Freedom of Information — the Australian experience

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Editor's Note: *This is an edited version of a talk given in the UK over 18 years ago. While much has changed, many of the weaknesses Senator Missen perceived in the Commonwealth FoI Act still persist. Furthermore, his comments about the relationship between FoI and the Westminster system are even more relevant as this issue goes to print. The talk is also a valuable historical record of one of the key participant's views and role in the development of FoI in Australia.*

Thank you for inviting me to come here to talk to you on a subject that is not new to me and not new to you. I hope I will be able to add to your knowledge tonight. Perhaps I may widen the subject a little further, by discussing the Australian experience in campaigning as well as our experience in the operation of the FoI Act, because I think there are significant factors that arise in both areas that may be useful and encouraging for you people who are in the process of campaigning.

It is my belief that the development of the 'right to know' is something that needs to come to all democratic societies. It is necessary for an informed public to have the right of access to government documents. I regret that this country, which has been such a leader in democratic developments for hundreds of years, is proceeding so slowly in this area. I believe that the experience we have had in Australia, even after two years of operation of freedom of information, has indicated that it is a very necessary improvement for the democratic system. So I will say something about our form of legislation, the type of operation and the way in which we got our FoI Act. I want also to speak, at an early stage, about the Westminster system, and to tackle head on (and I do this in the home of the Westminster system) the arguments that are consistently raised against freedom of information. They are misleading arguments and outdated arguments, but nonetheless are firmly held by senior public servants or 'mandarins' as they are sometimes known. Some hold a fixed vision of an unchanging political system, firmly believing that changes would lead to a weakening of the Westminster principles of government.

In the first place I will say a little about that delusion. When we did our Senate investigation in Australia in 1978–79, we made it clear that we wanted to investigate that argument. In the 1979 Senate Report on Freedom of Information — a 15 month study — the Senators gave a great deal of attention, possibly excessive attention, to the views of senior public servants and tried to find out why they felt this was a dangerous development. We came to firm conclusions, in that Report, that the opponents of FoI were using the Westminster system as a kind of strait-jacket, which was restraining democracy in a certain fixed position. They were not recognising that, far from freedom of information changing the system, the system was indeed changing at all stages, and freedom of information was a response that was needed to the changes that were occurring.

One might say that there is a high road of argument on the subject of the Westminster system and that is the view that important Westminster tenets must be retained. One of these, of course, is the 'responsible government' argument. Governments in our type of system, yours and ours, arise from election from the people and governments emerge from majorities in the Lower House and remain responsible to it. That aspect will not be changed by freedom of information at all. But there are other arguments that are raised. One is the tradition of 'collective ministerial responsibility' which as felt by some may be radically changed by adopting FoI. It may well be changed to some degree but not substantially. The other traditional principle of 'individual ministerial responsibility' is now long outdated and hardly operating. It requires that Ministers will face parliament and resign if their actions are found to be unsatisfactory. I think this last happened in Britain in 1954 in the Crichel Down case, when a Minister resigned over the actions of his Department, and it has not happened for years in Australia. One has to remember that the party system has become so predominant that Ministers are generally protected by a compliant majority in the House and the idea of them resigning, because of the exercise of their ministerial responsibility (under which public servants can shelter) is something which does not happen.

There are other traditions ascribed to the so-called Westminster system, including the essential non-political nature of the public service. We have not had that for years. Senior public servants are often known, not-so much for their party political activities, but because they have political ideas which are known and promoted and continue to be brought forward by senior public servants from one government to another. Important civil servants operate in this way so they do act in an influential political way to some extent. Also the anonymity which is said to be another feature in the Westminster system, is something which has fallen away very considerably in all these countries — Australia, Canada and the United Kingdom in more recent years. Those arguments are what I would describe as 'the high road' in opposition to FoI and I make no apologies in saying that they are mostly delusions but need to be faced four square by FoI advocates.

There is also a 'low road' of argument which, in many respects, has a closer reality. That is the type of argument expressed by the Hon. James Callaghan, before he was Prime Minister. He showed a type of frankness when he gave evidence to the Fulton Committee some years ago. He used the analogy of a cricket club, and said that parliament just was not like that. His words were:

> Frankly half the people in this country are concerned to find things that can redound to the discredit of the Government every day. It is inevitable in this case that a government is going to have some defensive reaction and say 'We are not going to tell you anything more than we can about what is going to discredit us.

