

FREEDOM OF INFORMATION – A NEW PARADIGM

The 2010 Whitmore Lecture

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1 It is a great honour to have been invited to deliver the fourth annual Whitmore Lecture to the New South Wales Chapter of the Council of Australasian Tribunals. This year marks a break from the tradition of these events: unlike your previous speakers, I have never been personally associated with Professor Whitmore, whether as a colleague (The Hon Sir Anthony Mason AC, KBE²), a pupil (the Hon Justice Garry Downes AM³) or both (Professor John McMillan⁴)! Moreover, as Professor McMillan pointed out last year, in the “Whitmore era” in the 1970s when I was studying law, “administrative law was an emerging branch of learning in Australia [and]... was not a compulsory or separate subject in many law schools”⁵. It was apparently available as an optional subject at least in 1964, as witness Justice Downes’ perspicacity in studying it,⁶ but such foresightedness completely by-passed me!

2 Professor Whitmore lived through and was personally instrumental in some of the most profound changes to the Australian administrative law

¹ I acknowledge the invaluable assistance of my legal researcher, Amy Knox, in the preparation of this paper.

² The Hon Sir Anthony Mason AC, KBE, “The Kerr Report: Its Continuing Significance”, *Whitmore Lecture*, Address to the Annual Conference of the New South Wales Chapter of the Council of Australasian Tribunals, 19 September 2007.

³ The Hon Justice Garry Downes AM, President of the Administrative Appeals Tribunal, “The Council of Australasian Tribunals: The National Perspective”, *Whitmore Lecture*, Address to the Annual Conference of the NSW Chapter of the COAT, 13 September 2005:

<http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/WhitmoreLectureSeptember2008.htm>

⁴ Prof John McMillan, Commonwealth Ombudsman, “Can Administrative Law Foster Good Administration?”, *Whitmore Lecture*, Address to the Annual Conference of the NSW Chapter of the COAT, 16 September 2009:

http://www.ombudsman.gov.au/docs/speeches/whitmore_lecture.pdf

⁵ *Ibid.*

landscape. His participation in the Kerr and Bland Committees, and in particular his contribution on merits review in the Kerr Report,⁷ has had a lasting impact on Australian administrative justice.

3 Professor Whitmore was part of a reform movement that profoundly altered the way Australians relate to their government.

4 The changes that have taken place in administrative law since the 1960s and 1970s have given Australians the ability to access understand and challenge government decision-making. And as Professor McMillan so succinctly put it when he spoke to you last year, that system:

“[H]as developed to play an influential role in stimulating good administration to the benefit of the community generally.”⁸

5 Professor Whitmore was interested both in administrative law and in civil liberties.⁹ His interest in the former found expression in his involvement in writing *Principles of Australian Administrative Law*¹⁰, the third and fourth editions of which he co-authored with Professor Benjafield which was the leading, and for many years, the only Australian text on administrative law. This was no doubt because, as Chief Justice French pointed out recently, a “perusal of the Commonwealth Law Reports in the late 1960s discloses a relatively sparse selection of High Court decisions on administrative law”.¹¹ In some recognition of this proposition, in 1971 Professors Benjafield and Whitmore wrote in their fourth edition, that progress

⁶ Downes, *op cit*, 1.

⁷ As referred to by Mason, *op cit*, 1.

⁸ McMillan, *op cit*, 1.

⁹ Don Harding, “Professor Harry Whitmore” (1982) 5 *University of New South Wales Law Journal* 189.

¹⁰ DG Benjafield and H Whitmore, *Principles of Australian Administrative Law*, 3rd ed (1966) The Law Book Company Ltd. I should not give Professor Whitmore all the credit. The first edition of *Principles of Australian Administrative Law* was written by Professor Friedmann and published in 1950. However the original work was considerably expanded, first with Professor Benjafield’s involvement in the second edition, then when Professor Whitmore replaced Professor Friedmann with greater emphasis on substantive principles of judicial review, and on administrative tribunals and statutory corporations in operation in Australia: Michael Scott, “Book Review: Principles of Australian Administrative Law” (1964) 2 *University of Tasmania Law Review* 493. Professor Whitmore published a fifth edition, as sole author in 1980: Harding, *op cit*, 190.

¹¹ “Administrative Justice – Words in Search of Meaning”, Address to the Australian Institute of Administrative Law Annual Conference, 22 July 2010.

towards reform of Australian administrative law “has been inordinately slow”.¹²

6 Professor Whitmore’s interest in civil liberties found expression in *Freedom in Australia*, which he co-authored with Professor Enid Campbell.¹³

7 Freedom of information, as such, was not the major focus of Professor Whitmore’s career. However, he was very much alive to the dangers of governmental opacity. In particular, Professor Whitmore despaired at the capacity for administrative review to succeed where agency secrecy was the norm.¹⁴ He and Professor Campbell made the following observation in *Freedom in Australia*:

“The most pernicious of official attitudes is secrecy. Ministers and officials have developed a firm attitude that the general public are not entitled to know anything about what they are doing—even if their actions vitally affect the rights of citizens both individually and collectively.”¹⁵

8 It is interesting to observe the shift between the first and second editions of *Freedom in Australia*. It was first published in 1966; the second edition came out in 1973. In the 1966 version, the question of access to information was dealt with very briefly; under a sub-section “Official Secrets” within a chapter headed “Security of the State”.

