Apart from the grant of leave from the Privy Council itself and appeals as of right from State courts, the door to London is closed. What will happen to this residue? The Constitutional Convention in Perth did not reach a unanimous view on what should be done. But opening the N.S.W. Parliament, the Governor announced the intention of the N.S.W. Government to seek to terminate appeals from that State, without waiting for action by the other States. Such a move would appear to have local support. The *Sydney Morning Herald* (3 July 1978) described the remaining appeals as "an increasing nonsense" and a "law anachronism". The exact machinery of abolition has not yet been spelt out. It may include a combination of

- N.S.W. Legislation
- A request to the Federal Parliament for legislation under s.51 of the Constitution
- Petition to the Queen in Council

Why should there be this fuss about a few appeals to London?

> "[L]awmakers, including judges . . . [should] perform their functions sensitive to the special needs and circumstances of their own country, a requirement recognised by the Privy Council itself on occasions. [The present position] fails to give due weight to the emergence of Australia as a separate, sovereign nation with qualities of its own which the process of federation was specifically designed to encourage and facilitate . . . Anyone who has doubts about the national Australian intensions of the 1900 delegation to London needs only [to] read Deakin's account of the tiresome negotiations by which he sought to diminish the future role of the Privy Council . . . There are, of course, much more important issues than this facing the law and the courts. But this is a symbolic question . . . recent events suggest that Deakin's nationalist legacy for the design of a wholly Australian judicature is now working its way to its inevitable and proper conclusion."
>
> 1978 *Alfred Deakin Lecture.*

Across the Tasman, in New Zealand, there is a somewhat similar debate. [1978] *Reform* 54 recorded that a vote at the N.Z. Legal Conference saw "New Zealand practitioners strongly in favour of abolition". This statement was based on a published report which referred to informal sampling at the Conference. No formal vote was taken at the session in question. Indeed discussion from the floor indicated that the majority of practitioners who spoke tended to favour retention of appeal. One correspondent says that so far as professional thinking can be judged, many practitioners accept, but with regret, that sooner or later the right of appeal will be abolished. In Australia, steeled by the gradual erosion of appeal rights, there will be fewer regrets. The implications of severing our judicial umbilical cord must be considered. Optimists say it will promote a greater judicial inventiveness and a search for principle, released from the fear of inconsistency with the latest orthodoxy on the other side of the world. Time will tell.

Freedom and Information

> "He that communicates his secret to another makes himself that other's slave."
>
> Baltasar Gracián,
> *The Art of Worldly Wisdom*, 1647.

The latest piece in the mosaic of administrative law reforms introduced by the Commonwealth has now been unveiled. The Freedom of Information Bill 1978 was introduced into Parliament by Attorney-General Durack together with a companion Archives Bill 1978. The F.O.I. Bill was described as

> "a major initiative by the Government in its programme of administrative law reform. It is, in many respects, a unique initiative. Although a number of countries have freedom of information legislation, this is the first occasion on which a Westminster-style government has brought forward such a measure. The Bill . . . will establish for members of the public legally enforceable rights of access to information in documentary form held by Ministers and Government agencies except where an overriding interest may require confidentiality to be maintained."

Both Bills have been laid before Parliament in order to permit public debate in advance of their passage into law. The Attorney-General has stressed that the government expects that the legislation, once passed, will be administered in accordance with the policy "that as much information as possible should be provided to those seeking it". The ultimate aim is to make Commonwealth administration "more responsible to the public need".

Debate on the provisions of the Bill and on its adequacy has, inevitably, followed. The focus of attention has been upon the list of 14 exemptions from the obligation to give access. These exemptions include matters such as

national security and defence, Cabinet documents, documents affecting personal privacy, confidence and trade secrets or the national economy. There are others. Most hotly debated is the exemption of "internal working documents". The Attorney-General has said that the Act will be a "catalyst of change". His critics include some on both sides of Parliament and writers outside the legislature. Senator Alan Missen (Govt.Vic.) says that most of the critics do not feel that the appropriate balance between openness and confidentiality has been struck. Amongst criticisms mentioned by him:

- past or existing documents created before the Act are not accessible
- under many exemptions, conclusive certificates can be given by Ministers, not examinable by the Administrative Appeals Tribunal
- the absence of provision for payment of costs, even where a document is wrongly declined
- the width of the expressions "Cabinet documents" and "internal working documents"

"It will be seen that these exemptions, prepared by the Public Service, are covering a very wide field. It might be said that you have what appears to be a shining apple, but when most of the fruit has been eaten away, there is not much benefit." *The Age*, 5 July 1978.

Outside Parliament the critics have also been busy. The managing director of David Syme & Co. Pty. Ltd., publishers of *The Age*, Mr. Ranald McDonald, said that the Bill made a "mockery not only of the notion of the right to information but of the principle of right to appeal to courts."

> "During its long gestation, the Bill has changed for the worse—if that is possible. For instance decisions about requests for information from the public do not require to be answered for some sixty days. An earlier draft required that the enquirer be notified within 21 days."

The Shadow Attorney-General, Mr. Lionel Bowen, is especially critical of the scope of exemptions and the procedural defects.

> "It comes at a time when the need for real rather illusory public access to the workings of government is critical. The bureaucratic process today is more complex than ever before and the danger of a Minister becoming the creature of his bureaucrats is more prevalent than ever before."