That, I am sure, is an attitude honestly held by him and supported by many people in Government. It is also illustrated in the case of our own Australian Attorney General, Senator Gareth Evans, a great advocate of freedom of information. Without him we would not have achieved as

much as we have. But Senator Evans, just before the Labor Government took office in 1983, said: 'Look, if we are going to do anything to reform the Freedom of Information Act, and if we want to, we had better do it in the first fortnight, before the new government has any secrets to hide.' Unfortunately he did not get going in the first fortnight and when he brought his amending Bill before Cabinet they rebuffed him on two important commitments which the ALP had already made. But through the actions of the Opposition we restored at least one of the major reforms he had hoped to effect.

The Westminster system, as such, has many versions and it varies from one country to another. Our Australian federal system involves an unusual compromise between responsible government and the power of the Senate which protects the states. In other variations, power is given under our administrative law changes of more recent years, to an Administrative Appeals Tribunal which even has the right to reverse ministerial decisions 'on the merits' in many cases. Now that involves some changes in the Westminster system, but its operation is now well accepted in Australia. We know that Ministers are not able to supervise the detailed operations of government departments. Very often decisions are made, often by senior public servants, which need to be looked at on review and changed. So the Westminster system is a developing one — it has different versions in different countries and it cannot stand as a sort of blanket prohibition on any change.

As I have said, parliamentary accountability, so far as Ministers are concerned, is something of a sham. Question time in all the Houses of Parliament proves this. My friend, James Michael, in his very excellent book *The Politics of Secrecy*, gave examples of this from the House of Commons where the idea that you are going to acquire a lot of information by asking questions is not realised. I have just spent an hour or two listening to the Prime Minister's question time this afternoon, and I did not learn very much more, although it was exciting as an entertainment. The fact is that Question Time, unfortunately, means that Members continue to be ill-informed. MPs need to be better briefed, as freedom of information would make them, and Ministers would then have to be better informed to answer searching questions. Moreover, I have mentioned the rarity of resignations of Ministers despite all this talk of individual ministerial responsibility to Parliament.

In regard to 'collective ministerial responsibility', I think Lord Hailsham said something very interesting a few years ago when he pointed out that it was originally devised to protect Ministers from the exercise of Crown pressure if applied individually to Ministers. So collective responsibility was devised. But, as Lord Hailsham explained, the threat now is from 'elected dictatorships'. We have many examples where Prime Ministers are seen to have had too much power. I think Cabinets also have too much power. The office of Prime Minister is developing into a type of presidential system and their control over information is a power in itself. Parliament must restore the balance of power and FoI will assist it.

Not only is the political system changing, but the courts, both in your country and in ours, have in their judgments made a difference. They are mostly concerned with the rights of individuals in litigation to get discovery of government documents and the government has often resisted showing these documents to individuals. Superior courts, in recent years, have challenged this. In England, the case of *Conway v Rimmer* (1968) was very important because it did indicate that the courts were prepared to go behind the decision of Ministers, reject their arguments, and make documents available to parties in litigation. The Australian High Court case of *Sankey v Whitlam* was also extremely significant. It was a demonstration of the changed attitude of the courts in Australia because there the High Court went behind the certificates of a Minister and said they could not be 'conclusive' in denying discovery of government documents. The judges insisted on their right to look at documents in question and see if they conformed with the Minister's description. The Court did so and required disclosure.

I mention this because the changing views of the courts was a powerful impetus to FoI. But none of this substitutes for the fact that you need to establish a general right to know in our democratic communities. You should not allow lofty references to the Westminster system to justify the failure of governments to move in that direction.

Let me turn now to the ten years from 1972 to 1982 when our FoI Act came into operation. We have since had two years of its operation. On the whole it is an encouraging picture. The Whitlam Government, a Labor government, came into power in 1972 with the promise of a Freedom of Information Bill. It raised some public discussion on this matter but, unfortunately, during three years of power, government did very little except produce a departmental report which is a very disappointing document. It was concocted by public servants, with little or no public input, and when it was tabled, very little public discussion arose.

