perceived shortcomings of the proposed guidelines, praised the initiative of the UN in putting forth such a measure. The introduction and passage of the Guidelines is a reflection of the degree to which privacy/data protection concerns are growing in international bodies. Grace told the delegates that it was unfortunate that it was not widely known that the UN had developed such Guidelines. Though the General Assembly is about to adopt the Guidelines, Grace said that there was no guarantee they would be adopted by member countries. It is uncertain, he observed, to what extent these will be enthusiastically accepted within countries which currently do not have data protection and privacy laws for both the public and private sectors as 'even during the consultative process countries such as the US and Canada felt that the passage of the resolution should be delayed'.

One perceived weakness of the Guidelines is that the method of implementation of them would vary from country to country. On the positive side, they do not attempt to define privacy since the definition varies distinctly from country to country. So in this respect, said Grace, it is good that they articulated general principles of data protection and privacy.

The Guidelines propose criminal sanctions as a remedy for violations of any of the principles, which cover both the public and private sectors, but do not specify what these remedies should be, instead leaving it up to the legal regime in the country concerned. Grace objected to section 6 of the Guidelines, the power to make exceptions to the application of the data protection principles, as being too broad. The Guidelines state that departures from the basic principles: lawfulness and fairness, accuracy, purpose-specification, the right of access and principle of non-discrimination, 'may be authorised only if they are necessary to protect national security, public order, health and morality or the rights and freedoms of others, including persons being persecuted, and are specified in a law or equivalent regulation promulgated in accordance within the internal legal system which expressly states their limits and sets forth appropriate safeguards'.

Grace said that he hoped that the idea of 'national legislation restricting access to medical files on grounds of public health' would not be taken seriously.

Apart from some perceived problems and weaknesses of the UN proposal, he said that the important thing is that as data commissioners 'we should take the opportunity to adopt the Guidelines as it is good to have rules of the road for privacy which they can all follow'. 'Hopefully', he told the conference, 'this will now take the privacy message around the world'.

One of the primary differences of opinion among those participating at the conference was how other countries will be encouraged to develop data protection principles and ways in which a system will be developed to adequately protect the transfer of personal information between countries. One problem in trying to use the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is that it is perceived as a European instrument although it is open to signature by any country. The other problem is the means to develop protection for the transfer of data. The recent study on new technologies by the Council of Europe's Committee of Experts on Data Protection suggested that current data protection laws are sufficient to ensure the integrity of personal data being sent abroad. Some commissioners argue that an international body is required to develop rules and policies, whereas others prefer policy developments by the commissioners to handle the situation.

TOM RILEY

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RECENT DEVELOPMENTS

NEW SOUTH WALES *FREEDOM OF INFORMATION ACT*:

AN OVERVIEW

Freedom of information legislation has finally become a reality in NSW after a long history which began in 1977 when Professor Peter Wilenski recommended in a report commissioned by the Wran Labor Government entitled 'Directions for Change' that the time had come in NSW to begin the process of providing greater access to citizens of government information. Despite the Government's platitudes about being committed to open government no FoI legislation was passed in NSW. State administration remained clothed in secrecy.

FoI legislation was a 1987 campaign promise by the Liberal Party. After winning office the new Government introduced the first Bill on 2 June 1988. After amendments, the *Freedom of Information Act* was assented to on 21 March 1989 to become effective on 1 July, 1989.

Like the Commonwealth and Victorian legislation it gives the public the legal right to information held by State government agencies and public bodies. Unlike the Victorian legislation, the NSW Act extends to local and municipal councils but only in respect of files to an applicant's personal affairs.

The exemptions

Schedule 1 lists three categories of documents which are exempt. Part I consists of 'restricted documents'. These comprise Cabinet and Executive Council Documents; documents containing information exempt under Commonwealth or Victorian FoI legislation; and documents concerning law enforcement and public safety. The Premier of NSW, as the Minister responsible for FoI, may issue a conclusive certificate that a document in this Part is restricted. Such a ministerial certificate lasts for two years unless it is withdrawn sooner; it may be renewed.

For a second group of documents listed in Schedule 1 consultation is required between the agency and the affected third person before the decision is made to release them. These are documents affecting the personal affairs or business affairs of another, intergovernmental relations and the conduct of research.

Part 3 of Schedule 1 comprises a long list of other documents that may be exempt. They are internal working documents — those that would disclose the decision-making functions of the Government, a Minister or an agency and would be contrary to the public interest; documents subject to legal professional privilege; those relating to judicial functions of a court or

tribunal; documents the subject of secrecy provisions; those containing confidential material the disclosure of which would found an action for breach of confidence, documents affecting the economy of the State or the financial or property interests of the State or an agency, disclosure of which would be, on balance, be contrary to the public interest. Also exempt are documents concerning operations of agencies (for example, tests, examinations, audits, assessment of personnel, and documents the disclosure of which would have a substantial adverse effect on the effective performance of the agency's functions or the conduct of its industrial relations and would on balance be contrary to the public interest); documents subject to contempt, documents arising out of companies and securities legislation and private documents in public library collections.