9 In contrast, the 1973 edition of *Freedom in Australia* was an entirely re-written work.¹⁶ It contained an entire chapter on Freedom of Information (“FOI”). Professors Whitmore and Campbell there dealt extensively with the (limited) ways the Australian public could obtain access to government information through the courts, question time and parliamentary committees. Of the state of access to government information in Australia, they wrote:

¹² D G Benjafield & H Whitmore, *Principles of Australian Administrative Law*, 4th ed (1971) The Law Book Co Ltd, 361.

¹³ H Whitmore & E Campbell, *Freedom in Australia* (1966) Sydney University Press.

¹⁴ H Whitmore, *Principles of Australian Administrative Law*, 5th ed (1980) The Law Book Co Ltd, 134.

¹⁵ *Freedom in Australia*, 271.

“[S]ecrecy has become...a way of life, or a way of government.”¹⁷

- 10 A substantial exercise in comparative law followed, examining the capacity of the public in the United Kingdom and the United States to obtain information from their governments. Of particular interest in this context was the US *Freedom of Information Act*, which was passed in 1966 – the year *Freedom in Australia* was first published. The US model was held up as demonstrating what Australia ought to be aiming for:

“A firm commitment to the idea that the public has a *right* to such information as is necessary to underpin a *truly democratic* society.”¹⁸ (emphasis added)

- 11 A review of the development of FOI laws in Australia reveals the perspicacity of Professors Whitmore and Campbell. They were in the vanguard of FOI proponents in Australia. As you will see, their clarion call for Australia to adopt the US approach has ultimately borne fruit – albeit without express acknowledgement – in recently revised FOI legislation.
- 12 Fortunately, Professors Whitmore and Campbell were not alone in recognising the value of the US approach. A number of politicians and academics were also strongly influenced by the operation and rationale of the US approach to administrative law generally, and freedom of information in particular.¹⁹

The introduction of FOI legislation

- 13 “Freedom of information” – the phrase and the concept – first gained popular currency in Australia with the election of the Whitlam government.

¹⁶ Harding, *op cit*, 190.

¹⁷ H Whitmore & E Campbell, *Freedom in Australia*, 2nd ed (1973) Sydney University Press, 340; a concise history of the evolution of Australian legislation “From secrecy to open government” can be read in Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No.112 (2009), [2.4]ff.

¹⁸ *Ibid*, 346.

¹⁹ See ALRC 112, [2.15].

Freedom of information was a key plank in the policy platform Labor took to the 1972 election. The policy was modelled on the US system.²⁰

- 14 Gough Whitlam's final public statement before the 1972 election consisted of 14 "great and good reasons why the Labor Party will form Australia's next government." One of the 14 was as follows:

"There must be an end to excessive, paranoiac secrecy in government. There must be more communication between government and people. Labor will pass a Freedom of Information Act, along the lines of the American legislation, to give every member of the public a guaranteed right to public information, gathered at the public expense."

- 15 As "great and good" as that no doubt sounded, no Freedom of Information Act was actually passed during Mr Whitlam's (admittedly curtailed) term in office. However, in 1978 an FOI Bill was introduced into the Senate by the Attorney-General, Senator Peter Durack QC, who described it as "a major initiative by the Government in its program of administrative law reform... [and] a unique initiative." As Senator Durack explained, although a number of countries had FOI legislation, this was the first occasion on which a Westminster-style government had brought forward such a measure.²¹

- 16 However, it was not until 1982, and a multiplicity of inquiries and reports, that an FOI Act was passed at the Commonwealth level by the Fraser government. It commenced operation on 1 December 1982. It was amended in the years that followed, the most significant amendment being, so far as this meeting is concerned, the transfer of the review functions under the Act to the Administrative Appeals Tribunal ("AAT").²²

²⁰ J Spigelman, *Secrecy: Political Censorship in Australia* (1972) Angus & Robertson, 170-176. Chief Justice James Spigelman, then the private secretary to Gough Whitlam, wrote and spoke extensively on the potential for Australia to benefit from the US model.

²¹ See ALRC, *Open Government - A Review of the Federal Freedom of Information Act 1982*, Report No. 77 (1994), 12.

²² ALRC 77, 13.

- 17 The *Ombudsman Act* 1976 (Cth), the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) were passed before the Commonwealth FOI Act. After the enactment of the Commonwealth FOI Act, the *Privacy Act* 1988 (Cth) was passed. These five pieces of legislation have been described as the Commonwealth’s “new administrative law package”.²³
- 18 The states and territories gradually followed suit. By 1994 every Australian jurisdiction had a statutory scheme guaranteeing the right of the public to access information held by their governments, subject to a range of exemptions and conditions. All were modelled on the federal FOI Act, although as the ALRC observed in 1994 “a number ... sought to improve upon the federal provisions”.²⁴ Reviews of decisions were committed to administrative tribunals in the Commonwealth, Victoria and the ACT. The NSW FOI Act was passed in 1989 and reviews of decisions made under it were transferred from the District Court to the NSW Administrative Decisions Tribunal in 1998.²⁵

The old model

- 19 The structure of the first wave of FOI legislation can be gleaned from the objects of the 1982 Commonwealth Act:

“(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:

(a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and

²³ M Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (2005) LexisNexis Butterworths, [1.7]

²⁴ ALRC 77, 15. ALRC 77 sets out the details of each State and Territory’s legislation.

²⁵ Section 58, Commonwealth FOI Act; s 51, *Freedom of Information Act* 1982 (Vic); s 59, *Freedom of Information Act* 1989 (ACT); *Administrative Decisions Legislation Amendment Act* 1997 (NSW), Sch 5.16 [4] which commenced operation on 6 October 1998.

