

Implications of freedom of information for the Westminster system of government

4.1 Many of those who do not share our enthusiasm for freedom of information, or for opening up the processes of government to greater public scrutiny, frequently take refuge in saying that such concepts are somehow incompatible with a system of government based, as ours is, upon the Westminster model. To them, the features which are unique to the Westminster system, and which clearly differentiate it from the United States or Swedish models, somehow operate to require a more limited and restricted Freedom of Information Bill. They see what has come to be known as 'open government' as something foreign and irrelevant to us in Australia, because we are essentially a Westminster system.

4.2 We reject such arguments and assert strongly that there is nothing in the Westminster system which should operate to preclude Australia from having an effective Freedom of Information Bill. As we shall show, opponents of the Bill have frequently misunderstood what the Westminster system is, or else have misrepresented how it actually operates in our contemporary society. We conclude that an effective Freedom of Information Bill, far from being incompatible with a Westminster system, may in fact have the potential to strengthen it.

4.3 On 9 June 1978 the Attorney-General, Senator Durack, presented the Freedom of Information Bill to the Senate. At the outset of his speech he noted: 'Although a number of countries have freedom of information legislation, this is the first occasion on which a Westminster style government has brought forward such a measure.'¹ This is certainly true at a national level, although we note that the Canadian provinces of Nova Scotia and New Brunswick enacted such legislation in 1977 and 1978 respectively.² In addition the former Canadian Federal Government had a Green Paper³ on freedom of information under detailed study, and the newly elected Conservative Government has indicated that it will give special priority to the projected law on access to information.

4.4 While the United States and Swedish experiences may be familiar to many, we readily acknowledge that the introduction of freedom of information legislation in a country with a Westminster system of government does pose unique problems which do not confront policy makers in Washington or Stockholm. These differences have been critical in giving the proposed Australian bill its particular form and character. Even if a Freedom of Information Bill were to be passed in Australia, which was far more extensive and liberal than the current proposal, it would still be significantly different in form from familiar overseas examples. But it need be no less effective in obtaining precisely the same desired objectives.

¹ Australia, Senate, *Hansard*, 9 June 1978, p. 2693.

² Canada, Commission on Freedom of Information and Individual Privacy, *Freedom of Information and Ministerial Responsibility* (Research Publication 2, Dr D. C. Williams Chairman), The Commission, Ontario, September 1978, p. 48.

³ Canada, Department of the Secretary of State, *Legislation on Public Access to Government Documents*, Government Printer, Ottawa, 1977.

4.5 In this chapter we analyse exactly what the 'Westminster system' is, both in theory and practice, and test the view of those who support the specific provisions of this Bill on 'Westminster-related' grounds against what we see as the realities of Australian federal government and administration.

The nature of the Westminster system

4.6 There is no precise definition of the Westminster system in a real sense, and it is unlikely that there ever could be because so much of what is understood as essential to the system is informal, depending upon traditions, conventions and understandings that do not admit of precise formulation. Quite clearly a great deal of Australian practice is modelled upon British traditions and practices, and although new Australian attitudes have developed (for instance in relation to the federal nature of our government) there are still valuable lessons to be drawn from the British system. This lack of precise definition was indeed recognised by some of the most senior public servants who gave evidence before us. Mr Lindsay Curtis (First Assistant Secretary, Attorney-General's Department) said: 'I do not know of any definitive description of what constitutes the Westminster system'⁴ and Mr (now Sir) Geoffrey Yeend (Secretary, Department of the Prime Minister and Cabinet) stated that 'the Westminster system is all things to all people—that depends on whom you are asking to define it.'⁵

4.7 Despite this lack of definition, witnesses from the very highest level of the public service were all concerned to tell us that somehow freedom of information legislation would alter the traditional pattern of Westminster government. This point was made by Mr Curtis and Mr (now Sir) Geoffrey Yeend, and supported by Sir Arthur Tange (Secretary, Department of Defence)⁶; it was also made by Mr J. O. Stone (Secretary, Treasury) who put it thus:

The diminution, shall I say, which the Bill represents from what may in any case be thought to be a rather overstrained interpretation of the Westminster tradition, is a diminution and not a fundamental attack upon it.⁷

He did however add that if the present Bill were extended it would 'cut much more fundamentally at the Westminster tradition.'

4.8 A more extreme position, however, was taken by the Premier of Queensland, who in his submission to us stated that freedom of information legislation in principle represents 'an attempt to graft upon the governmental structure of Australia, which is modelled upon the Westminster system . . . ideas and concepts which are alien to that system'.⁸ Needless to say, this is a view which we reject. While we see freedom of information legislation as altering what may have been seen to be the principles of the Westminster system in their purest form, we do not see this as in any way derogating from that tradition. Rather it will make that very tradition operate better in the wider interests of the people of Australia. Indeed we find ourselves very much in sympathy with the Freedom of Information Legislation Campaign Committee (FOIL) which, in recognising that some modification of the traditional view of the Westminster system was consequential upon the passage of any effective freedom of information legislation, said that 'we must be prepared to accept an alteration of our traditional conventions of government in light of the realities of contemporary government.'⁹

⁴ *Transcript of Evidence*, p. 15.

⁵ *Transcript of Evidence*, p. 2299.

⁶ *Transcript of Evidence*, p. 2046.

⁷ *Transcript of Evidence*, p. 1708.

⁸ Submission no. 108, p. 1.

⁹ Submission no. 9 incorporated in *Transcript of Evidence*, p. 168.

4.9 Although we do not offer any definition of the Westminster system, we can quite easily state what have traditionally been held to be the key elements of it, those which distinguish it from governmental systems such as those of the United States or Sweden, and those without which it is alleged our system of government in Australia could not operate. The characteristic features of a Westminster system, of which perhaps only the first amounts to a necessary condition, are usually stated to be:

- (a) that the *Executive is to be found as part of and not as separate from the Legislature*; that is, that ministers are all members of the Parliament;
- (b) that there is a doctrine and practice of *collective ministerial responsibility* usually expressed in the phrase 'Cabinet solidarity' which requires all ministers to consider themselves equally responsible for and bound by the decisions of the executive government;
- (c) that there is a doctrine of *individual ministerial responsibility* which holds that each minister is personally responsible for all of the decisions made and carried out by the department which he heads;
- (d) that the government of the day is served by a *public service which remains politically neutral and in no way involved in partisan controversies* so that it is able to serve any government regardless of its political complexion with an equal degree of loyalty and efficiency;
- (e) that *the members of the public service remain as far as possible personally anonymous*, so that particular views are not ascribed to individual public servants, and so that the views of public servants are not seen to be at variance with the views ultimately expressed by the executive government.

4.10 Of these five elements, the first is in no way affected by freedom of information legislation, and so it is to the other four features of the Westminster system that we must now turn. In each case we wish to ask the following:

- what precisely does this mean in a theoretical sense?
- how precisely does this operate in practice?
- how is it thought that this part of the Westminster system will be affected by freedom of information legislation? and
- how do we respond to such fears as may be advanced?

In each case, although we shall rely principally upon Australian experience, we shall also seek to compare the situation as far as it is applicable in Britain and to a lesser extent Canada.

Collective ministerial responsibility

4.11 A very clear formulation of this principle has been given by a British author in relation to that government, but it applies without any further qualification in Australia. He writes:

In accordance with these conventional rules about collective responsibility, all members of the administration are expected publicly to support its policies and its actions, regardless of their private feelings on the matter. Should they for any reason no longer be prepared to do so, they must resign their offices (although not, usually, their seats in Parliament). Constitutionally, they cannot acquiesce in a decision and then, at some later stage when, for example, it becomes unpopular, claim that they were opposed to it and thus seek personally to escape the political penalties.