One of the significant parts of the Australian experience occurred when the Fraser Government came into power. Within a month, the Liberal Prime Minister, Malcolm Fraser, declared a real interest in freedom of information and then undertook that there would be a Bill brought forward by his government. This cross-party support is the significant difference between our two countries.

There is value when from both political sides there are promises, even though governments tend to backslide. But if they have made those promises, they find it very hard to avoid their commitments.

Before the tabling of the Fraser Government Bill in 1978 I had received a draft of the Bill and went to the United States to study developments there. I returned and made many suggestions for amendments, most of which were ignored, and the Bill was tabled. The legislation was somewhat limited in scope, with very widely expressed exemptions. There were two streams of development from that stage: a public campaign, which I am glad to see you are pursuing here, widened the interest of the public and showed them the need and usefulness of freedom of information. In parliament FoI advocates asked series of questions on secret government records. The refusals to disclose highlighted the need for a strongly expressed FoI Act. There was also, of course, a Senate Committee Inquiry by the Standing Committee on Constitutional and Legal Affairs. The Senate in Australia has much more power than your House of Lords, and certain of our Bills go through the Senate first, especially when the Minister is in the Senate. Most of the work on this subject was done by the Senate and debate in the House of Representatives made very few changes and very little discussion took place. The Senate Committee investigation,

which I had the honour to chair, was made up of three Liberal Senators and three Labor Senators. Senator Gareth Evans, who is now the Australian Attorney-General, was Deputy Chairman of the Committee, and worked extremely hard on this matter. Other Senators, my two Liberal colleagues, Senator David Hamer and Senator Chris Puplick (who has been out of the Senate for a few years but is about to return to the Senate), worked extremely well too in this inquiry.

The result was a report which was unanimous, with one or two minor shades of differences in various areas. Senator Evans and I, for example, were rather unhappy that we had to allow our Security Organisations (ASIO) fairly complete freedom from freedom of information. Our other colleagues took a more cautious line and we left it for future consideration. In the course of that inquiry, Senators and staff went to most States. We had submissions from some 169 persons and organisations. There was a great width of interest, by public interest bodies, unions, libraries (librarians were very active), political parties, and all sorts of bodies outside politics. The value of FoI was appreciated by a great number of organisations such as social welfare groups.

In the course of the inquiry we gave every opportunity for the senior public servants to come before the Committee to explain how terrible it was going to be and how the use of FoI was going to lead to enormous problems. Some said that FoI would lead to enormous increases in departmental costs and requirements for extra staff. Others denied this. A couple of interesting examples that were given to the Committee and recorded in its Report demonstrated the exaggerated fears of some public servants. The Electoral Office told the Committee, quite seriously, that they expected in the first year 86,000 enquiries under the Freedom of Information Act about electoral matters. When asked how they arrived at those figures, they said that the number of electors was 8,600,000 and they expected about 1% of inquiries. Well, I have to tell you that, in the first year of operation, there were only six electoral FoI enquiries. From the Immigration Department, which also was a centre of opposition to FoI, witnesses estimated that they would get over 100,000 enquiries in a year, and need enormous increases in staff. In the first year it received 465 FoI requests, to be precise. Many of us are, indeed, disappointed with the response, but one cannot claim that the demand is likely to bankrupt the nation!

After hearing all these witnesses, we came up with 106 recommendations for amendments to the 1978 Bill and the accompanying Archives Bill. We waited about a year for the Fraser Government to respond and its response was disappointing. An election intervened and in due course another amended Bill appeared incorporating some of the Committee's recommendations. Now the very good piece of luck that FoI advocates had in Australia was that, on 30 June 1981, the losing government was losing its majority because there were new Senators coming in and majority would then be in the hands of the Australian Democrats and the Labor Party. A small number of Liberal Senators negotiated with the government. The government commenced the debate on the Bill and it suffered several defeats in divisions. There were 80 amendments proposed by an alliance of Liberal, Labor and Democrat Senators. After the first ten or so amendments the government had lost two or three divisions. They called off the debate and negotiated with the Liberal Senators. There were about eight or nine Liberal Senators supporting the amendments to the Bill. Because of the fact that the government wanted to get its Bill through and an Act in operation, they had to 30 June to do that. I suppose we really 'blackmailed' the government into accepting some amendments. But we finally got what was still a fairly limited Bill — something like about 35 of the 80 amendments. We were abused by the Labor and Democratic Senators for accepting a compromise. However, it was a deliberate choice to take a Bill that was not strong enough but finally to get something into operation and hope that, in the new parliament, we could improve it. This did, in fact occur.