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, *limited only by exceptions and exemptions necessary for the protection of essential public interests* and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities..."(emphasis added)

- 20 The NSW FOI Act followed much the same model. Its objects were to extend, as far as possible, the rights of the public, among other matters, to obtain access to information held by the Government (s 5(1)(a)) and to confer on each member of the public a legally enforceable right to be given access to documents held by the Government, subject only to such restrictions as were reasonably necessary for the proper administration of the Government: s 5(2)(b).
- 21 The structure of the first wave of FOI legislation was as follows, taking for present purposes as relevant comparators the Commonwealth FOI Act and the NSW FOI Act.
- 22 Part 2 of each Act dealt with the publication by the responsible minister for an agency of a statement setting out the structure and functions of the agency, how the functions affected members of the public, a description of the sorts of documents maintained by the agency and a description of the procedures of the agency which enabled members of the public to obtain physical access to the agency's documents: s 8, Commonwealth FOI Act; s 14, NSW FOI Act.
- 23 Part 3 dealt with "Access to Documents". Every person was given a legally enforceable right to obtain access to an agency's documents in accordance with the Act: s 11, Commonwealth FOI Act; s 16, NSW FOI Act.
- 24 That right was exercised by making an application for access to the agency's document: s 15, Commonwealth FOI Act; s 17, NSW FOI Act.

- 25 Access was available to all but exempt documents: s 11(1)(a), Commonwealth FOI Act; s 25, NSW FOI Act. There was a long list of exempt documents: Pt IV, Commonwealth FOI Act; Sch 1, NSW FOI Act.
- 26 Cabinet documents, and executive council documents attracted apparently absolute exempt document status: s 34, 35, Commonwealth FOI Act; cll 1, 2, Sch 1, NSW FOI Act.
- 27 Otherwise status as an exempt document turned on whether disclosure of a document would “on balance, be in the public interest”: s 33A, Commonwealth FOI Act (documents affecting relations with States); s 40, Commonwealth FOI Act (documents concerning certain operations of agencies); s 39, Commonwealth FOI Act (documents affecting financial or property interest of the Commonwealth).
- 28 Under the Commonwealth Act a document was also exempt if its disclosure would be contrary to the public interest because, in substance, it could be expected to have a substantial adverse effect on the ability of the Government of the Commonwealth to manage the Australian economy or could reasonably be expected to result in an undue disturbance of the ordinary course of business in the community, an undue benefit or detriment to any personal class of persons, by giving premature knowledge of or concerning supposed or possible action or inaction of the Government or the Parliament of the Commonwealth: s 44, Commonwealth FOI Act. Internal working documents, being those which disclosed matters, in substance for the purposes of the deliberative processes involved in the function of an agency or minister or of the Government of the Commonwealth, were exempt documents if their disclosure would be contrary to the public interest: s 36, Commonwealth FOI Act.
- 29 A similar structure existed under the NSW FOI Act albeit that there were various formulations of the public interest test. Documents affecting law enforcement and public safety were not exempt if their disclosure would

“on balance, be in the public interest”: Sch 1, cl 4. Similar phraseology was found in relation to documents affecting counter-terrorism measures: cl 4A. Otherwise documents affecting inter-governmental relations (cl 5), internal working documents (cl 9), containing confidential material (cl 13), affecting the economy of the State (cl 14), affecting financial or property interests (cl 15) and those concerning operations of agencies (cl 16) were exempt if they contained matter the disclosure of which, inter alia, would “on balance be contrary to the public interest”.

30 Other references to “public interest” in the NSW FOI Act were in s 52 dealing with review by the Ombudsman where, under subsection (6)(a), in a report under s 26 of the *Ombudsman Act* 1974 (NSW) of an investigation of a determination made by an agency under the FOI Act, the Ombudsman could recommend that the public release of the document concerned would, on balance, be in the public interest even though access had been duly refused because it is an exempt document.

31 The closest the NSW FOI Act came to giving any indication of what the public interest might entail was s 59A which provided:

“59A Public interest

For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

(a) cause embarrassment to the Government or a loss of confidence in the Government, or

(b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.”

The core concept: public interest

32 There was no definition of “public interest” in the FOI legislation. That left decisions made invoking a statutory exemption which turned on a “public interest” test relatively inscrutable having regard to the fact that “the

expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view' ".²⁶ Determining where the public interest lies has been said to be "a question of fact and degree"²⁷, such that "by its very nature it will be something that is not easily susceptible to judicial review".²⁸

- 33 An early attempt at formulating the balancing exercise involved in determining where the public interest lay can be seen in *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 (at 246) where Beaumont J said:

"In evaluating where the public interest ultimately lies in the present case, it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other".

- 34 However not all statements were as broadly expressed.

- 35 Early in the history of FOI legislation, Davies J when sitting on the Administrative Appeals Tribunal in *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626 sought to identify the elements of the public interest relevant to determining whether the disclosure of deliberative process documents "would be contrary to the public interest" as follows:

"(a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved

²⁶ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 (at 216) per Mason CJ, Brennan, Dawson and Gaudron JJ – a decision which considered the question of "pubic interest" in the context of the *Liquor Act* 1982 (NSW).

²⁷ *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* [1987] HCA 27; (1987) 61 ALJR 393 (at 395).