Schedule 2 contains a list of exempt bodies and offices. They are all functions of the office of Auditor-General and Director of Public Prosecutions, the Government Insurance Office, the Independent Commission against Corruption and the State Bank; the investment functions of The State Authorities Superannuation Board; the executor, administrator or trustee functions of the office of Public Trustee, and the borrowing, investment and liability and asset management functions of The Treasury Corporation.

A further source of refusal to deal with applications for information is s.22 of the Act which provides that agencies can so refuse if the application would 'substantially and unreasonably' divert agency resources. Section 25 provides further sources of refusal, i.e. an agency may refuse access to documents that are available for inspection or purchase or in the agency's library. Under this section an agency may also refuse access to those documents created more than five years ago unless they relate to the personal affairs of the applicant.

Charges

The application fee for personal and non-personal information is $30. Processing fees which cover time for locating the information, decision making, consultation where necessary and photocopying are $30 an hour. Twenty hours of free processing time is allowed for requests for personal information.

Rebates of 50 per cent are available on all charges for pensioners with the Health Benefit Card and those with equivalent income, children, non-profit organisations and for those applications where public interest can be demonstrated.

Appeal provisions

Internal review by the agency may be requested for a flat fee of $40 ($20 for those entitled to a rebate). After internal review has been requested, an applicant can request the assistance of the State Ombudsman who can investigate a complaint and make recommendations but cannot change or reverse a decision. Appeal to the District Court may be made within 60 days of the agency's review or receipt of the Ombudsman's decision. So far there are no less formal administrative appeals procedures, although the government has announced a commitment to an Administrative Appeals Tribunal.

When reviewing the provisions of the Act including the substantial list of exemptions one can conclude little else but that this is modest legislation. The balance it seems lies very much with the bureaucracy. As one parliamentarian observed during debate on the Bill: could one find out under this Act the facts concerning the awarding of the Sydney Harbour tunnel contract? Would such information, which should be available under freedom of information legislation, be denied as a substantial and unreasonable diversion of agency resources? Time will tell. The Government has promised a review of the Act in two years.

ANNE ARDAGH

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NSW *FoI ACT* OFF AND RUNNING

The tide of open government has finally begun to make some ripples in the New South Wales bureaucracy. Commencing operation on 1 July 1989, the NSW *FoI Act* is of course still in its infancy. The NSW FoI Unit is working furiously to promote the legislation and educate FoI officers on how to administer the Act. An FoI procedure manual has been issued by the Unit and consultants have been training FoI officers for several months. According to the FoI Unit's Director, Mr David Roden, 'key to the campaign has been the development of resource material which explains the material in easy to understand terms. Our messages have to be simple and clear to effectively explain what is a fairly complex piece of legislation'. FoI publicity brochures informing would-be applicants how to make a request and seek review of a decision refusing access to documents have been widely distributed. Posters and cartoons explaining the legislation have also been released.

An FoI Hotline has been operating since 1 July. In the first month of its operation the Unit received in excess of 250 calls on the hotline and an additional 350 calls on its ordinary numbers. Telephone number for the hotline are (02)223 6200 or toll free (008)044051.

It is estimated by the Unit that in its first three months of operation, between 400–500 applications have been made under the Act. Seventy per cent of requests have been granted in full.

Further information about the NSW Act can be obtained from David Roden, Director, FoI Unit, NSW Premiers Department, Level 10, 8 Bent Street Sydney 2000 (tel. (02)221 5711).

THE FITZGERALD REPORT

In May 1987 a Commission of Inquiry headed by Mr Tony Fitzgerald, QC was established to investigate police corruption in Queensland. The Commission took evidence from 339 witnesses over 238 public sitting days and submitted its report to the Government on 3 July 1989.

The 242-page report contains a detailed examination of the role of the Executive in Queensland. Mr Fitzgerald was particularly critical of the excessive level of secrecy in which the Executive functioned. Under the heading of 'Secrecy' Mr Fitzgerald observed:

> Although 'leaks' are commonplace, it is claimed that communications and advice to Ministers and Cabinet discussions must be confidential so that they can be candid and not inhibited by fear of ill-informed or captious public or political criticism. The secrecy of Cabinet discussions is seen as being consistent with the doctrines of Cabinet solidarity and collective responsibility under which all Ministers, irrespective of their individual views, are required to support Cabinet decisions in Parliament.
>
> It is obvious, however, that confidentiality also provides a ready means by which a Government can withhold information which it is reluctant to disclose.
>
> A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered

there are no constraints on the exercise of political power.

The rejection of constraints is likely to add to the power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.