By the same token, it is impossible for the House of Commons to vote for the removal of a particular member of the government without also voting against the whole government, unless it is clear that the government is prepared to sacrifice that individual either as a scapegoat or because no collective responsibility is

involved. Just as, at an election, the voters must judge the government's record as a whole, so must they (and the House of Commons) judge the government as a whole. In short, the administration must stand or fall together. All its members must submit its policy to Parliament, must defend that policy, and, without exception, must resign or submit themselves to a general election if the House of Commons refuses to support it.¹⁰

A more cynical expression of this in practice was the statement of Lord Melbourne, who following a Cabinet discussion on the Corn Laws in 1841 said:

Bye the bye, there is one thing we haven't agreed upon, which is, what we are to say. Is it to make our corn dearer or cheaper, or to make the price steady? I don't care which, but we had better all be in the same story.¹¹

4.12 The earliest assertion of this principle, that all ministers must support the agreed upon policy or face the consequences, was seen in 1792 when the younger Pitt dismissed his Lord Chancellor for publicly dissociating himself from Pitt's creation of the Sinking Fund.¹² In 1878 Lord Salisbury declared:

It is, I maintain, only on the principle that absolute responsibility is undertaken by every Member of a Cabinet who, after a decision is arrived at, remains a Member of it, that the joint responsibility of Ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established.¹³

4.13 It is held that if ministers publicly criticise government policy they are dismissed (a recent British example being the dismissal of Mr E. Heffer for speaking against British membership of the EEC in the Commons); or they should resign (e.g. when Mr L. E. Bury resigned as Minister for Air in 1962 for disagreeing with the Government about the impact of Britain's entry into the EEC,¹⁴ or when Mr Gorton resigned in 1971 after publishing a series of articles criticising Cabinet leaks in a national newspaper). Equally if they cannot support government policy, because particular decisions have been taken (e.g. Mr Ellicott's resignation as Attorney-General in 1977 because of decisions about the conduct of *Sankey v. Whitlam*^{14(a)}) or have not been taken (e.g. Mr Menzies' resignation in 1939 over failure to introduce a national insurance scheme); or because they disagree with general policies (e.g. Mr Bury's resignation in 1971 over disagreements on foreign policy), then the proper course open to them is to resign from the Ministry.

4.14 This principle—that Cabinet speaks with one voice only—has never really been departed from in Australia, although one author has written that 'it is not an absolute value in Australian politics'¹⁵ and Prime Minister Chifley allowed a considerable degree of freedom in discussion of the Bretton Woods financial agreement.¹⁶ On the other hand the Prime Minister (Rt Hon. J. M. Fraser) has written that 'collective responsibility is the key feature of Cabinet government'.¹⁷ By contrast this principle has been formally set aside twice in Britain

¹⁰ G. C. Moodie, *The Government of Great Britain*, Methuen, London, 1964, p. 88.

¹¹ Sir Spencer Walpole, *Life of Lord John Russell*, Greenwood Press, New York, 1968, p. 369.

¹² H. Wilson, *The Governance of Britain*, M. Joseph, London, 1976, p. 16.

¹³ Great Britain, House of Lords, *Hansard*, 8 April 1878, cols 833–4.

¹⁴ In seeking Bury's resignation, Menzies wrote: 'Ministerial responsibility and Cabinet solidarity are of the essence of our system of Government'. See L. F. Crisp, *Australian National Government*, 4th edn. Cheshire, Melbourne, 1978, p. 355.

^{14(a)} (1978) 53 ALJR 11.

¹⁵ Royal Commission on Australian Government Administration (Dr. H. C. Coombs, Chairman), *Appendix, Volume One*, Parl. Paper 186/1976, Canberra, 1977, p. 36.

¹⁶ L. F. Crisp, *Ben Chifley: A Political Biography*, Angus & Robertson, Hong Kong, 1977, pp. 198–212.

¹⁷ J. M. Fraser, 'Responsibility in Government', *Australian Journal of Public Administration*, XXXVII, 1 March 1978, p. 3.

this century. In 1932 the separate parties of the National (coalition) Government produced an 'agreement to differ' on the question of the tariff. In 1975 Prime Minister Harold Wilson formally announced that this doctrine would be relaxed for the period of the referendum campaign on membership of the European Economic Community.¹⁸ In the House of Commons he said:

The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government's recommendation; whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour of a different conclusion in the referendum campaign.¹⁹

In practice, of course, it is often somewhat different. While a minister may not publicly disagree with a government decision, it is not uncommon for the media to make a great deal of the 'known' opposition of an individual minister to a particular decision.

4.15 None of the witnesses before our Committee really discussed what impact the Freedom of Information Bill might have upon the question of collective ministerial responsibility. However it would undoubtedly be felt that if the traditional solidarity of Cabinet were to be undermined, the stability of Cabinet government as such would be weakened. Similarly, it might be felt that if the secrecy of Cabinet discussions were breached then frank discussion would no longer be possible, especially if particular points of view were to become identifiable with particular ministers who might be in a minority, and as a result the operations of the Cabinet would be impaired. This indeed was what lay behind the remarks of the Secretary of the Department of the Prime Minister and Cabinet who stressed how important it was that ministers should be able:

to meet together, to have a full and frank discussion of all aspects of a problem, to make concessions to one another, to seek the best and appropriate solution and then to enunciate it with one voice . . . so that the public is not . . . confused.²⁰

It is also pointed out, rightly, that the United States Freedom of Information Act does not apply to the operations of the United States Cabinet, although its role in the government of the United States is very different from that in a Westminster system.²¹

4.16 We agree that there are serious difficulties and we make it clear that we in no way seek to reduce the effectiveness of the Cabinet system; nor do we seek to destroy the secrecy surrounding Cabinet discussions. These points are made particularly in Chapter 18 dealing with clause 24 of the Bill. There are, however, three areas in which we would argue for some modification of the traditional practices. The first of these relates to the question of whether Cabinet *decisions* once made (or at least most of them) should be revealed publicly. We discuss this in Chapter 18 also.

4.17 Secondly there is the question of the revelation of more details about the operations and discussions of Cabinet at some future date. In *Conway v. Rimmer* Lord Reid expressed a view that 'cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest'. However he went on to add: 'but I do not think that many people would give as the reason that premature disclosure would prevent candour in the cabinet'.²²

¹⁸ Wilson, cited footnote 12, p. 75.

¹⁹ Great Britain, House of Commons, *Hansard*, 23 January 1975, col. 1746.

²⁰ *Transcript of Evidence*, pp. 2299-3000.

²¹ *Transcript of Evidence*, p. 31.

²² *Conway v. Rimmer* [1968] 1 All ER at p. 874.

4.18 The same issues were raised in 1975 when the British Government attempted to prevent the publication of the late Richard Crossman's 'Diaries of a Cabinet Minister'. In that case the Crown argued that 'publication would be against the public interest in that it would prejudice the maintenance of the doctrine of collective cabinet responsibility',²³ and that 'since Cabinet government depends on the mutual confidence of collective responsibility, its basis can be eroded by the premature disclosure of what has passed within the confidential relationship'.²⁴ In dismissing the Crown's appeal, Lord Chief Justice Widgery said:

It seems to me that the degree of protection afforded to cabinet papers and discussions cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over.²⁵

The maintenance of the doctrine of joint responsibility within the cabinet is in the public interest and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers . . . There must however be a limit in time after which the confidential character of the information and the duty of the court to restrain publication, will lapse.²⁶

As a result, although the events described by Crossman were only 10 years old and bore 'a distressing similarity' to current problems, and despite the fact that at the time of publication the individuals involved (i.e. in Cabinet) were the same, the Lord Chief Justice saw fit to prevent suppression of the publication.²⁷

4.19 Following this controversy, a committee under Viscount Radcliffe was established and the Report of the Committee of Privy Councillors on Ministerial Memoirs appeared in January 1976.²⁸ It set out some guidelines for future publications which appear very restrictive in character, but the impact of this Report cannot yet be estimated.

4.20 Finally there is the question of the extent to which advice or policy options given by various departments to Cabinet should be available, and we deal with these matters in Chapters 18 and 19 discussing clauses 24 and 26 of the Bill. However we note here that in July 1977 the Head of the Civil Service in Britain, Lord Croham, wrote to his department heads saying that in the case of future policy studies,

the background material should, as far as possible, be written in a form which would permit it to be published separately, with the minimum of alteration, once a ministerial decision to do so had been taken.²⁹

Indeed, in the same month the Expenditure Committee of the House of Commons had stated that it saw 'no reason why there should not be general publication of PRU [Policy Research Unit] reports'.³⁰

²³ *Attorney-General v. Jonathan Cape* (The Crossman Diaries Case) [1975] 3 All ER at p. 485.

²⁴ *ibid.*, at p. 488.

²⁵ *ibid.*, at p. 493.

²⁶ *ibid.*, at pp. 496-7.

²⁷ *ibid.*, at p. 497.

