discussed in the Green Paper: a complaint could first be made to the Information Commissioner, but if his recommendation that a document should be released was not accepted by a department or minister, an appeal could then be made to the courts. However, the then Secretary of State indicated in October 1978 that legislation would be introduced which would not permit an appeal to the courts but vest the final decision in a minister. Finally, the newly elected Conservative Government in Canada has indicated that it will give priority to a law on access to information.

2.41 Reforms have also been instituted or researched in some of the Canadian provinces. Private members' bills, based mainly on the United States Act, have been introduced in most of the ten provinces, though none has been passed. In three provinces however the governments have introduced bills, and in two these have been passed. Nova Scotia passed an Act in May 1977, that was proclaimed in November of that year, thus becoming the first government in the Commonwealth to adopt such legislation. The Act has some unusual features: it combines a right to inspect and correct personal files; besides containing exemptions it lists categories of documents that must be made available (though in the case of conflict, the exemption prevails); and it specifies that the right of appeal from a denial is first to the minister, and thence to the Legislature where the appeal must be presented by a member. The second province to enact legislation was New Brunswick in June 1978. There the power to make a decision on a request is vested in the minister. The appeal system from a minister's decision is very similar to that in Sweden whereby the appeal may be taken either to the Ombudsman (who may only make a recommendation to a minister), or to a judge of the Supreme Court; both avenues may be used if an applicant so desires. The other province deserving discussion is Ontario, where a 'Commission on Freedom of Information and Individual Privacy' was established in March 1977 and is currently operating. A number of quite lengthy research publications, which we have already cited, has been provided by the Commission, and they have been of use in our own deliberations.

2.42 One factor which unites the studies undertaken by the various Canadian provincial and national governments is a concern to safeguard the traditional role and authority of ministers. The point of greatest experimentation in each of the various proposals arises in the discussion on the nature of the appeal rights to be granted to a dissatisfied applicant. There appears to be a common assumption that external review detracts from ministerial authority, which must itself be an immutable element of the constitutional arrangements. The Ombudsman, whose role figures prominently in many of the recommendations is, it seems, utilised less because he can assist individuals to assert their rights than because he provides an intermediate solution to the extremes of ministerial or judicial control.

2.43 In *Britain* a fixation with ministerial responsibility has, perhaps not surprisingly, provided the prevailing climate in which all consideration has been given to freedom of information. The most recent Government White Paper on the issue states inflexibly at the outset that 'nothing must be allowed to

detract from the basic principle of Ministerial accountability to Parliament'.[35] Individual and collective ministerial responsibility and accountability are referred to as 'the hub around which so much of our administrative and political life revolves', and as doctrines that lie 'behind our existing practices of disclosure of official information' (which, by and large, were regarded as adequate).[36]

2.44 One might not have expected this emphasis in Britain, nor for that matter in Australia, since the Report of the Fulton Committee on the Civil Service in 1968, which found that reliance upon ministerial responsibility was inadequate and that a large number of new techniques for scrutiny and accountability was needed. The Fulton Committee also concluded that 'the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater amount of openness'.[37] The Committee further proposed that the Government set up an inquiry to investigate official secrecy. What has resulted is a plethora of inquiries and proposals, four of which appear determined to continue the secrecy so deplored by the Fulton Committee.

2.45 The first was a Government White Paper, *Information and the Public Interest*, which urged no changes but found the existing information practices to be largely adequate.[38] Next was the Franks Committee, whose terms of reference confined it to section 2 of the Official Secrets Act. It proposed a number of changes—which are summarised in Chapter 21 of this report—in relation to the British equivalent of section 70 of the Commonwealth *Crimes Act* 1914.[39] Decisive action on these proposals was not taken until after the *Crossman Diaries Case*[40] in 1975 and an embarrassing leak of Cabinet minutes in 1976. It was announced in November 1976 that the Official Secrets Act would be reformed, along the lines of the Franks Report but with modifications (mentioned in Chapter 21). The Government, as the Home Secretary proudly claimed, would 'replace the old blunderbus with an Armalite rifle'. Detailed proposals, yet to be enacted, were outlined in a further White Paper published in July 1978.[41]