²⁸ *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 (at 123-124) per Beaumont, Drummond and Sundberg JJ.

in the communication, the more likely it will be that the communication should not be disclosed;

(b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

(c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process."²⁹

36 This list became known as “the Howard factors”. As the Australian Law Reform Commission (the “ALRC”) commented, “[f]or a number of years [they] were treated as though they were statutory factors to be taken into account when determining when disclosure would not be in the public interest”.³⁰ This was despite the fact that, as Deputy President Todd held, the Howard factors were “empiric conclusions ... not ... determinative guidelines”.³¹

37 The “Howard factors” were robustly criticised by the Queensland Information Commissioner in 1993 as “with the benefit of hindsight ... an ill-advised attempt to formulate a list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest”.³² However, as I observed in *WorkCover Authority (NSW), General Manager v Law Society (NSW)* [2006] NSWCA 84; (2006) 65 NSWLR 502 (at [155]) Davies J himself acknowledged, that at the early stage of the development of FOI legislation in Australia when *Re Howard*

²⁹ At 634-635.

³⁰ ALRC 77, [9.16].

³¹ *Re Rae and Dept of Prime Minister and Cabinet* (1986) 12 ALD 589 (at 597).

³² *Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs* [1993] 1 QAR 60.

was decided, what he was undertaking was of necessity a somewhat conjectural exercise.

- 38 Authorities which have reviewed agencies' claims that disclosure would be contrary to the public interest, have been criticised as inconsistent – some it is said suggesting that “broad and general assertions suffice” (a reference to *Re Howard*), while others “indicated such claims must be based on specific evidence concerning the particular documents in question which defines the likely consequences of their disclosure”.³³
- 39 However in the absence of any greater legislative guidance, courts and tribunals were left to do the best they could.

The Commonwealth FOI Act: the 1994 ALRC Report

- 40 An attempt to review the position was made in 1994 when the Acting Attorney-General of Australia, the Hon Duncan Kerr MP, referred to the ALRC and the Administrative Review Council for inquiry and report the question whether the basic purposes and principles of FOI legislation in Australia had been satisfied. The ALRC was particularly asked to consider whether the Commonwealth FOI Act should be amended to achieve those purposes better, in particular:

“(i) whether the objects clause fully reflects the purpose of the Act;
...

(iii) to what extent the existing exemption provisions of the Act should be amended to improve public access to government held information, in particular,

- whether any existing ground for exemption should be removed or amended;

- which exemptions, if any, should be subject to a public interest test and whether that test should be standardised for each exemption to which it applies; and

³³ Bill Lane & Eleanor Dickens, “Reforming FOI – Time for a New Model” (2010) 62 *AIAL Forum* 13, 25.

- whether conclusive certificates are justified or whether they should no longer be provided for...³⁴

- 41 After 13 years of operation of the FOI Act, there were said to be numerous concerns about its operations including “the number and breadth of the exemptions, the high cost of obtaining information and the quality of the current review procedure”.³⁵
- 42 Among the ALRC’s recommendations were revising “the object clause to promote a pro-disclosure interpretation of the Act and to acknowledge the important role of freedom of information in Australia’s constitutionally guaranteed representative democracy”.³⁶ This reflected the ALRC’s view that removing “reference to the exemptions from the object clause will provide sufficient reinforcement of what is already clear from the Act but not always acknowledged - that, *prima facie*, the applicant has a right to obtain a requested document.”³⁷
- 43 The ALRC Report noted that the FOI Act was distinguished by its focus on the “public interest as the key determinant of disclosure of government information” with a public interest test being expressly incorporated in most exemption provisions and implicit in others.³⁸ However the ALRC report also noted critically that “[t]he public interest is an amorphous concept which is not defined in the FOI Act or any other statute [and] was essentially non-justiciable and depend[ed] on the application of a subjective rather than an ascertainable criterion.”³⁹
- 44 While this lack of definition was implicitly criticised as posing difficulties for agencies, applicants and the AAT alike, the ALRC did not consider an attempt should be made to define public interest. This was because, it appears, it held the view that the “public interest [would] change over time

³⁴ ALRC 77, vi.
³⁵ ALRC 77, [1.2].
³⁶ ALRC 77, Overview.
³⁷ ALRC 77, [8.2].
³⁸ ALRC 77, [8.12].
³⁹ ALRC 77, [8.13].

and according to the circumstances of each situation [and] it would be impossible to define the public interest yet allow the necessary flexibility.”⁴⁰

45 Nevertheless the ALRC did suggest that it would be helpful if the FOI Commissioner issued guidelines providing assistance on how to apply a public interest test and on what factors should or should not be taken into account in weighing the public interest.⁴¹

46 The ALRC’s recommendations languished – they were not taken up by the Commonwealth, State or Territory governments.

The move for reform

47 However there has recently been a flurry of activity in the FOI world.

48 Since 2007 Prime Minister Rudd and Premiers Bligh, Barnett and Rees have instigated amendments to the FOI legislation in their jurisdictions having committed themselves to “making government more open and accountable than it had been under their predecessors.”⁴²

49 Quite what inspired this rush of activity – the recommendations in the ALRC Report 77 having lain fallow for fourteen years – cannot be precisely pinpointed. However it may, I suggest, be no coincidence that the flurry of activity coincided with the establishment of Australia’s “Right to Know Coalition” – a grouping of 12 major media companies formed in May 2007 to address concerns about free speech.⁴³

50 One of the Right to Know Coalition’s first activities was to commission a national audit into the state of free speech in Australia, chaired by former ICAC Commissioner and NSW Ombudsman Irene Moss AO. It was

⁴⁰ ALRC 77, [8.13.].

⁴¹ ALRC 77, [8.14].

⁴² David Solomon, “FOI Reform or Political Window Dressing” (2010) 62 *AIAL Forum* 1, 3.