We had this piece of good fortune, a government determined to meet its commitment, and very different from the misfortune you had here in England where Clement Freud's Bill almost went through before the Labour government was forced to an election. Freud's Bill did not quite pass through the House of Commons. We had good luck on our side.

The Bill which the Australian Parliament passed, and which came into operation in 1982, did have widespread support from many organisations. It was acceptable to the government. If we had insisted on all the amendments being passed, the Bill would have gone back to the House of Representatives where it would never have passed. The Fraser Government would have rejected amendments and it would have gone backwards and forwards for some years. It was important for this not to occur.

So the Bill came into operation, after some delay, in October 1982. The Labor Party, before the election in March 1983, had been promising substantial amendments. While in Opposition, ALP speakers, including Senator Gareth Evans, made some marvellous speeches in support of other amendments, some of which I have been able since to quote back at him. The Labor Party undertook that when they got into office they would implement the rest of the Senate Committee's report. Their words were, 'Labour will implement fully the outstanding recommendations of the Senate Committee on Constitutional and Legal Affairs, to ensure that freedom of information operates in practice as well as in name'. I have tried to hold them to that undertaking.

Labor came into government and proceeded to prepare a Bill. In two major areas which I will mention, they retreated. Cabinet rejected two of Senator Evans' proposals, but the other amendments that are now in the 1983 Bill contained most of the other improvements proposed by the 1979 Senate Committee Report. Some 20 amendments are in the Bill passed in 1983. Among the other improvements is an increase in the availability of the Act for past or existing documents, including documents containing personal information about individuals that may be inaccurate. In our legislation there are provisions for correction of such documents. But you could not, under the 1982 Act, go back beyond the date of the operation of the Act. However, now you can go back forever in the case of any documents which affect you personally. In regard to all other documents, we now go back five years to 1977, covering those matters that people may want to see. That was a big extension which happened in 1983. In the Amending Bill we added public interest tests to a number of exemptions so that, even if the exemption in the Act might say that disclosure might be refused because it might interfere with the operation of a government department, there is an additional 'public interest' clause. Such a document will be released if it is in

the interest of the public that it should be disclosed. There are also changes to the exemptions that have been quite valuable.

The Cabinet documents, which we excluded from disclosure by exemption, have been narrowed down so that factual documents, that may be attached to Cabinet material, can be disclosed. This stops Ministers from tacking documents onto a Cabinet submission. Therefore, all kinds of interesting and useful factual material that the public should have can now be brought out into the public gaze.

The cost provisions now enable our Administrative Appeals Tribunal, on appeals, to recommend that costs be paid by the government and particularly where appeals are made on matters of important public interest.

There were, however, two defects in the amendments proposed last year. As I said, they involved two rejections that the present Attorney-General suffered at the hands of the Hawke Cabinet. One was on the matter of conclusive certificates — the provision which applies to a number of exemptions mainly related to national security, international affairs, the internal working documents of government. A Minister can give a certificate in these areas and his word is final. Now we wanted to change that. We recommended in 1979 that it should go. The Labor Government rejected the Attorney-General's amendments. They have, however, improved the provision by providing that now any such decisions are subject to appeal to the Administrative Appeals Tribunal which can make recommendations which, regretfully, are not binding. But if the Minister still adamantly refuses to go along with that recommendation, he has to table in parliament the reasons, so it can be debated. It is not as good as we want, but I could not get my colleagues to push the amendments any further.