2.46 To balance this apparent resistance to disclosure, the Prime Minister (Rt Hon. J. Callaghan) in November 1976 announced that there would be more openness—a concession to the Labour election manifesto of 1974 that a measure be enacted 'to put the burden on the public authorities to justify withholding information'.[42] The new policy was implemented in part in a letter to departments in July 1977 by the head of the Civil Service, Lord Croham, advising them to implement new practices to facilitate openness. One practice was that background material for policy studies and reports be written in a form that enables it to be separated and published.[43] The only other notably liberal step has been the publication by the Government in March 1979 of yet another White Paper,

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[35] Great Britain, *Open Government*, Cmnd 7520, HMSO, London, March 1979, para. 2, p. 3.
[36] Ibid., para. 11, p. 6.
[37] Great Britain, The Civil Service Committee (Lord Fulton, Chairman), *Report*, Cmnd 3638, HMSO, London, June 1968, vol. 1, para. 277, p. 91.
[38] Great Britain, *Information and the Public Interest*, Cmnd 4089, HMSO, London, June 1969. Both this Paper and the Fulton Report were preceded by three inquiries into the 'D' Notice System. See D. G. T. Williams, 'Official Secrecy in England', *Federal Law Review* 3, 1968–1969, pp. 22–50.
[39] Great Britain, Home Office, Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO, London, September 1972, vol. 1.
[40] *Attorney-General* v. *Jonathan Cape* [1975] 3 All ER 484, [1976] QB 752.
[41] Great Britain, Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 7285, HMSO, London, July 1978.
[42] British Labour Party, *The Labour Party Manifesto: October 1974*, London, 1974, p. 24.
[43] This letter is referred to in *Open Government* cited footnote 35.

entitled *Open Government*, proposing on this occasion that a Code of Practice be adopted, in effect bringing into operation a freedom of information scheme on an administrative basis without judicial involvement.[44]

2.47 It is clear that British officialdom is resisting access legislation. Indeed, Lord Croham's Information Directive commented that 'Our prospects of being able to avoid such an expensive development here could well depend on whether we can show that the Prime Minister's statement had reality and results'.[45] For its part the White Paper referred to in the previous paragraph says it would be 'rash' to design a course leading to such legislation, believing that an analysis of foreign experience seems 'to indicate that no country has attempted to establish a system which would alter the fundamental relationship, already established, between the executive, the legislature and the courts'.[46] The same resistance is not however evident elsewhere. The Labour Party has supported the enactment of legislation both at its annual conferences in 1977 and 1978 and at the National Executive Committee level in 1978. Since 1975 support for the idea has been expressed by an All-Party Committee for Freedom of Information as well as a number of community groups.[47] Lastly, in January 1979 an *Official Information Bill* was introduced into the Commons as a Private Member's Bill by Clement Freud, M.P. (Liberal) with backing from all parties. The Bill went to a Committee stage and withstood a number of government amendments particularly ones designed to remove judicial review.[48] Before it could go back to the House for the Report Stage and Third Reading, Parliament was dissolved. Since the election of the new Government a Private Member's Bill has again been introduced (this time by Mr Michael Meacher, M.P., a Labour member) and is expected to be read a second time on 9 November 1979.[49]

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[44] *Open Government*, cited footnote 35.

[45] This letter is referred to in *Open Government* ibid.

[46] *Open Government*, cited footnote 35, para. 38, p. 12.

[47] P. White, 'Official Secrets and Government Openness in Britain', *Australian Library Journal*, (to be published November 1979). See also strong support for such a bill from Rt Hon. Anthony Wedgwood Benn, M.P., 'Democracy in the Age of Science', *Political Quarterly* 50, 1, January–March 1979, pp. 7–23.

[48] Great Britain, House of Commons, *Hansard*, 19 January 1979, cols 2131–2213. During the debate Mr Freud remarked: 'The Official Secrets Act decrees that anything is secret that an official says is secret. It is the civil servants' chastity belt', col. 2145.

[49] Great Britain, House of Commons, *Hansard*, 25 July 1979, col. 608.