Mr. John McMillan in (1978) 8 *Federal Law Review* 379, described the issue of "freedom of information" in Australia as "closed". The legislation will "do more to entrench the administration's right to withhold initial information, but to secure the public's right of access to it". The same theme is taken up by Professor Colin Howard, Dean of Law at Melbourne University

> "If this Bill is enacted into law, the de facto secrecy and obstructiveness which are all too familiar will have the further backing of an explicit Act of Parliament . . . The purported system of review of decisions . . . is mere window-dressing. The Administrative Appeals Tribunal is given a power to review, but this power does not extend to reviewing ministerial notations that documents are exempt or decisions that disclosure of deliberative processes would be against the public interest."
>
> *Civil Liberty*, #42 5-6.

As against all this, the establishment of an onus on government to justify withholding information may, ultimately, work changed attitudes. This is the Attorney-General's thesis.

> "The fact that the Bill establishes a presumption in favour of disclosure, will be a lever to compel a department denying access to a document to make out its case in terms of actual harm that might flow from release of that document."

The use of Parliament and the media to highlight refusal of access might render the exemptions less potent than feared. Only time (and experience) will tell.

Meanwhile other developments are happening that should be noted.

- The *Administrative Decisions (Judicial Review) Act* 1977 (Cth.) takes a further step towards operation. A report of the Administrative Review Council on the recommended exemptions from the Act is expected to be delivered to the Attorney-General shortly. That Act contains a critical provision, in keeping with the F.O.I. legislation. S.13 gives a "right to reasons" to persons affected by administrative decisions made by Commonwealth public servants. It will be interesting to see the final list of exemptions from the operations of the Act. The legislation has already passed through Federal Parliament. Its proclamation has been delayed whilst the many claims for exemption have been sifted by the A.R.C. The Act simplifies judicial review procedure, states

a catalogue of grounds for review and provides the all-important access to reasons and information upon which review may be made.

- In South Australia, an announcement was made on 21 June that a Government committee would investigate freedom of information legislation for that State and draw up detailed instructions for a Bill. Legislation by the end of the year was promised.
- In Ontario, the Commission on F.O.I. and Individual Privacy has held public hearings, and issued its research program. Address: 180 Dundas St. West, Toronto, Canada.
- In England the long awaited white paper on reform of the *Official Secrets Act* 1911 fell short of the expectations of those committed to F.O.I. legislation. The only major reform proposed was to limit the cases where disclosure about government secrets would render the officer liable to criminal sanctions under the Act. *The Times* contrasted the legislation recommended with the Labour Government's manifesto to replace the Secrets Act with a statute putting the onus on public authorities to justify withholding information. Thundered *The Times*:

> "British governments have not been so successful in advancing the welfare of the country, that the habit of secrecy can be justified by results. Some secrecy is necessary for government, but nothing like as much as is practised in London. The cause of public information is not merely a search by newspapers for more grist for their mills. It is important to efficiency and democracy."

Reformers' Ruminations

> "To the timorous souls I would say in the words of William Cowper: 'Ye fearful saints fresh courage take./The clouds ye so much dread/ Are big with mercy, and shall break/In blessings on your head.' Instead of 'saints' read 'judges'. Instead of 'mercy' read 'justice'. And you will find a good way to law reform!"
>
> *per* Lord Denning M.R.

> "The clouds in my Lord's adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers."
>
> *per* Bridge L.J.
>
> [1977] 3 *All E.R.* 803 at 815, 821.

A number of recent publications show law reformers contemplating their art and musing openly on what it is that they are about. In his Presidential Address to the Holdsworth Club *Ferment in the Law*, 1977, Lord Edmund-Davies referred to the astonishing transitions that have taken place in society and in the law in his lifetime

> "It has been a lifetime of great change for lawyers, as for all men. Revered legal institutions (such as the Jury system in general, and the sanctity of unanimous verdicts in particular) established principles (such as the *stare decisis* rule), fundamental bases of penal policy (such as the concept of personal responsibility) these and many other familiar features of the legal landscape have been subjected to a fresh and careful scrutiny. 'Critics of the status quo' . . . have rioted in print, sometimes emboldened by courage borne of their confusion. But that is no new thing for, as Lord Buckmaster once said, 'law and legal procedure have always been a red flag to the man possessed of reforming zeal'."

Lord Edmund-Davies doubted that there was ever a time when more practising lawyers of distinction had been prepared to extricate themselves from day-to-day tasks to survey their place in the life and work of the people. He referred to his own work in a Royal Commission and in the Criminal Law Revision Committee of which he was chairman for seven years. Why there should now be such a ferment of law reform has not been adequately explained. Proferred explanations include the advance of legal aid, the increase in crime, the "general lessening of respect for tradition and authority and the speed and sophistication of the modern world".

> "Generalisations are dangerous. Some say that judges as a class are reluctant reformers, while academics are avid. But I have known the roles to be exchanged, some academics being cautious and conservative, while in one important respect judges are persistent and consistent reformers. It is not only as members of law reform bodies that judges have done useful work. We have long lost sight of the judge who profoundly shocked Romilly when sentencing Thomas Muir to 14 years' transportation by declaring that to speak of reforming the Law Courts was 'seditious, highly criminal and betrayed the most hostile disposition towards the constitution'. The disappearance of such judges is good riddance."