⁴³ See <http://www.australiasrighttoknow.com.au/>

released in October 2007.⁴⁴ It identified one of the battlegrounds over press freedom as the operation of FOI laws, saying “journalists have long complained they are unable to effectively hold governments to account given the scope of statutory exceptions for requested documents, the time taken to fulfil requests and the substantial processing costs”. It referred to journalists’ complaints that “media freedom in Australia suffered a major setback in September 2006 when the High Court supported the right of governments to withhold documents through use of “conclusive certificates”⁴⁵.

- 51 The Independent Audit criticised a “range of factors” which were said to limit the effectiveness of FOI laws in ensuring access to documents relevant to government accountability. It complained that:

“No government, federal, state or territory, has taken sustained measures to deal with an enduring ‘culture of secrecy’ still evident in many agencies. There are few visible, consistent advocates of open government principles, within government systems and leadership on FOI is lacking....

In the federal arena in particular, FOI is marked by a high degree of legal technicality which dominates considerations about whether disclosure is in the public interest, or may demonstrate harm to an essential public interest.”⁴⁶ (emphasis added)

- 52 The Independent Audit also asserted there were “inadequacies in the design of the [FOI] laws [and] too much scope for interpretation of exemption provisions in ways that lead to refusal of access to documents about matters of public interest and concern.”⁴⁷

⁴⁴ “Report of the Independent Audit into the State of Free Speech in Australia” (Report prepared for the Right to Know Coalition, 31 October 2007) see <http://www.australiasrighttoknow.com.au/files/docs/Reports2007/31-Oct-07-Executive-Summary-2007.pdf>

⁴⁵ Independent Audit, 10; see *McKinnon v Secretary, Dept of Treasury* [2006] HCA 45; (2006) 228 CLR 423.

⁴⁶ Independent Audit, 89-90.

⁴⁷ Independent Audit, 90.

- 53 As the following discussion will explain the new wave of FOI reforms which started in 2007 reflect many of the concerns expressed in the Independent Audit.

The first new wave

- 54 Soon after she became Premier of Queensland in 2007 Premier Anna Bligh initiated an independent review of Queensland FOI legislation to be undertaken by a Panel chaired by Dr David Solomon AM. This led to the publication of *The Right to Information: Reviewing Queensland's Freedom of Information Act* (the "Solomon Report") in June 2008. That Report can fairly, in my view, be said to have triggered the wave of reforms which have followed at the Commonwealth level, in New South Wales and Tasmania⁴⁸.

- 55 The Panel's view was that:

"FOI's place in the government information experience should be recast as the Act of last resort moving the existing 'pull' model to a 'push' model where government routinely and proactively releases government information without the need to make an FOI request."⁴⁹

- 56 The Panel identified application of public interest tests as "one of the most significant weaknesses of FOI". One problem the Panel identified, echoing the ALRC's 1994 Report, was the fact that " 'the public interest' has been regarded as 'an amorphous concept', undefined and dependent on the application of subjective criteria." Another was that most FOI laws included at least several different public interest tests, some putting a small emphasis on disclosure, others said to "kick the balance heavily in

⁴⁸ In 2009 the Tasmanian Government issued a Directions Paper, *Strengthening Trust in Government – everyone's Right to Know: Review of the Freedom of Information Act 1991*. Its new *Right to Information Act 2009* commenced on 1 July 2010. It bears some resemblance to the Solomon model.

⁴⁹ Solomon Report, 4, [3.1] ff. The Solomon Report noted (at [3.1]) a UNESCO report in January 2008 according to which the laws of 14 countries showed a move to a push model and to making information available on a proactive basis especially online, whether or not required to do so by FOI laws.

favour of withholding information”. The Panel also noted that few non-disclosure decisions based on public interest were challenged, partly because the applicant for the information was unaware of the components of any public interest consideration the agency may have applied.⁵⁰

57 The Panel’s proposals were intended to overcome these difficulties. Their proposals have become the model for the new paradigm of FOI legislation. In short, their proposals were that:

(a) the essential features of the public interest, relevant to FOI, were to be listed in the legislation. This it was said would allow decision makers to identify more easily the relevant public interest factors that need to be balanced and also allow applicants to decide whether their application had been properly assessed on public interest grounds. In this respect, it might be noted, the Panel observed that it was “not as unusual, as some commentary might suggest, for governments to try to define the factors that need to be taken into account when assessing the public interest” – pointing out that “all Australian Governments agreed in 1995 to list in the Competition Principles Policy Agreements the factors that would be used to determine what is in the public interest, in relation to the application of that agreement”.⁵¹

(b) a single public interest test was to be applied in the form:

“access is to be provided to matters unless its disclosure, on balance, would be contrary to the public interest”;

(c) all exemptions in present legislation which included a public interest test were no longer to be exemptions, rather the harm each exemption was intended to protect against was to be included in the public interest factors to be weighed.⁵²

⁵⁰ Solomon Report, 141.

⁵¹ Solomon Report, 149.

⁵² Solomon Report, 2.

