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Comment

'But now, in 1999, as civil libertarians, lawyers, and the ALP raise concerns about Jeff Kennett's latest review of the FoI laws, Perton has gone public to question the long-term relevance of the legislation. "Over the next five to 10 years, you will see other developments that will probably render the 1960s, 1970s concept of the act redundant"...'

Ewin Hannan, 'Open and Shut,' Age 23 January 1999,
quoting Victor Perton chairman of the
Victorian Parliamentary Law Reform Committee

Background: *These comments were made in the light of Victorian Premier Jeff Kennett's commissioning of a review into FoI after the Victorian Civil and Administrative Tribunal ordered the release of the names of nurses on a duty roster at a State hospital to a person serving a prison sentence for a triple murder.*

Victor Perton is right. The relevance of Freedom of Information legislation does need to be questioned. However I believe any review or reconsideration of FoI ought to be designed to rejuvenate rather than bury this crucial part of our democracy. At least Victor Perton offers a critique, which can be sensibly examined and debated. He still shares the objective of the reformers of governmental practice and operation who saw FoI legislation as a necessity for citizens who wanted to be part of the democratic process. Victor Perton is merely questioning the efficacy of FoI to still perform these functions in the 1990s.

Unlike his leader, Jeff Kennett, Perton's motivations are not to seize on one incident — a little like the dictators in any authoritarian regime — to serve as a justification to dismantle one of the few remaining operational elements of civic governance in Victoria. The Premier's rantings about 'the pale of decency' and his resolve to scrap FoI if necessary to protect the safety of Victorians left on the public payroll reek of political opportunism.

Piece by piece the Kennett government has chipped away at legislation which is regarded by many, including Justices Gaudron, Gummow and Hayne in the 1998 High Court decision in *Egan v Willis*, as a necessary component of representative democracy in Australia.

A few years ago a Tasmanian liberal backbencher offered the observation that it would be a brave government which abolished the *FoI Act* rather than simply amending it when needed. Till now Kennett has certainly heeded that advice. Almost on an annual basis he has taken steps which have damaged the design integrity of the legislation and significantly reduced its usefulness for various users ranging from individual citizens to information brokers like journalists, lawyers and parliamentarians. Yet the ultimate prize for Kennett — the removal of this democratic thorn from his body politic — has proved too difficult.

Cynically the Premier has exploited a single case and with calculated timing announced a government review of FoI. The specifics of this review its scope, objectives and the identity of the reviewers are unclear.

At the moment I am teaching in a country, Ireland, which is only slowly crawling its way back from a dark period resulting from a collapse in government integrity and accountability. Apart from an almost never ending series of tribunals (the equivalent of a Royal Commission in Australia) the Irish are relying on their new freedom of information legislation to throw light on the dark areas where an unhealthy mixture of government and private interests festered until they deeply infected the body politic of Ireland.

Fintan O'Toole in his 1995 book *Meanwhile Back at the Ranch: the Politics of Irish Beef* has captured this collapse in democracy:

> the basic institutions of Irish democracy faced a searching test. A secret policy, carried out with virtually no public scrutiny and even in violation of public policy statements, was now faced with parliamentary attempts to drag it into the light. In the course of these attempts, Irish democracy was put to the test, and failed miserably.

Out of the ashes of this failure, the Irish turned, in part, to FoI to help rebuild their democracy and replenish their faith in the institutions of government. It would seem to be a strange irony for any Australian jurisdiction to discard something the Irish have found an urgent need for in the light of a too vigorous linkage between ministers, big business and political party finances.

So why do I think that Victor Perton has a point although disagreeing with his conclusion? First, the basic design principles of FoI legislation need to be revisited. Second, in light of a failure of political and bureaucratic leadership to ensure compliance with both the letter and spirit of the legislation there needs to be a rebirth of access legislation designed to nurture democracy into the first decades of the next century.

Over three years ago the Australian Law Reform Commission made 106 recommendations to improve the Commonwealth *FoI Act,* which is of almost identical vintage and design to the Victorian Act. Both pieces of legislation, as noted by Victor Perton, are showing the stress of time and mistreatment by those administering and using the legislation.

Unlike Victor Perton I do not believe that data protection schemes, the use of the internet and the remnants of the checks and balances on government are sufficient to justify the removal of FoI from the statute books. The pursuit of the wonders and opportunities of the information age should not blind us to the constants of governance. As John Ralston Saul points out, information is the new currency of power and in my mind freedom of information should still allow the citizen access to the government warehouses which hold the information collected and paid for on behalf of all citizens. The Scott Inquiry in the United Kingdom, the Beef, Moriarty and Flood Tribunals in Ireland have all demonstrated how Ministers, their mandarins and spin doctors, are willing to play fast and loose with language and the use of 'get out of jail free' denials where the public cannot subject those denials to verification.

Yet as Victor Perton points out, FoI is based on a mindset designed for the 1960s and 1970s. More importantly FoI was designed on the assumption that the public service was indeed civil and would administer the Act not only in compliance with the letter of the legislation but to advance the intent of the legislation.

The designers expected some trouble with the acceptance of FoI. That is why fees were made low, opportunities for review were included and an adversarial external review system was considered necessary to flush out blatant attempts to ignore the legislation.

What was underestimated was the level and frequency of administrative non-compliance, the infrequent but not rare examples of bureaucratic stonewalling and the slow death by a thousand cuts to the integrity of the legislation by governments.

We need to reassess many aspects of FoI. The Australian Law Reform Commission and numerous other reform suggestions from organisations around Australia like the NSW Ombudsman, and the Information Commissioners of Western Australia and Queensland, have already done all the hard work. Their vision is one of rejuvenation. I pray that the Victorian reviewers will break free from their Premier's dream of unfettered power.

Parliamentarians of vision, like Victor Perton, need to remember why they used FoI in opposition, why they would vote for its introduction if it was not already on the statute books and to remember how easily the fabric of democracy falls apart without the weave of openness and accountability.

Rick Snell

An edited version of this article was published in the Age, 1.2.99, News Extra, p.2.

Freedom of information and the contracting out of government services: Preserving rights in a changing environment

The administrative law system was established, among other reasons, to give individuals access to government information and to avenues of redress if they had been wrongly affected by government decisions. These aims were intended to have the flow-on effects of enhancing the accountability of government agencies, and improving the quality of executive decision making. The Administrative Review Council (the Council) was established under the *Administrative Appeals Tribunal Act 1975* to act as advocate for, and overseer of, the administrative law system.

Since that time, however, there have been significant developments in the way the Commonwealth government carries out its business. In particular, there has been a recent emphasis on the contracting out of government services, that is, where the government, or one of its agencies, pays a contractor to deliver a service previously delivered by the government. This move from the delivery of services from the public to the private realm, challenges the ability of the administrative law system to achieve what it was set up to do. For this reason, the Council undertook a comprehensive review of the administrative law implications of the contracting out of government services. The result of this review, the *Contracting out of Government Services Report,*[1] contains a number recommendations. This article attempts to provide an overview of the views expressed in that Report, with particular emphasis on freedom of information (FoI) issues.