The second defect, where we did have success, was to greatly increase the power of our Ombudsman and his operations in the working of freedom of information. There are a number of amendments which were moved by me last year. They were the same amendments that Senator Gareth Evans, in Opposition, had moved a year before. In fact I read his various speeches into the record. The amendments gave the Ombudsman the power to have an assistant dealing only in freedom of information and that he should go ahead with inquiries even though there might be a right of appeal to the Administrative Appeals Tribunal. So he is authorised to go ahead in the simple way to try to get documents for applicants. He can also appear as Counsel or engage Counsel before the Administrative Appeals Tribunal. That saves a lot of people problems where there is a serious principle involved. Litigants in Australia will not spend their money rashly. If these documents ought to be disclosed, then the Ombudsman can proceed on their behalf. Moreover, he now has increased powers of monitoring FoI operations under the Bill. He can report to the Public Service Board defects and misdemeanours by public servants under the Act, and also he reports to parliament extensively on FoI operations. So those amendments were passed through the Senate last year, against the will of the government. Gareth Evans then accepted defeat with a smile and went back to Cabinet which accepted the Senate amendments and they went through the House of Representatives. The FoI Act now stands as a substantially effective piece of legislation.

Now I want to make a reference to British views on our developments. In the course of this whole FoI campaign your British Civil Service Commission came to Australia and also to Canada, reporting in the midst of our inquiry. I want to say that you have been grossly misled by reports which the Commission made. They came back to England and predictably they did not like the United States FoI methods. They did not like the Canadian development. The Canadians were also going ahead and now have an *Access to Information Act* in operation. Your Commission had this to say about Canada and Australia in their Report:

> In Canada and Australia, the Civil Service Division team found that involvement of third parties, whether the Courts or quasi-judicial bodies such as the Ombudsman or a tribunal in assessing the merits of ministerial decisions on disclosure is held to represent a weakening of this (ministerial) accountability to Parliament with the complementing danger of politicising the Courts and other body.

Now that is all absolutely wrong. They had spoken no doubt to some senior public servants, then gallantly resisting freedom of information. Everything that has happened is exactly the opposite, both in Canada and Australia, and they did, therefore, come back with particularly bad advice for the British Parliament, because these things we do accept now — the use of the Ombudsman and Administrative Appeals Tribunal. I was quite amazed by that Report which I had not seen until quite recently.

Compared with the FoI Act that we actually have in Australia and the campaign we have had for it, I know there are differences here. I know there is a different tradition and there may not yet be the active political will. You have not got the same extent of agreement across the political parties as we have had. We had a cautious approach in my own Party but nonetheless a. There was a stronger commitment on the Opposition Party's side and that has made it rather easier. I am told, and see in James Michael's book, that 'nanny knows best' is one of the philosophies of people here, I suppose with experience of being brought up by nannies. I think in our rough crude way we Australians do not have that worry or that undue deference for authority.

You also have the *Official Secrets Act* here. In 1911 it was adopted in one hour in this great Parliament without a great deal of consideration. That Act is an aberration and that is an extra problem that you have. I sometimes think that people think that just getting rid of that Act will get you freedom of information. It won't. But certainly we did not have that problem of needing to repeal an Act of that nature. What we have had is certain all-party support and public support which has been strong. Many newspapers supported the campaign to the hilt.

We have not gone far enough in Australia. I just want to say this now, in point form:

1. Improvements we need are to ensure not only that disclosure of information occurs but that citizens make adequate use of documents obtained. We can get documents under the Act, but we also need to get things changed and we have a natural inertia to overcome.
2. We have to do something about this conclusive certificate blemish — that is a running sore.
3. We have got some rather widely expressed exemptions that need review.
4. In three years there is to be a Parliamentary review of the Act and its operation. We have to look at the exist-

ing secrecy provisions in our laws. In many other Acts, there are as many as 179 provisions elsewhere, that are supposed to be brought into accord with FoI within three years.

5. There are various exclusions and various other problems that require attention.

Remember the principles which the Canadian expert, Professor Rowat, put forward. He said there were three important principles for a good freedom of information Bill:

1. disclosure must be the rule rather than the exception;
2. there must be narrowly defined exemptions justifying secrecy;
3. there must be enforcement through appeals against secrecy to some independent arbitrator.