²⁸ Great Britain, Committee of Privy Councillors on Ministerial Memoirs (Viscount C. J. Radcliffe, Chairman), *Report*, Cmnd 6386, HMSO, London, January 1976. At para. 56, p. 20, they state that in memoirs a Minister '... should not reveal the opinions or attitudes of colleagues as to the Government business with which they have been concerned. That belongs to their stewardship, not to his. He may, on the other hand, describe and account for his own.'

²⁹ *The Times*, 17 August 1978, p. 2. See also *The Listener*, 7 September 1978, pp. 298-299.

³⁰ Great Britain, House of Commons, *Eleventh Report from the Expenditure Committee, Session 1976-7, The Civil Service Volume I—Report* (535-1), HMSO, London, 25 July 1977, para. 49, p. XXX.

4.21 We have discussed various issues touching upon the doctrine of collective ministerial responsibility at length, and elsewhere in this Report we make various recommendations about the alteration of this Bill as it affects the general workings of the Cabinet. We are firmly of the opinion that, while the changes which we recommend will have the effect of exposing somewhat more of the operation of Cabinet government in Australia, they will in no way derogate from the principle of collective ministerial responsibility, a principle which we regard as vital to the proper operation of our system of government and which we would in no way seek to weaken. Indeed it will be seen that our recommendations, if adopted, would clearly protect the confidentiality of all Cabinet deliberations; they would preserve the necessary degree of secrecy for advice tendered to Cabinet and would in no way expose the individual views or opinions of ministers in a way which could adversely affect the doctrine of collective responsibility. Our subsequent chapters on exemptions for Cabinet documents spell this out in greater detail.

Individual ministerial responsibility

4.22 No part of the Westminster system has been so thoroughly criticised, nor has any part so thoroughly changed, as the doctrine of individual ministerial responsibility.³¹ It must be remembered that this doctrine developed in the days when departments of state were small and it was a reasonable assumption that ministers of state were familiar with everything that went on in their departments.

4.23 The two strands of this doctrine have been expressed and described as follows:

The first strand (in terms of logic, if not of history) states that the political head of a department, and only the political head, is answerable to Parliament for all the actions of that department. The positive aspect of this is that Members of Parliament wishing to query any of the actions of a department know that there is one man to whom they may address their questions, who cannot evade the duty of answering them. The negative aspect of it is that civil servants are not answerable to Parliament for their actions, and are protected from political controversy by the minister. As Gladstone said: 'In every free state, for every public act, some one must be responsible; and the question is, who shall it be? The British Constitution answers: "the minister, and the minister exclusively"'.³²

The second strand of the doctrine states that the minister must receive 'the whole praise of what is well done, the whole blame of what is ill' in the work of his department; and that in consequence he must resign if serious blunders are exposed. Evidence for the importance attached to this second strand of the doctrine is to be found not only in text-books about British government but in 'a veritable canon of Parliamentary *obiter dicta*'.³²

Sir Ivor Jennings, in his classic study of Cabinet government in Britain writes:

The responsibility of ministers to the House of Commons is no fiction, though it is not so simple as it sounds. All decisions of any consequence are taken by ministers, either as such or as members of the Cabinet. All decisions taken by civil servants are taken on behalf of ministers and under their control. If the minister chooses, as in the large Departments inevitably he must, to leave decisions to civil servants, then he must take the political consequences of any defect of administration, any injustice to an individual, or any policy disapproved by the House of Commons. He cannot

³¹ For a definition of the doctrine of individual ministerial responsibility see S. E. Finer, 'The Individual Responsibility of Ministers', *Public Administration* XXXIV, 1956, p. 379.

³² A. H. Birch, *Representative and Responsible Government*, George Allen & Unwin Ltd, London, 1964, pp. 139-140.

defend himself by blaming the civil servant. If the civil servant could be criticised, he would require the means for defending himself. If the minister could blame the civil servant, then the civil servant would require the power to blame the minister. In other words, the civil servant would become a politician. The fundamental principle of our system of administration is, however, that the civil service should be impartial and, as far as may be possible, anonymous.³³

Although both these statements were written to describe practices in Britain they apply with equal validity to the Australian political system, at least as statements of the doctrine in its pristine purity as a theory.

4.24 There can be no doubt, however, that in practice things have just not worked out this way. By and large ministers have not resigned under these circumstances. Political practices have changed, and the twin forces of the increasing complexity and scope of departments of state (meaning that no one believes that ministers can be 'on top' of everything) and the development of party solidarity³⁴ (meaning that political parties rally to protect their own members from political attacks) have fundamentally eroded this doctrine. If one excludes ministers who resigned to take up other appointments, or resigned voluntarily at the end of their careers, there have been some thirteen ministerial resignations in Australia (federally) since 1939, none of which involved this principle. In Britain, of thirty-eight ministerial resignations in the same period, only two could have been said to have arisen as a result of the operation of this doctrine.³⁵

4.25 In Australia, the only recent example of a minister seeking to accept personal responsibility in this classical tradition occurred in 1967 when the Minister for Air (Mr Howson) in relation to the VIP flights controversy stated:

I recognise that it is a Minister's responsibility to have a final responsibility in his own field. If there are deficiencies then he must shoulder the blame. I have told the House of the deficiencies that have come to light . . . There have been mistakes . . . and I am the responsible Minister. I have therefore felt it necessary, out of respect to my colleagues and to this Parliament, to say to the Prime Minister . . . that I was prepared to offer my resignation to him . . . I have done this even though I believe that I have acted at all times honestly, with integrity . . .³⁶

The Prime Minister (Rt Hon. H. E. Holt) however did not accept the resignation, in part because he felt no political necessity to do so.

4.26 Politicians have themselves redefined the doctrine in a more limited way.³⁷ In the aftermath of the Crichton Downs affair (which did eventually lead to a ministerial resignation) in Britain, Herbert Morrison, M.P., said:

There can be no question whatever that Ministers are responsible for everything that their officers do, but if civil servants make errors or commit failures the House has a right to be assured that the Minister has dealt with the errors or failures adequately and properly, or that he will do so. That is a duty that falls on Ministers as well, and it would be wrong for a Minister automatically to defend every act of his

³³ I. W. Jennings, *The British Constitution*, 5th edn, Cambridge University Press, Cambridge, 1966, p. 149.

³⁴ M. Duverger, *Political Parties*, 2nd edn, Methuen, London, 1954, p. 352.

³⁵ H. Dalton (1947) over Budget leaks and Sir J. Dugdale (1954) over Crichton Down. See also Lord Denning, *The Discipline of the Law*, Butterworths, London, 1979, pp. 5-6, 88-101.

³⁶ Australia, House of Representatives, *Hansard*, 8 November 1967, p. 2777.

³⁷ M. Wright, 'Ministers and Civil Servants: Relations and Responsibilities', *Parliamentary Affairs* XXX, 3, Summer 1977, p. 294.

officers or servants merely because they belong to his Department. Therefore, the House has to be satisfied that he is dealing with the matter adequately.³⁸

The Home Secretary of the day said:

Where action has been taken by a civil servant of which the Minister disapproves and has no prior knowledge, and the conduct of the official is reprehensible, then there is no obligation on the part of the Minister to endorse what he believes to be wrong, or to defend what are clearly shown to be errors of his officers. The Minister is not bound to defend action of which he did not know, or of which he disapproves. But, of course, he remains constitutionally responsible to Parliament for the fact that something has gone wrong, and he alone can tell Parliament what has occurred and render an account of his stewardship.³⁹

4.27 In the Australian context, the doctrine was expressed as being a quite limited one, when in 1965 the Attorney-General, Mr B. M. (now Sir Billy) Snedden said:

What of cases where the Minister is not personally involved? . . . Responsible, yes, in the sense that he may have to answer and explain *to* Parliament, but not absolutely responsible in the sense that he has to answer *for* (is liable to censure for) everything done under his administration . . . There is no absolute vicarious liability on the part of the Minister for the 'sins' of his subordinates. If the Minister is free from personal fault, and could not by reasonable diligence in controlling his department have prevented the mistake, there is no compulsion to resign.⁴⁰

In a similar vein, the Prime Minister, Rt Hon. J. M. Fraser, has recently written that:

It has always been difficult for a minister to be aware of—let alone directly involved in—every exercise of the powers conferred upon him. I do not know why this ministerial inability to be Superman should surprise anyone. It is, after all, the very reason for the existence of a public service, organized into departments, to act as the minister's agents.⁴¹

The very size and complexity of modern departments inevitably means that the chances of these mistakes, even on a large scale, will multiply. For instance, in August 1977 the Auditor-General pointed out that the Department of Social Security had overpaid benefits to the extent of \$40 m⁴² but the Minister did not feel obliged to resign, and neither did anyone seriously call for her resignation.