- 58 According to the Panel these changes were “designed to simplify the administration of the public interest test by making it more transparent, understandable and credible, to make it more likely that it will be applied in the way the legislation intended.”⁵³
- 59 The transformation the Queensland proposals were said to achieve were in the approach an agency would take to a request for a document. It would first assess whether it fell within one of the small number of true exemptions without a public interest test. If the document was not exempt as falling within one of those categories, access was available unless disclosure, on balance, would be contrary to the public interest – a decision to be made by the agency checking the factors listed in the legislation to see which were applicable to the particular document being assessed.⁵⁴
- 60 The Panel identified a long list of factors it considered might be taken into account in weighing the public interest for and against disclosure of information. This is not the occasion to embark upon a detailed consideration of the *Right to Information Act 2009* (Qld) which commenced operation on 1 July 2009. It appears to have embraced the Solomon Report recommendations to a large extent. In particular there is a pro-disclosure bias in deciding access to documents (s 44), there is a declaration of Parliament's intention that grounds for refusing access are to be interpreted narrowly: s 47(2) (one ground being that disclosure of which would, on balance, be contrary to the public interest under s 49). The steps Parliament considers appropriate for deciding, for types of information (other than exempt information), whether disclosure would, on balance, be contrary to the public interest are set out in s 49 and Schedule 4. Schedule 4 sets out a long list of factors for and against disclosure which bears some resemblance to the Solomon Report list.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

The Commonwealth reforms

- 61 The process of reform at the Commonwealth level started with consultation with stakeholders, then the release in March 2009 of an Exposure Draft of the Freedom of Information Amendment (Reform) Bill 2009 (FOI Exposure Draft Bill) which drew in part on what were described as key findings of the ALRC's 1994 Report. This led to the passing of the Freedom of Information Amendment (Reform) Bill 2009 which effectively has not yet come into force. The Commonwealth reforms were said to "usher in a new regime for access to government information".⁵⁵
- 62 The Commonwealth FOI amendments, coupled with reforms proposed by the Commonwealth Information Commissioner Bill 2009, are said to be intended "to ensure that the public interest in disclosure remains at the forefront of decision making, and that the right of access to documents is not unduly restricted by liberal application of exemption criteria". This goal is to be achieved by a "new, single form of public interest test weighted towards disclosure [which] ... will be applied to ... the economy, research and personal information exemptions and ... partially applied to the business affairs exemption". Decision makers will be required to address the public interest factors taken into account in their reasons for the decision. However the bill does not seek to exhaustively define public interest factors in recognition of the fact that that the categories of public interest are not closed and the public interest will vary depending on the subject matter.⁵⁶
- 63 The Commonwealth Freedom of Information Amendment (Reform) Bill 2009 will commence on 1 November 2010. The primary purpose of the Bill has been said to be "to make major reforms to the Freedom of Information Act 1982 (FOI Act) to promote a pro-disclosure culture across

⁵⁵ The Hon Anthony Michael Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade, Second Reading Speech, Freedom of Information Amendment (Reform) Bill 2009, House of Representatives, *Parliamentary Debates* (Hansard), 26 November 2009, 12971.

⁵⁶ *Ibid.*

government and to build a stronger foundation for more openness in government”.⁵⁷ This reflects aspects of the Solomon Report (and the 1994 ALRC Report) insofar as it:

- (a) separates into two clear groups absolute exemptions, where the public interest against disclosure has been identified by Parliament as absolute, and conditional exemptions;
- (b) removes the multiple and varying public interest tests relating to each conditional exemption; and
- (c) replaces those multiple and varying tests with one public interest test.

64 However, the formulation of that test in the Commonwealth legislation differs from its form in the jurisdictions following the Solomon Report more closely. The conditional exemptions are still cast as *exemptions*, rather than as *factors* favouring non-disclosure in the public interest. Documents will still need to be classified according to whether they meet a “conditional exemption” provision description; only then will the simplified public interest test in s 31B be applied.

The New South Wales reforms

65 The New South Wales reforms followed on from the *Review of the Freedom of Information Act 1989* set out in a Special Report to Parliament under s 31 of the *Ombudsman Act 1974* (the “Ombudsman’s Report”) in February 2009. It is of some interest to note that this report was not the result of a referral by the government, but was made by the Ombudsman under his independent statutory reporting power. The Ombudsman’s Report opined that there was a need for significant change in the arrangements for and attitudes towards the provision of information in NSW and so recommended a new system with three key elements:

⁵⁷ Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009 (Cth).

- a greater level of proactive disclosure of government information
- a new Open Government Information Act to replace the FOI Act
- appointment of an independent Information Commissioner.”⁵⁸

66 The Ombudsman’s Report criticised the 1989 FOI Act as too complex and recommended “new legislation which is written in plain English in a modern drafting style, which focuses on policy and principle for discretionary matters and absolutes where there is no discretion”. It proposed keeping the ADT as the determinative avenue of external review and the Information Commissioner as an alternative avenue of non-determinative external review.⁵⁹

67 The Ombudsman’s Report emphasised that the new Act needed to state clearly that it is to be applied with the public interest in mind. It recommended adoption of the position taken in the Solomon Report that there should be a clear legislative statement that “[a]ccess is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest”. The Ombudsman’s Report thought that this approach would “help ensure that, before looking to the reasons for refusal, those determining applications will have the public interest at the front of their minds”.⁶⁰

68 The Ombudsman’s Report also embraced the recommendation in the Solomon Report “that this broad statement should be accompanied by a list of ‘for and against’ considerations to assist in assessing the public interest”.⁶¹

69 While the Ombudsman’s Report recognised the danger suggested by Public Interest Advocacy Centre that including a list of public considerations “may also ‘freeze’ the factors to which a decision-maker will have regard, even if the legislation expressly states that the list is not

⁵⁸ Ombudsman’s Report, 7
⁵⁹ Ombudsman’s Report, 7 – 8.
⁶⁰ Ombudsman’s Report, 56.
⁶¹ *Ibid.*

intended to be exhaustive”, the Ombudsman appears to have thought that risk could be ameliorated by the Information Commissioner preparing lists of factors to guide agency decision makers – such lists being intended “to provide targeted guidance in particular areas”.⁶²