The risk that the institutional culture of public administration will degenerate will be aggravated if, for any reason, including the misuse of power, a Government's legislative or executive activity ceases to be moderated by concern for public opinion and the possibility of a period in Opposition.

As matters progress and the Government stays in power, support will probably be attracted from ambitious people in the public service and the community. Positions of authority and influence and other benefits can be allocated to the wrong people for the wrong reasons. If those who succeed unfairly are encouraged by their success to extend their misbehaviour, their example will set the pattern which is imitated by their subordinates and competitors.

The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.

Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a version of power from the Parliament.

Information is the lynch pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

The involvement of Cabinet in an extended range of detailed decisions in the course of public administration gives principles intended to apply in different circumstances an operation that cannot have been contemplated or intended. Excessive Cabinet secrecy has led to the intrusion of personal and political considerations into the decision-making process by bureaucrats and politicians.

The letting of contracts, the issuing of mining tenements and rezoning or other planning approvals are matters that should not generally be subject to the principle of Cabinet secrecy. In the majority of cases, these decisions should be formal and merely give effect to advice. In those cases where the advice is rejected, even for legitimate policy reasons, the decision and the reasons for the decision should ordinarily be disclosed.

In most cases however, these kinds of administrative decisions should be removed entirely from the Cabinet room, in which case the principles of Cabinet secrecy will not arise at all. [s.3.22]

Concerned at the lack of any effective administrative law remedies which could enable a person aggrieved by a government decision to obtain reasons for that decision, Fitzgerald considered that part of the reform package should be the enactment of freedom of information legislation:

Allied to these improvements in administrative laws has been the concept of freedom of information.

Freedom of Information Acts, along the lines of the United States model, have been adopted to grant a general right of access to documents held by Government and Government agencies.

The professed aim of such legislation is to give all citizens a general right of access to Government information. Appeals are allowed to an external independent review body when a request for information is refused in whole or in part, or when a person objects to a decision to release information about their affairs, or when the accuracy or completeness of personal information held by Government is disputed by the person it concerns.

It is true that, where such legislation has been enacted in Australia (the Commonwealth, Victoria and more recently New South Wales) there has been criticism. Government agencies say that answering requests has been costly and disruptive. Applicants claim that some agencies are obstructive, and that the exemptions are too wide or are abused, and that increasing charges make the cost of request prohibitive.

The importance of the legislation lies in the principle it espouses, and in its ability to provide information to the public and to Parliament. It has already been used effectively for this purpose in other Parliaments. Its potential to make administrators accountable and keep the voters and Parliament informed are well understood by its supporters and enemies.

IN BRIEF

CABINET REGISTER

The Victorian Department of The Premier and Cabinet has recently released to *FoI Review* the Cabinet Register for the period July 1987 to December 1988. Under s.10 of the State *FoI Act* the Premier is obliged to publish a register containing details of decisions made by Cabinet, the date on which each decision was made and its reference number. However, the Premier has a discretion whether or not to make entries in the register. This has meant in practice that little light has been shed on the 'cabinet oyster'. Apparently the only matters placed in the register relate to government appointments and legislation considered by Cabinet. Government appointments are recorded in some detail; including the date of appointment and the remuneration of appointees.

For further information about the Register contact Steve Watson at the Department (tel. (03)651 5144).

PUBLIC SERVICE BOARD REPORTS ON VICTORIAN ACT TABLED IN PARLIAMENT

Section 65 of the Victorian *FoI Act* requires the Public Service Board to prepare an annual report on the difficulties encountered by agencies and Ministers in administering the legislation. The 1987 and 1988 reports were recently tabled in Parliament.

Presently, the Board's function in reviewing the Act has largely been overtaken by the Legal and Constitutional Committee review of the legislation. Nevertheless some useful information is contained in the reports. On the vexed issue of costs and charges, the Board estimates that the total cost to agencies administering the Act exceeds $2 million. Inconsistencies in returns supplied by agencies made it difficult for the Board to provide a more accurate estimate. The 1987 report recommended a review of costing structures, especially for expensive items like video tapes and microfilm copies.

Agencies surveyed by the Board expressed their concern at the cost of preparing Part 2 statements. Over 80% of agencies reported that they did not receive a single request from the public for a Part 2 statement. The Board recommended that the Attorney-General's Department investigate ways of reducing the cost and time necessary to produce the statements.

Finally, on the question of whether applicants should be entitled to access non-personal documents created before 5 July 1978, the Board maintained its position of previous reports that the retrospectivity period should not be extended. It reached this conclusion in spite of the fact that in the 1988 report period only 20 requests were refused under the 'prior documents' section. Part of the Legal and Constitutional Committee's reference is the interrelationship between the *FoI Act* and the *Public Records Act* 1973 and it is expected that it will address this issue in some detail.

Copies of the Public Service Reports can be obtained from Steve D'Arcy, PSB Policy Branch (tel. (03)651 5748).