4.28 Commentators have expressed similar views. The Royal Commission into Australian Government Administration (the Coombs Commission) was told, in relation to Britain, that:

In fact, it seems fair to add that British observers, as a consequence of redefining individual ministerial responsibility, have virtually abandoned the concept as a method of imposing accountability upon civil servants' actions . . .⁴³

Professor Finer has written:

We may put the matter in this way: whether a Minister is forced to resign depends on three factors, on himself, his Prime Minister and his party . . . For a resignation to occur all three factors have to be just so: the Minister compliant, the

³⁸ Great Britain, House of Commons, *Hansard*, 20 July 1954, col. 1274.

³⁹ Great Britain, House of Commons, *Hansard*, 20 July 1954, cols 1286–7.

⁴⁰ Speech to the third Commonwealth and Empire Law Conference on 25 August 1965 quoted in Crisp, *Australian National Government*, cited footnote 14, p. 355 (footnote).

⁴¹ Fraser, *Australian Journal of Public Administration*, cited footnote 17, p. 5.

⁴² Australia, Auditor-General's Office, *Report of the Auditor-General upon the Treasurer's Statement of Receipts and Expenditure and upon other accounts for the year ended 30 June 1977*, AGPS, Canberra, 1977, ch. 2.

⁴³ Coombs, *Appendix, Volume 1*, cited footnote 15, p. 21.

Prime Minister firm, the party clamorous. This conjuncture is rare and is in fact fortuitous. Above all, it is indiscriminate—which Ministers escape and which do not is decided neither by the circumstances of the offence nor its gravity.⁴⁴

In another Westminster system, Canada, it has been observed that:

the whole doctrine of Ministerial responsibility is only a convention, an unwritten rule that tends to shift and change over time, and recent events have demonstrated this convention is now but a myth.⁴⁵

Dr Emy in his paper for the Coombs Commission wrote:

Unlike Britain, it is difficult to say whether ministerial responsibility is a significant influence upon the probity of ministers' personal behaviour. There have been several cases in recent political history where a ministerial resignation might reasonably have been expected, but none was forthcoming. This is indicative of a wider point: Australian parliamentary practice has been characterised by a reluctance to make rules or even to pass judgment upon the propriety of ministerial behaviour. The case for separate standards of public morality, or for an ethic of responsible government, has gone by default.

Australian ministers have shown little inclination to accept the implications of a concept of absolute responsibility. Public criticism of their official advisers is not unknown: nor are attempts to shift the blame for political as well as administrative error on to public servants . . . In Australia, the inadequacy of ministerial responsibility as a method of imposing a realistic degree of political responsibility upon ministers reflects the basic weakness of the House of Representatives as an institution . . . The basic cause of this situation is the effect of party discipline upon a small legislature. But the House itself has taken too little interest in the procedures and devices it has at its disposal for securing information and accountability. It has failed to use the reports from either independent authorities such as the Public Service Board, or from its own committees such as Public Accounts, or from the public corporations as a basis for debate and inquiry. Parliament has failed to develop any systematic or constructive approach to the problem of scrutinising the actions of bureaucrats, the organisation and efficiency of the public service, or the personal behaviour and policy aspirations of ministers. Consequently, even the concept of answerability is of little practical significance. It has even less significance if ministers themselves refuse to take this function seriously. There is widespread recognition that parliament does not possess the requisite influence seriously to embarrass ministers. Where ministers enjoy personal authority within the party, it is difficult to believe that the open or parliamentary processes provide any real threat to their reputation.⁴⁶

Similarly one of the Commissioners of that inquiry submitted to us that 'the obsolescence of ministerial responsibility as a partial instrument of political and administrative accountability and control is proclaimed everywhere save in Westminster system Parliaments themselves.'⁴⁷ On the other hand this legislation, taken together with other recent changes in administrative law such as the Ombudsman Act, the Administrative Appeals Tribunal Act and the yet to be proclaimed Administrative Decisions (Judicial Review) Act will provide other avenues for review of departmental decisions and other mechanisms to provide for the accountability of the various departments and public servants.

4.29 It has also become apparent that the decline in the anonymity of public servants, particularly at the most senior levels, is related to the general decline

⁴⁴ Finer, *Public Administration*, cited footnote 31, p. 393.

⁴⁵ G. Baldwin, 'Freedom of Information: Another Personal View', *Canadian Political Science Bulletin* 7, January 1978, p. 63.

⁴⁶ Coombs, *Appendix, Volume 1*, cited footnote 15, p. 35.

⁴⁷ Submission no. 12 incorporated in *Transcript of Evidence*, p. 607.

in levels of individual ministerial responsibility. From time to time particular policies have become clearly identified with senior public servants rather than their ministers, especially in areas where one permanent head remains in place during the tenure of several different ministers. Equally, ministers have from time to time attempted to shift responsibility for particular decisions (especially of an administrative nature) on to public servants. In this latter case there are many instances in our statutes where decisions are required to be made by the statutory officers concerned and not by their ministerial heads. Some of these powers may involve statutory officers making decisions which have a highly political content, for example the determination made by the Director-General of Social Security to refuse to pay certain unemployment benefits (the Karen Green case), a matter which eventually found its way to the High Court⁴⁸; or a decision made some years ago by the Director-General of Civil Aviation about the importation of aircraft.⁴⁹ In these and other cases the statutory officers concerned have been exposed to considerable publicity and analysis of their actions, with their ministers playing a strictly limited role in the ensuing political controversy.

4.30 In our view it is clear that the theory and practice of individual ministerial responsibility bear increasingly little relationship to each other. The short answer to those who have expressed views that freedom of information legislation will adversely affect the operation of the doctrine of individual ministerial responsibility is that they are in fact worrying about something which has long ceased to exist in practice.

4.31 A further answer which we believe can be given to those concerned about the implications of freedom of information legislation for individual ministerial responsibility, is that our proposals are, in fact, likely to give a new vigour and meaning to this very concept, and to revitalise this whole aspect of the traditional Westminster system. Clearly if more information is made available to the public, then ministers will be required to answer for more of the activities and administrative decisions of their departments. Sir Arthur Tange recognised this when he told the Committee:

I think I am entitled to say that the working of this legislation will result in a new relationship between the Minister and members of Parliament and a new relationship between Ministers and members of Parliament and the media. Some of the ideas on freedom of information originated in countries which do not have the Westminster system. I think it will be essential to the effective working of a Westminster system, assuming that Parliament still continues to have question time and questions without notice, that as far as possible the Minister is aware of a mass of detail. At present he can do this at a time of his own choosing and in accordance with his judgment of the national priorities and the responsibilities of his portfolio. But henceforth this will be dictated by the exigencies of the operation of a piece of legislation which, at four o'clock on Friday afternoon might lead to the release of documents quite properly under the application of this legislation and of which it might be impossible for the Minister to be aware before he goes into the next question time in Parliament. This seems to me to be one of the realities of the situation.⁵⁰

4.32 We in fact see these freedom of information proposals as requiring ministers to take greater personal interest in the actions of their departments at a lower level of administration and decision making. To this extent we believe that effective

⁴⁸ *Green v. Daniels* (1977) 13 ALR 1.

⁴⁹ S. Brogden, *Australia's Two Airlines Policy*, MUP, 1968, ch. 7. Also, *R. v. Anderson* (1965) 113 CLR 177.

⁵⁰ *Transcript of Evidence*, p. 2046.

freedom of information legislation will lead to a renewed strengthening of the principle of individual ministerial accountability. Ministers will be required to accept a greater degree of personal responsibility for the proper and efficient working of their departments. Where maladministration occurs, and this clearly results from the failure of the minister to take effective action to prevent it, or where it results from neglect of his administrative (as distinct from his policy making) responsibilities as a minister, then public exposure should occur. If this in turn leads to the imposition of political sanctions against the minister concerned, we would see that as potentially strengthening the democratic process. In short, where a department fails to operate as it should because a minister has failed in his responsibilities there is no justification for this failure being concealed from the electorate. We feel that freedom of information legislation will achieve this strengthening of accountability on the part of ministers.