70 In the Second Reading Speech to the new package of legislation introduced consequent upon the Ombudsman’s Report, being the Government Information (Public Access) Bill, the Government Information (Information Commissioner) Bill, and the Government Information (Public Access) (Consequential Amendments and Repeal) Bill, the Hon Tony Kelly, Minister for Police, Minister for Lands and Minister for Rural Affairs, described the new legislation as shifting “the focus towards proactive disclosure ... requir[ing] that certain ‘open access information’ must be published”.⁶³

71 The then Premier Nathan Rees described the NSW FOI reforms as intended “to end a culture of secrecy within the Government and Bureaucracy”.⁶⁴

The new model

72 The NSW FOI Act was recently repealed as part of the package of legislation which included the *Government Information (Public Access) Act 2009 (NSW)* (the “GIPA Act”).⁶⁵ It is convenient to look at the GIPA Act, which commenced on 1 July 2010, to get a sense of how the new FOI model will work.

73 The objects of the GIPA Act bear some resemblance to the objects of the 1989 NSW FOI Act insofar as members of the public are given an enforceable right to access government information. Section 3(1)(c) of the GIPA Act, however, sets out as one of its objects “that access to

⁶² Ombudsman’s Report, 55 – 57.

⁶³ NSW Legislative Council, *Parliamentary Debates* (Hansard), 24 June 2009, 16615.

⁶⁴ Premier of NSW, “Rees acts to end Government ‘secrecy’” (Press Release, 23 October 2008), quoted in the Ombudsman’s Report, 33 [3.2].

Government information is restricted only when there is an overriding public interest against disclosure”.

- 74 Part 2 of the GIPA Act deals with “Open Government Information - general principles”.
- 75 It opens with s 5 which provides that there is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.
- 76 An agency must make government information that is “open access information publicly available unless there is an overriding public interest against disclosure of the information”: s 6(1). Part 3 of the GIPA Act deals with open access information.
- 77 Returning to Part 2, an agency is authorised to make any government information held by it publicly available unless there is an overriding public interest against its disclosure: s 7(1). An agency is also authorised to release government information in response to an informal request (being a request that is not “an access application”) unless there is an overriding public interest against its disclosure: s 8.
- 78 A person who makes an access application for government information has a legally enforceable right to be provided with access to it in accordance with Pt 4 of the Act unless there is an overriding public interest against its disclosure: s 9(1).
- 79 Division 2 of Pt 2 sets out public interest considerations for and against disclosure. There is a general public interest in favour of the disclosure of government information: s 12(1). While nothing in the Act limits any public interest consideration in favour of the disclosure of government information that may be taken into account for the purpose of determining whether

⁶⁵ See *Government Information (Public Access) (Consequential Amendments and Repeal)*

there is an overriding public interest against disclosure of government information (s 12(2)), the notes to that subsection (which do not form part of the Act⁶⁶) set out examples of public interest considerations in favour of disclosure of information. They are:

“(a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

(b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.

(c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

(d) The information is personal information of the person to whom it is to be disclosed.

(e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.”

80 The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information for the assistance of agencies (s 12(3)), a provision which echoes the recommendations of the ALRC in 1994 and the Solomon Report.

81 There is an overriding public interest against disclosure of government information for the purposes of the Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

⁶⁶ Act 2009, s 3.
Sch 4, cl 16

- 82 Schedule 1 to the GIPA Act sets out government information in respect of which it is to be conclusively presumed there is an overriding public interest against disclosure: s 14(1).
- 83 The GIPA Act sets out in a Table to s 14 what are said to be “the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of Government information”: s 14(2). The Table is lengthy. In short, it sets out seven headings (and numerous sub paragraphs) concerning when there is a public interest consideration against disclosure of information in relation to responsible and effective government, law enforcement and security, individual rights, judicial processes and natural justice, business interests of agencies and other persons, environment, culture, economy and general matters, secrecy provisions and documents which are exempt under interstate FOI legislation.
- 84 Finally, s 15 sets out principles which are to be applied in determining whether there is an overriding public interest against disclosure of Government information.
- 85 Part 4 of the GIPA Act deals with access applications. Part 5 deals with the review of decisions.

Administrative review

- 86 It is appropriate at this stage to make a brief comparison of the process of administrative review under the NSW FOI Act and that available under the GIPA Act.
- 87 A person who was aggrieved by a determination made by an agency or Minister under s 24 or s 43 of the NSW FOI Act could apply to the ADT for a review of the determination. The ADT was empowered to decide what the correct and preferable decision was having regard to the material

before it: s 53 FOI Act. In any proceedings concerning a determination made under the Act by an agency or Minister, the burden of establishing that the determination was justified lay on the agency or Minister: s 61.

88 That position has not substantially altered under the GIPA Act, although there are some differences – not least the availability of two avenues of external review, one to the ADT, the other to the Information Commissioner. I shall return to the latter.

89 Under the GIPA Act a person who is aggrieved by a reviewable decision of an agency may apply to the ADT for a review of the decision (referred as "ADT review"): s 100 – a review which will enable the ADT still to decide what was the correct and preferable decision.

90 However now the Information Commissioner has a right to appear and be heard in any proceedings before the ADT (and proceedings on an appeal in respect of any such proceedings) in relation to an ADT review: s 104.

91 The power of the ADT considering a review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information is expressed differently to the power it had under the FOI Act to review a claim to non-disclosure on the basis that a document was restricted, being a document referred to in any one or more of the provisions of Part 1 of Sch 1.