One can add a fourth criteria to it, in regard to access, because he did refer in detail to these matters. There must be easy access. This is very important. If you have a marvellous Bill but people do not use it, its not good enough. Legislation must include production and correction of documents which affect people's personal lives. You must charge low fees and have a right of waiver of fees. The public service must be enjoined to ensure it will be helpful to people seeking information. Now I say finally, Mr Chairman, that I wish you every bit of luck in Britain in going ahead with this campaign. It took us about ten years and you have some time to wait, but FoI is an idea whose time has come. It is very necessary for Britain to get back to its role in democratic reform. I hope that you will soon have a strong freedom of information Bill and I am sure it will be of great benefit to and for your people if you manage it.

The full text of this speech can be downloaded from the Campaign for Freedom of Information <**http://www.cfoi. org.uk/miss n.html**>. This lecture is reprinted courtesy of the UK Campaign for Freedom of Information.

NATO'S web of secrets

Last December, the international movement for open government marked a small victory: Romania's new right-to-information law came into force. Unfortunately, the victory was short-lived. Four months later, Romania also adopted a new state secrets law that creates a broad authority to withhold information that has been classified as sensitive by government officials.

An earlier draft of this state secrets law was strongly criticised by the International Helsinki Federation, and struck down by Romania's Constitutional Court in April 2001. The new law is only a modest improvement. Article 19, a freedom of expression advocacy group, says that the restrictions on access to information are still 'incredibly broad'.

There have been similar developments across much of Central and Eastern Europe. Ten countries in the region have adopted right-to-information laws in the last decade — while eleven have adopted laws to restrict access to information that has been classified as sensitive. The Slovak Republic adopted its new secrecy law in May 2001 despite protests from non-government organizations. In May 2002, a cross-party coalition of legislators launched a constitutional challenge against Bulgaria's recently adopted state secrets law.

There's a simple explanation for this wave of legislative activity. In 1999, NATO made clear that countries who wanted to join the alliance would need to establish 'sufficient safeguards and procedures to ensure the security of the most sensitive information as laid down in NATO security policy'. Central and Eastern European countries have rushed to get legislation in place before NATO's meeting in Prague this November, where decisions on expansion are expected to be made.

The result has been tight new rules on the treatment of classified information, as well as strict policies on security clearances. In the Slovak Republic, the new security agency will review political and religious affiliations, and lifestyles — including extramarital affairs — that are thought to create a danger of blackmail. The Associated Press reported recently that Romania intends to deny clearances to security staff with 'anti-western attitudes'.

Some observers have asked whether governments in the region are using the process of NATO expansion as a pretext for adopting unnecessarily broad secrecy laws — or whether NATO's requirements are themselves unduly tilted against transparency. These are reasonable questions, but NATO is doing little to help provide answers. Although its security policy is contained in an *unclassified* document, NATO refuses to make it publicly available. It has also instructed its current member countries to withhold their copies of NATO's policy. As a result, requests for the policy made under the freedom of information laws of the United States, Canada and United Kingdom have all been declined. (A similar request to the European Union, which is collaborating with NATO, was also refused.)

A small window into the evolution of NATO policy is provided by a selection of archival records from the 1950s that are now available at NATO's Brussels headquarters. (The rules that determine which archival records will be made publicly available are contained in NATO's security policy, and are therefore inaccessible. Captain Yossarian would be impressed.) These archival records suggest that the criticisms made against the new state secrets laws of Central and Eastern Europe — excessive breadth, combined with onerous clearance rules — could likely be made against the NATO policy itself.

NATO's policy on the handling of sensitive information was codified between 1953 and 1955, in the early years of the Cold War. It was very much a product of that time. Its rules on vetting of personnel mimicked the onerous loyalty requirements adopted by the Eisenhower administration in November 1953 as a counter to the McCarthy investigations. Military planners in the United States and United Kingdom, who dominated NATO in its early years, ensured that NATO policy also included strict rules against disclosure of information.

Behind NATO's closed doors, some governments chafed at the new restrictions. Belgium complained about disproportionate influence of British and American military staff; Norwegian and Danish officials lobbied for narrower definitions of classified information; Italy suggested that