The neutrality of the Public Service

4.33 It has traditionally been held that a Westminster system must be served by a public service which is a career service⁵¹ of high professional standards, one which advises governments equally well regardless of their political complexion, one where the senior public servants play no overt role in the political contests of the day and are generally anonymous in the public eye; and where the professional service carries out the instructions of the elected government once decisions have been made. While in no way debating the issue, or proffering any opinion, we do note that there has been an increasing public debate in recent years and there appears to be a growing body of informed opinion that challenges some of these views, and regards the possible development of a public service where senior officers change regularly with changes of government as not being incompatible with the ideals of the Westminster system.⁵² For instance, the Prime Minister, the Rt Hon. J. M. Fraser recently acknowledged that:

The present government has recognized that there may be occasions when governments will wish to appoint politically committed persons to the highest public service positions. When such politically committed persons are appointed, there should be no continuing commitment to them on the part of succeeding governments The appointment of a politically committed individual as head of a department might serve the interests of the government making the appointment very well. But new governments might conclude that it is impossible for a person so identified with their political opponents to serve them impartially We have responded to this problem with the Public Service Amendment (First Division Officers) Act passed earlier this year It is felt that these new procedures enable a government to make appointments from outside the normal public service career structure, but prevent any lasting breach of the principle of an apolitical public service.⁵³

⁵¹ This is as distinct from the United States system where senior administration officials are removed and replaced ('the spoils system') when a new President takes over. However we noted that in recent years the changes in Permanent Heads of Departments have been more frequent than in the past, something admitted by the Public Service Board when it appeared before us (*Transcript of Evidence*, p. 898). However, the Prime Minister, when introducing the Public Service Amendment (First Division Officers) Bill 1976 which makes it in effect easier to remove First Division Officers when governments change, said 'One of the most important foundations of the parliamentary system of government is the political neutrality of the Public Service'. Australia, House of Representatives, *Hansard*, 18 November 1976, p. 2865.

⁵² See for example R. M. Spann, 'Bureaucracy and the Public Service', in H. Mayer & H. Nelson (eds), *Australian Politics: A Fourth Reader*, Cheshire, Melbourne, 1976, ch. 81.

⁵³ Fraser, *Australian Journal of Public Administration*, cited footnote 17, p. 7.

4.34 In its submission to the Coombs Commission, the Public Service Board expressed its interpretation of the doctrine of public service neutrality as follows:

The concept of neutrality does not imply that public servants have no political views or associations. Rather, it is concerned with the responsibility owed by a public servant to the government of the day, irrespective of its political complexion; impartial advice on policy options; and the whole-hearted implementation of decisions made at the political level irrespective of whether they accord with the views of the officer.⁵⁴

Again, this sounds fine in theory, but it is well attested that the struggle between the departmental view and a contrary ministerial view does not cease simply because a decision is eventually made by the politicians.⁵⁵ The doctrine also implies that '... while bureaucrats should not be partisan, they do not have the right to be neutral between government and opposition. Public servants owe loyal service to the government in office ...'.⁵⁶ A further implication is that:

A public servant has a duty while at work to protect and promote the minister's and the government's interests, as he would if they were wholly acceptable to him personally. So, in making clear policy options, he should indicate how they might be related to the apparent political aims and general outlook of the government; and he should interpret and promote the government's and the minister's policy concerns as best he can, even in the absence of clear guidelines in a particular field of policy.⁵⁷

4.35 A further question arises about the nature of the ministerial–public service relationship when the opinions of senior public servants are published after they retire from the Service; especially if these comments are critical of government policy or of the ministers whom they have served. Such publications are by no means unknown in Australia. For instance, when Mr (later Sir) Paul Hasluck left the then Department of External Affairs, he wrote on several occasions in a highly critical way of the foreign policies of his former Minister, Dr H. V. Evatt. Similarly, Sir Alan Watt, a former Permanent Head of the same Department criticised various policies and ministers whom he had served in his book *The Evolution of Australian Foreign Policy 1938–1965* which was published in 1967, only two years after many of the events he described. Mr W. R. Crocker and Mr M. Booker, both former senior Australian diplomats, published books after their retirement entitled *Australian Ambassador* and *The Last Domino* in 1971 and 1976 respectively. Both books were highly critical of some aspects of Australian foreign policy.

4.36 Most recently, Mr A. Renouf, another former Permanent Head of the Department of Foreign Affairs, published his book *The Frightened Country* in 1979. This book, highly critical both of current government policy and members of the current Government, was written while Mr Renouf was still an officer of the Department and was published within a few weeks of his retirement. Mr Renouf's actions were very quickly and forcefully condemned by the Public Service Board which, in a formal statement issued on 20 August 1979, said:

The conventions relating to public comment by public servants include a requirement that public servants concerned with policy should not publicly criticise

⁵⁴ Australia, Public Service Board, *First PSB Submission to the Royal Commission on Australian Government Administration*, Public Service Board, Canberra, 1974, p. 64.

⁵⁵ R. K. Alderman & J. A. Cross, 'Ministerial Reshuffles and the Civil Service', *British Journal of Political Science* 9, 1, January 1979; R. N. Spann, *Government Administration in Australia*, George Allen & Unwin, Sydney, 1979, p. 473.

⁵⁶ J. W. Pickersgill, 'Bureaucrats and Politicians', *Canadian Public Administration* 15, Fall 1972, p. 426.

⁵⁷ Spann, *Government Administration in Australia*, cited footnote 55, p. 257.

Ministers (past or present). In the case of senior public servants and certainly those who have had the unique responsibilities of Permanent Head it is the Board's view that those conventions should have application after retirement also in respect of matters which arose when they were serving officers.

In the Board's view the proper relationship between Ministers and senior public servants requires an atmosphere of mutual confidence and trust with public servants giving advice fearlessly and Ministers accepting responsibility for decisions made. Within a Westminster-type system neither Ministers nor public servants should allow themselves to become in any sense public adversaries.

The publication, by an ex-Permanent Head, immediately after his retirement, of his opinions about the appropriateness or otherwise of the policy decisions or actions of Governments which he has served, is not in the Board's view conducive to the maintenance of a proper ministerial-public service relationship—if the example were to be emulated on any scale it could be destructive of it.

This statement by the Public Service Board is a clear example of the classic approach to ministerial-public service relationship within a Westminster-type system of government. It also serves to reinforce our view that freedom of information legislation will only be effective if the public service as a whole, and especially at a senior level, is prepared to adopt attitudes which are more conducive to the free exchange of information than has been the case in the past.

4.37 We would not seek to dwell on this issue of neutrality. No submission or witness before us suggested that freedom of information legislation would have any significant impact in this area, and this is a view which we share. There is a world of difference between taking a 'political' position in terms of supporting government, rather than opposition, policies; and taking a 'partisan' position favouring one political party or cause above another. Few senior public servants have overtly identified themselves with particular political parties,⁵⁸ although in recent years a number of people of known prior political affiliation have been appointed to very senior public service positions, with consequential problems arising upon changes of government.⁵⁹ We would not see our proposals altering this in any way. Provided, as we said, that partisan considerations remain absent from the operations of the public service we see no changes of behaviour likely to result from any of our proposals.

4.38 There is a further consideration however, that goes beyond the question of public servants playing a partisan role; and that relates to the whole question of how the distribution of power has shifted between public servants and politicians. In recent years it has been increasingly argued that there has been an undesirable shift of real power from the elected government to the public

⁵⁸ Rare examples being those of Dr John Burton, a former head of the then Department of External Affairs, who resigned to fight an election as an endorsed party candidate (H. W. Scarrow, *The Higher Public Service of the Commonwealth of Australia*, Duke University Press, Durham, N. C., 1957, pp. 154-6); Dr Rex Paterson, a former Director of the Commonwealth Department of National Development, later M.P. for Dawson (Queensland) (Spann, *Government Administration in Australia*, cited footnote 55, p. 259); and Mr Ellicott (now Minister for Home Affairs) who was a former Solicitor-General.