92 It is limited, in the first instance, to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter: s 106(1). However if it is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it: s 106(2). If the ADT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, the ADT is to reject the claim when determining the

review application and may then proceed to make a decision as to the correct and preferable decision on the matter: s 106(3).

- 93 This express reference to the ADT's power in relation to such documents is no doubt intended finally to put to rest the submission frequently made to the ADT and, as far as I can see, equally frequently rejected by that body, that s 57 of the NSW FOI Act circumscribed the power of the ADT to consider an application for review of a decision not to disclose restricted documents – in particular that the Tribunal had no power to conduct merits review of a decision involving a "restricted document".⁶⁷
- 94 The ADT is given a new power effectively to restrain a person who has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit from making an access application without first obtaining the approval of the ADT: s 110.

The Information Commissioner

- 95 The other significant FOI reform has been the recognition that apparently proactive legislation will have little effect without active engagement with the subjects of reform: in this case, the public service. Many jurisdictions have used the latest round of reforms to either introduce, or significantly develop, the role of Information Commissioners. While each jurisdiction has a slightly different model for this position, they all share two common elements. The first is their role as the "champion" of FOI, as an office to promote and improve governmental information policy and accessibility across the board.
- 96 In New South Wales the office of Information Commissioner is created under the *Government Information (Information Commissioner) Act 2009*. The Information Commissioner may entertain complaints about the conduct (including action or inaction) of an agency in the exercise of

functions under an Information Act – that definition including the GIPA Act. However no complaint can be made to the Information Commissioner in respect a reviewable decision of an agency: s 89 (4), GIPA Act.

- 97 The second similarity is the combining of policing and advisory roles in respect of FOI. In a number of jurisdictions, the Information Commissioner’s office will be providing advice and guidance, through formal guidelines, informal discussions and other means, to the agencies and officials whose decisions they will also help review. This means the approach taken “on review” becomes central to entrenching the goals of the new legislative scheme.
- 98 Finally, as I earlier noted, under the GIPA Act there is a right of external review to the NSW Information Commissioner: s 89. However the powers of the Commissioner on review are limited to making recommendations to the relevant agency about the decision as the Information Commissioner thinks appropriate: s 92. Those recommendations include, but are not limited to (s 92(2)), recommending that the agency reconsider the decision that is the subject of the Information Commissioner’s review and make a new decision as if the decision reviewed had not been made: s 93(1). The Information Commissioner’s powers extend to making a recommendation against a decision of an agency that there is an overriding public interest against disclosure of government information: s 94. The Information Commissioner may not review a decision if the decision is or has been the subject of review by the ADT: s 98.

Conclusion

- 99 Part of Tony Blair’s manifesto when campaigning for office in 1996 was to introduce Freedom of Information legislation. He described the constitutional reform New Labour was proposing with a FOI Act as “a change that is absolutely fundamental to how we see politics developing in

⁶⁷ See *BY v Director General, Attorney General's Department* [2002] NSWADT 79

this country over the next few years”. In language redolent of the rhetoric employed by the Australian politicians, to which I have referred in this paper, he declared that his party wanted to:

“...end the obsessive and unnecessary secrecy which surrounds government activity and make government information available to the public unless there are good reasons not to do so. So the presumption is that information should be, rather than should not be, released.”⁶⁸

100 Britain’s FOI legislation was introduced in 2000. In his recently published autobiography Mr Blair described the decision to do so in the following terms:

“Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.

Once I appreciated the full enormity of the blunder, I used to say - more than a little unfairly - to any civil servant who would listen: Where was Sir Humphrey when I needed him? We had legislated in the first throes of power. How could you, knowing what you know have allowed us to do such a thing so utterly undermining of sensible government?”⁶⁹

101 My researches for this paper do not reveal any Australian politician who has publicly expressed such views about our FOI legislation – although, according to the Independent Audit to which I earlier referred, Philip Ruddock “claim[ed] that our Freedom of Information Act is ‘not designed as a research tool for the media’ ”.⁷⁰

102 On a more positive note, Dr Solomon has described the recent FOI reforms as “a quantum leap in advancing freedom of information”.⁷¹

(at [18] – [20]) per O’Connor DCJ.

⁶⁸ Rt Hon Tony Blair MP, Leader of the Labour Party, speech at the Campaign for Freedom of Information’s Annual Awards ceremony, 25 March 1996. <http://www.cfoi.org.uk/blairawards.html>

⁶⁹ Tony Blair, *A Journey* (2010), Hutchinson, 516.

⁷⁰ Independent Audit, 2.

⁷¹ Solomon Report, 6.

Whether that is so awaits application of the new legislation with their more prescriptive approach to the “public interest”.

103 The original FOI legislation was criticised on the basis that it “depend[ed] too much on a ‘pull model’ which focuses on the dissemination of information in response to the making of individual requests for information rather than on a ‘push model’ which emphasises the proactive publication of information”.⁷²

104 We now have, or will shortly have, “push” models at federal and three State levels – each however, somewhat differently expressed. It remains to be seen whether the new models will achieve any greater success than their predecessors.

105 However I think Professor Whitmore would, by now, have achieved some degree of satisfaction that legislatures have indicated their intention to move away from the ministerial and bureaucratic attitude he deplored as, in effect, ensuring the public had no right to know, to recognising that access to government information is restricted only when there is an overriding public interest against disclosure.

106 He could justifiably feel vindicated in the stance he (and Professor Campbell) took in 1973!

⁷² Paterson, *op cit*, at [12.11]. The validity of this critique was recognized in both the Solomon Report (at 4, 16 – 17, 34) and the Ombudsman’s Report (at 21); see also Lane and Dickens, *op cit*, 16.