⁵⁹ The appointment of a number of such persons by the Labor Government during 1972-75 was a prime factor leading to the introduction of the *Public Service Amendment (First Division Officers) Act 1976* (No. 6 of 1977) by the Liberal-National Country Party Government. By changing the method of appointing and removing First Division Officers, the new legislation makes it easier to terminate 'political appointments'. See in particular clause 3 (a) of the Bill amending s. 54 of the Principal Act.

service. Writing in 1964, R. H. S. Crossman summarised developments which he characterised as involving 'the passing of Cabinet government' thus:

Unification and centralisation have had two important political effects. Firstly, they have made it even more difficult for departmental ministers to get their way against their senior officials, or where necessary to dismiss them. In our new kind of civil service, the minister must normally be content with the rôle of public relations officer to his department . . . Secondly, the centralisation of authority, both for appointments and for policy decisions . . . has brought with it an immense accretion of power to the Prime Minister. He is now the apex not only of a highly centralised political machine, but also of an equally centralised and vastly more powerful administrative machine.⁶⁰

This shift of power was recognised on both sides of British politics. The Labour Party spoke of the 'dangerously unbalanced and dependent relationship' of ministers with their officials⁶¹ and the Conservatives of

a recognisable shift of power away from the elected politician to the bureaucrat. It would be wrong to close one's eyes to the fact that, in Sir Eric Roll's words, 'the tradition that ministers take the political decisions and civil servants carry them out has long been overtaken by reality.'⁶²

4.39 The same is the case in Australia. One of the foremost experts on the subject has recently written:

The professional expert and the manager [in Australia] played a relatively more important role . . . than in Britain.⁶³

and,

Among the institutional elites of Australian society, public servants occupy an important place. Australia has an executive-biased political system . . . Parliaments rarely have a large supply of able members, operate fewer formal controls on administration than in most countries. Ministers have often had political skills and interests, rather than executive capacity or experience. This has helped to give senior departmental officers and the executive heads of the large statutory corporations considerable influence, especially when they have worked with a strong head of government. Public officers have played a major part in Australian history . . . The Federal system has helped in this process.⁶⁴

One Canadian observer has summarised the situation thus:

There is no doubt, however, that while the *focus* of responsibility in government continues to be primarily the minister, the *locus* of actual responsibility lies increasingly in the public service.⁶⁵

4.40 This shift in the balance of power between the elected government and the professional public service has important implications for freedom of information legislation. In essence it means that the public service should be made more open to public scrutiny and more accountable for its actions than has traditionally been the case. We do not believe that this changed attitude is in any way incompatible with the principles of the Westminster system. In Chapter 2 under the heading 'Democracy and the right to know' we discussed some aspects of this matter. We

⁶⁰ W. Bagehot, *The English Constitution*, C. A. Watts, London, 1964, introduction, p. 51.

⁶¹ P. Shore, *Entitled to Know*, MacGibbon and Kee, London, 1966, p. 155. See also the Labour Party evidence to the Fulton Committee, Great Britain, the Civil Service Committee (Lord Fulton, Chairman), *Proposals and Opinions*, HMSO, London, June 1968, vol. 5 (2), pp. 652-673.

⁶² *The Times*, 27 May 1976, p. 16.

⁶³ Spann, *Government Administration in Australia*, cited footnote 55, p. 33.

⁶⁴ Spann, *Government Administration in Australia*, cited footnote 55, pp. 36-7.

⁶⁵ Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 28.

pointed out that in Britain the Fulton Committee (1968) had deplored excessive secrecy in government and had called for greater exposure of government administration to the public gaze;⁶⁶ that this view had been endorsed by the British Government's White Paper (1969)⁶⁷ and recognised by the Franks Committee (1972).⁶⁸ However the long awaited government response to the Franks Committee recommendations, published in July 1978⁶⁹ has been greeted with great disappointment by supporters of the concept of less secrecy in government.⁷⁰

4.41 This administrative secrecy is, however, in no way confined to the operations of Westminster-style governments. A recent study by the International Institute of Administrative Sciences reported on the problems of government secrecy in four Western European, two Eastern European and three Scandinavian countries plus the United States and Canada. The report indicated that most fears expressed about the danger of open government were quite groundless, as adequate protection has always been afforded to material that ought to be protected. Thus, even in Sweden, 'there has been little danger of too much administrative openness'.⁷¹

4.42 We noted earlier that an essential feature of the Westminster system was the accountability of the Executive to Parliament, and in this regard we are much encouraged by the statements of Lord Croham, a recent former head of the British Civil Service, that greater openness of the public service to the general electorate will 'lead to a strengthening of Parliament in relation to the executive'.⁷²

4.43 We find it interesting by contrast that the Public Service Board in its submission to us sought to imply that greater public access to information would in fact increase the power of the public service in relation to the elected government. The Board spoke of

the added *power* which public access to internal working documents could give public servants. Evidence that Ministers had acted contrary to advice given by or even the views of public servants could be used against Ministers by those disagreeing with the relevant actions. In such cases the public servants could be portrayed by Ministerial opponents as wise/expert/disinterested, etc., and the Minister put on the defensive. The coercive influence on governments which could thus be put in the hands of public servants should not be underestimated. Nor would it fail to be recognised by Ministers.⁷³

This of course amounts to no more than speculation and for our part the views of Lord Croham are much to be preferred. It is certainly upon that premise that we have proceeded.

⁶⁶ Great Britain, The Civil Service Committee (Lord Fulton, Chairman), *Report*, Cmnd 3638, HMSO, London, June 1968, vol. 1, para. 277, p. 91.

⁶⁷ Great Britain, *Information and the Public Interest*, Cmnd 4089, HMSO, London, June 1969.

⁶⁸ Great Britain, Departmental Committee on Section 2 of the Official Secrets Act 1911, (Lord Franks, Chairman), *Report*, Cmnd 5104, HMSO, London, vol. 1, September 1972.

⁶⁹ Great Britain, Home Office, *Reform of Section 2 of the Official Secrets Act 1911*, Cmnd 7285, HMSO, London, July 1978.

⁷⁰ For an example of this response see R. J. Williams, 'Official Secrets and Open Government: A Reappraisal', *Political Quarterly* 50, 1, January-March 1979, pp. 100-104.

⁷¹ D. C. Rowat, *Administrative Secrecy in Developed Countries*, Macmillan Press Ltd, London, 1979, p. 13.

⁷² *The Times*, 17 August 1978, p. 2.

⁷³ Submission no. 47 incorporated in *Transcript of Evidence*, p. 840.

The anonymity of the Public Service

4.44 In the classic model of the Westminster system it is expected that the particular views of individual public servants are not common knowledge.⁷⁴ It has traditionally been held that differences of opinion between ministers and officials should not become public knowledge; that policy decisions or positions should be identified as being the responsibility of ministers and not officials; and that, whatever views the officials do hold, they defer and accept the policies decided by ministers. Anonymity has thus been described as an 'equally important tradition'⁷⁵ as that of neutrality in the public service. In evidence before us, senior Australian public servants stressed the importance of this tradition. Mr Curtis said:

I think the principal point that is being considered is whether a public service could continue to serve successive governments, not only with impartiality but with an acceptance of impartiality by governments if their positions on policy issues become known and debated. Perhaps where public servants become identified with particular partisan issues, not necessarily political partisan issues, then it may well be that a succeeding government committed to a different line of thought would wish to have different advisers . . . The second point is that once the views of an individual public servant become known and subject to public debate it seems to be almost inevitable that the public servant is going to be drawn into the arena to defend his views.⁷⁶

Mr Stone said that one of the effects of the Westminster system is that 'we cannot have a situation in which a department is saying one thing when the Minister may want to be saying something else'.⁷⁷

4.45 Defenders of the traditional view of the Westminster system are most anxious to preserve this concept of absolute anonymity. The British Government's White Paper states:

The risk must be avoided of officials becoming personally identified with a particular line of advice on a particular issue of policy or exposed to pressure to discuss in what respects their advice has not been accepted by ministers. It is clearly right that officials should not be drawn into expressing personal views on policy matters which could be represented as in conflict with those of their Ministers, or as reflecting any political bias.⁷⁸

This is very much in line with the submission of the Public Service Board which we quoted above.

4.46 Once again, however, the political reality has far outdistanced the pristine theory, as Mr Curtis clearly recognised when he said:

Given the extent to which the names of senior officials of at least some departments are now publicly known and their views and backgrounds, or supposed views and backgrounds, are discussed in the daily Press and weekly journals, it may be doubted whether much if anything is left of the tradition of anonymity.⁷⁹

And again,

It seems to me inevitable that as the interface between government and the public becomes larger with the expansion of government regulatory activities, more and more will be known about not only who the public servants are who are operating within the system but what their views are as well.⁸⁰

⁷⁴ Spann, *Government Administration in Australia*, cited footnote 55, ch. 10.

⁷⁵ Birch, cited footnote 32, p. 242.

⁷⁶ *Transcript of Evidence*, p. 23.

⁷⁷ *Transcript of Evidence*, p. 1693.

⁷⁸ *Information and the Public Interest*, cited footnote 67, para. 30, p. 10.

⁷⁹ *Transcript of Evidence*, p. 28.

⁸⁰ *Transcript of Evidence*, p. 29.

This is not a new phenomenon. Professor Encel writes:

Educational policy in Victoria is identified with the name of Frank Tate and in N.S.W. with those of Peter Board and Harold Wyndham. The building of railways, of great bridges, of water supply projects, electricity generating enterprises . . . with names like Speight, O'Connor, Bradfield, Hudson and Monash. In other cases, leading officials have become dominant figures over the whole range of state administration . . . like J. D. Story, in Queensland, and Wallace Wurth in N.S.W.⁸¹

The Ontario Commission research paper notes, 'it is evident that official anonymity is gradually declining despite the efforts of most ministers and public servants to resist this development,⁸² and the Fulton Committee wrote of anonymity that 'it is already being eroded by Parliament and to a more limited extent by the pressures of the press, radio and television; the process will continue and we see no reason to seek to reverse it'.⁸³

4.47 Public servants at a very senior level appear frequently before parliamentary committees where quite free exchanges of opinion occur. As has been said, their supposed views are canvassed in the press⁸⁴ and, indeed, discussed in the Parliament.⁸⁵ Leading figures such as Sir Arthur Tange are inextricably linked with their departments and their views become known over many years. Industry and interest group leaders develop close relationships with senior public servants.⁸⁶ It is increasingly common for such officials to speak at public meetings and seminars, especially since the 1974 repeal of regulation 34 (b) of the Public Service Regulations which forbade an officer to publicly comment upon any administrative action or upon the administration of any department.⁸⁷ In short it could be said that this concept has largely vanished and 'that lapses in ministerial responsibility help to reinforce a decline in anonymity resulting from other changes in the political system'.⁸⁸

4.48 The principal issue arising in this context is what changes to the Westminster system are likely to arise if greater access is granted to what are generally called 'internal working documents' (a matter dealt with in fuller detail in Chapter 19 relating to clause 26 of the Bill) and whether this in turn will reveal the identity of individual public servants and the specific nature of their advice.

4.49 First it is held that such increased disclosure would lead to some change in the nature of the relationship between officials and their ministers. Specifically Mr Stone said that: 'the breach in the relationship between Ministers and their

⁸¹ S. Encel, *Equality and Authority: A Study of Class, Status and Power in Australia*, Cheshire, Melbourne, 1970, p. 71.

⁸² Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 24.

⁸³ Fulton, *Report*, cited footnote 66, para. 283, p. 93.

⁸⁴ See for instance the articles in *The National Times* dealing with Sir Arthur Tange (Defence), 28 April 1979, pp. 23-31; Mr John Stone (Treasury), 28 October 1978, pp. 8-11; Mr Geoffrey Yeend (Prime Minister and Cabinet) and Sir Alan Carmody (Prime Minister and Cabinet), 11 November 1978, pp. 14-17; Mr Nick Parkinson (Foreign Affairs), 18 November 1978, pp. 8-10; Mr Pat Lanigan (Social Security), 2 December 1978, pp. 18-19; Mr K. O. Shann (Public Service Board), 9 December 1978, pp. 33-36; and Mr Ian Castles (Finance), 16 December 1978, pp. 39-41.

⁸⁵ See for instance comments about the views of Sir Arthur Tange in Australia, Senate, *Hansard*, 20 March 1979, pp. 739-745.

⁸⁶ See comments of Mr Curtis in *Transcript of Evidence*, p. 28.

⁸⁷ Spann, *Government Administration in Australia*, cited footnote 55, p. 260.

⁸⁸ Williams, *Freedom of Information and Ministerial Responsibility*, cited footnote 2, p. 25.

departments which would be involved in the publication of such a document would be very much against the public interest',⁸⁹ and

In my considered judgment the release, under sanction of the Bill, of what are loosely called internal working documents of departments, that is to say the kind of documents that pass in the policy-advising process between officials and their Ministers, would be subversive of the system under which we presently operate. People may not like that system but it is the system.⁹⁰

4.50 Secondly, several of our witnesses echoed criticisms that have also been made overseas that the public exposure of these advisings, or the revelation of the identity of individual public servants will lead to a major change in the nature of that advice itself. It is said that the quality of the advice tendered will be adversely affected, being more cautious and less innovative.

The Chairman of the Public Service Board Mr R. W. Cole said:

To take an extreme example, if it was suggested that internal working documents should not be exempt . . . Documents that I have seen over my years in the Treasury, the Department of Transport and the Department of Finance, often have quite strongly criticised existing government policies or things that are going to become government policies. There has been a battle going on behind the scenes as to whether the Government should adopt policy x. At present it is possible in the Public Service to write a document saying policy x being proposed by a Minister is very bad for these reasons, and that goes to the Minister or may even go into Cabinet. If that were going to be published or made available to journalists it could not be written.⁹¹

And again,

I am just asserting that it is a fact that people do write documents in a way which is geared to what they believe will be the readership, and that where they have an obligation to write for a wider readership they write them in a different way. I am not saying this is 100 per cent so, but they write them in a different way from the way in which they write them for internal purposes.⁹²

In doing the best you can you may chance your arm somewhat because you may not be sure of your facts and you may be making a quick judgment. If the senior public servant fears that in some sense this might be published and held against him he may be ultra-cautious, which may not be helpful to the recipient.⁹³

4.51 Indeed in its written submission the Board spelt this out in greater detail. It submitted:

Public servants if believing that they may be writing, in effect, for publication could tend to be more careful and less straight forward and frank in internal written communications. Being more careful has obvious merits though it may slow advising processes down—a public servant whose primary aim is never to be seen to make a mistake is not the ideal model. Particularly in the policy advising areas of government quick and often comparatively informal papers are prepared of necessity—i.e., to an externally imposed timetable. Even deeper assessments, particularly those which may be critical of an existing policy, may be written in direct language rather than in the guarded language common in reports which are written by public servants for publication. Any inhibition on frankness in communication would in the Board's view risk weakening the policy formulation and advice to government functions of the public service.

⁸⁹ *Transcript of Evidence*, p. 1696.

⁹⁰ *Transcript of Evidence*, p. 1697.

⁹¹ *Transcript of Evidence*, p. 887.

⁹² *Transcript of Evidence*, p. 888.

⁹³ *Transcript of Evidence*, p. 889.

Individual public servants could become publicly identified with particular points of view. They could thus become involved in political controversies as either critics or defenders of government policies or of the policies of opposition parties. Public servants could be attacked in person for views they may have expressed. Before it is thought 'why not?' the question needs to be asked: should those public servants be given the right of reply in such circumstances? The Board believes that it would be inappropriate for individual public servants to become involved in political debate and that it would seriously erode the concept of a neutral public service if circumstances were allowed to arise in which any such tendency developed. Indeed, if this were to happen, pressures would almost certainly arise for Governments to take responsibility for the appointment of persons to positions in the Public Service below the Permanent Head/Statutory Officer level concerned with policy formulation and advice.⁹⁴

4.52 When the Secretary of the Treasury was asked if he thought that subsequent disclosure of official advisings would cause a document to be written in a different fashion, he replied: 'In my opinion it is quite certain it would do so'. He said that for himself 'I would be much more circumspect than I am normally accustomed to be'. However, on the issue of the quality of his own advice, he said that 'The policy prescriptions I hope would not differ'. But as to the impact on others he felt that they might in fact tend to reduce the quality of their output,

Because I have seen sufficient of the world to notice that in fact people do write differently, or even speak differently for that matter, in one set of circumstances from another.⁹⁵

4.53 With slightly different emphasis, the Secretary of the Department of the Prime Minister and Cabinet said:

I think those who contend that nothing will change do not know what they are talking about. The system will certainly change. It will change for me and I expect it will change for others. Let me add that does not say anything about the integrity of advisers if that is what the British comment was about. The advice will be just as frank and forthright and I hope as accurate, but it will be done differently.⁹⁶

By this he meant that formal records might not be kept but rather that records would be of a less formal nature; more would be done by simple discussion, or on the telephone. He said 'You may not be allowed to record a file note of the discussion. The Minister may not want it'.⁹⁷ He added,

It is not a fear of exposure; it is that advisers only have one try. You put your thoughts down on a piece of paper and that is it. It then goes out to public controversy; you do not have a second chance to go and explain your views; you do not then enter the public platform to defend and explain what you have said. I believe it will be a permanent change, not necessarily in the same degree all the way through, but those who contend that there will be no change are doing something less than facing up to all the facts.⁹⁸

4.54 This view has frequently been advanced in the courts to argue for the non-disclosure of documents, and in almost all cases the courts have rejected this view. Viscount Simon L. C. said:

It is not a sufficient ground [to withhold a document] that the documents are 'state documents' or 'official' or are marked 'confidential'. It would not be a good ground

⁹⁴ Submission no. 47 incorporated in *Transcript of Evidence*, pp. 839-840.

⁹⁵ *Transcript of Evidence*, p. 1713.

⁹⁶ *Transcript of Evidence*, p. 2305.

⁹⁷ *Transcript of Evidence*, p. 2305.

⁹⁸ *Transcript of Evidence*, p. 2306.

that, if they were produced, the consequences might involve the department or the government in Parliamentary discussion or in public criticism . . . Neither would it be a good ground that production might tend to expose a want of efficiency in the administration . . . In a word, it is not enough that the minister or the department does not want to have the documents produced.⁹⁹

In the United States, the Supreme Court in its historic judgment on the question of the release of the 'Watergate tapes' said:

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candour and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.¹⁰⁰

4.55 The Australian High Court has recently pronounced decisively on these objections in *Sankey v. Whitlam* (which we discuss at length in Chapter 5). Acting Chief Justice Gibbs said:

Not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind.¹⁰¹

Mr Justice Mason (a former Solicitor-General) said:

I agree with his Lordship [Lord Reid in *Conway v. Rimmer*] that the possibility that premature disclosure will result in want of candour in Cabinet discussions or in advice given by public servants is so slight that it may be ignored . . . I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.¹⁰²

And Mr Justice Stephen said of such claims that 'Recent authorities have disposed of this ground as a tenable basis for privilege'.¹⁰³

4.56 We tend to support the view that the courts have expounded—in effect that while there may well be some change in the nature of advice provided to the government, these changes will be for the better. The specious or expedient advice, the unsubstantiated comments about individuals, or the expression of mere opinions without any real support may well vanish, but we share Mr Stone's hope that the quality of policy prescriptions will not differ. We are not alone in this view. The Fulton Committee said:

We think that administration suffers from the convention, which is still alive in many fields, that only the Minister should explain issues in public and what his department is or is not doing about them . . . In our view, therefore the convention of anonymity should be modified and civil servants, as professional

⁹⁹ *Duncan v. Cammell Laird and Co. Ltd* [1942] 1 All ER at p. 595.

¹⁰⁰ *United States v. Nixon* 94 S.Ct. 3090 L.Ed.2d (1974).

¹⁰¹ *Sankey v. Whitlam* (1978) 53 ALJR 11 at p. 22.

¹⁰² *ibid.*, at p. 44.

¹⁰³ *ibid.*, at p. 31.

administrators, should be able to go further than now in explaining what their departments are doing, at any rate so far as concerns managing existing policies and implementing legislation.¹⁰⁴

Lord Armstrong, an eminent English public servant writes,

To my mind there would be every advantage in the name of the civil servants responsible for such [policy option] studies being known, and their being allowed to join in public debate on their own findings.¹⁰⁵

4.57 Lest it be thought that such views are confined to judges and British public servants, we would note that Mr R. Doyle, Senior Research Officer of the Administrative and Clerical Officers Association told the Committee that 'We do not accept that FOI legislation will do away with the concept of candour'¹⁰⁶ and when asked if he thought that comprehensive freedom of information legislation would cause his members to behave in a different fashion in terms of committing advice and opinion to paper, he replied 'Shortly, no'.¹⁰⁷

4.58 The inevitability of this process was recognised by the Attorney-General (Senator Hon. P. D. Durack, Q.C.) when he told us that

The views or supposed views of individual public servants tend more and more to be canvassed in the Press. Individual public servants have more and more direct dealings with the public in the development as well as in the administration of government policies and programs. This process of change needs to be allowed to evolve.¹⁰⁸

4.59 Indeed there are two further desirable consequences which could flow. Lord Croham wrote:

If I am right, therefore, openness will do precisely what civil servants are attacked for doing. It will reinforce moderation and consistency in government and lead to less violent swings in policy.¹⁰⁹

And Mr Curtis, speaking of the advantage enjoyed over most members of the general public by those individuals who have close personal contacts with public service decision makers, commented:

One of the purposes of freedom of information legislation is to ensure that the insider, the person who has established an inside running, does not get a better deal with government than a person who does not have these contacts or inside running.¹¹⁰

4.60 We are thus led to the conclusion that although an effective Freedom of Information Bill will in fact cause some revision in the doctrines of public service neutrality and anonymity, and may indeed modify the relationship between ministers and public servants, these changes are likely to be for the better. The Public Service Board and others submitted that any loss of any portion of the secrecy which now surrounds so much of the workings of government and the public service would have a detrimental effect upon the system as a whole.¹¹¹

¹⁰⁴ Fulton, *Report*, cited footnote 66, para. 283, p. 93.

¹⁰⁵ Sir William Armstrong, *The Role and Character of the Civil Service*, OUP, London, 1970, p. 15.

¹⁰⁶ *Transcript of Evidence*, p. 930.

¹⁰⁷ *Transcript of Evidence*, p. 931.

¹⁰⁸ Senator P. Durack, Q.C., *The Freedom of Information Bill; An Address by the Attorney-General Senator Peter Durack, Q.C., To The Australian Pharmaceutical Manufacturers Association*, Press Release by the Attorney-General, Canberra, 21 August 1978, p. 7.

¹⁰⁹ *The Times*, 17 August 1978, p. 2.

¹¹⁰ *Transcript of Evidence*, p. 28.

¹¹¹ Submission no. 47 incorporated in *Transcript of Evidence*, pp. 839-840.

Such a view was by contrast rejected by the public service unions¹¹² and attacked by many other witnesses. A view similar to that of the Public Service Board was put strongly to the British Fulton Committee more than a decade ago. Like that Committee, we reject it.

4.61 Our view about the impact of such legislation on the other aspects of the Westminster system which we have discussed is similar. Collective Cabinet responsibility will not be weakened and individual ministerial responsibility may well be strengthened. The political system, whatever its form or nature, should exist to one end only: not the convenience of the government, but the service of the people. To this end, no views about the supposed nature of the Westminster system should prevent the strengthening of the accountability of all parts of the government to the people from being achieved. We well remember that these accusations against freedom of information legislation were equally mounted against the Ombudsman legislation (it was going to destroy ministerial responsibility and render the private member of Parliament irrelevant) and virtually all other major developments in administrative law reform.

Conclusion

4.62 We value the Westminster system of government; we do not seek to change it; nor do we believe effective freedom of information legislation would change it. A great deal of the talk about the Westminster system and how it would be altered by freedom of information legislation has been obscure and misleading. To a great extent the term 'Westminster system' has been used as a smoke-screen behind which to hide, and with which to cover up existing practices of unnecessary secrecy. Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government. The only feature of the Westminster system which cannot be in any way modified without fundamentally subverting that system is the need to ensure that members of the Executive Government are part of, and drawn from, the Legislature. Freedom of information legislation does not alter this one iota. The other features of the Westminster system which we have identified will either not be significantly changed by our freedom of information proposals or else will, we believe, be changed for the better.

4.63 Freedom of information legislation does not relate to any specific system of government, be it a Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving. Any political system which holds that the people are entitled to a maximum degree of information about how *their* government operates, so that it can be made more responsive and accountable to them, will welcome an effective Freedom of Information Bill. In this respect a Westminster system of government should be no different from any other.

¹¹² *Transcript of Evidence*, pp. 908-942. See especially p. 930.