

FREEDOM OF INFORMATION : THE EXPERIENCE OF THE AUSTRALIAN STATES - AN EPIPHANY?

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INTRODUCTION

A Freedom of Information (FOI) barometer would indicate a significant shift in the prevailing attitudinal responses to access to government held information at the state level in Australia in recent years. The responses would vary between jurisdictions but only in terms of details not substance. What began as a few recitations of concern about delays, application of exemptions and fees has now metamorphosed into a strong phalanx of information commissioners, parliamentary committees, ombudsman and others seeking fundamental reforms. In 1994 Spencer Zifcak argued that the history of FOI in Victoria could be seen as proceeding through three phases - optimism, pessimism, revisionism.¹ The Zifcak typology could be expanded Australia-wide with a fourth stage being added; namely, a return to fundamentals.

In the period up to December 1998 a number of factors had placed state FOI regimes under considerable stress. These factors included the advent of outsourcing and

the persistence (or reflowering) of a culture of governmental secrecy, over use and abuse of exemption provisions, modifications to exemptions (like those to the cabinet exemption in Victoria and Queensland) and the failure to act on reports (the Australian Law Reform Commission Report at the Commonwealth level, Commission for Government in Western Australia and the reforms suggested by David Landa when he retired as NSW Ombudsman) which suggested urgent remedial action.²

However today a number of indicators suggest a more optimistic assessment. In three jurisdictions, Western Australia, South Australia and Queensland, there has been the delivery or promise of conceptual blueprints which hold the promise of transforming the practice, principles and framework of FOI in Australia. Each blueprint, in its own way, bears the hallmarks of the epiphany in the title of this paper. The link between each vision is that the designers have gone back to first principles and then evaluated their own access to information regime in light of those preferred outcomes.

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¹ S Zifcak, 'Freedom of Information and Cabinet Government: Are They Compatible In Every Dissimilar Respect?' (1994) 1 *Australian Journal of Administrative Law*, 208-221.

² Rick Snell, 'Comment,' (1997) 67 *FoI Review*, 1.

On a legislative front most of the implemented amendments in the last two years have either returned the system closer to its original state, as in Victoria, or removed a major deficiency, as in Tasmania. In the area of external review the best performers, the Information Commissioners, have kept their ranking whilst New South Wales by transferring FOI jurisdiction to the Administrative Decisions Tribunal is starting to reap the benefits of a receptive, informed and more accessible external review model. The Ombudsman jurisdictions³ have started to apply some of the best administrative practices developed in Western Australia. In most of the state jurisdictions there appears to be a revival of a more active and committed FOI constituency. This revival has been manifested by strong attendances at public forums and more specifically by renewed activity by journalists and FOI coordinator networks.

STATE FOI—DEFECTIVE FOUNDATIONS

The decade following the enactment of the *Freedom of Information Act 1989* (NSW) promised an exciting prospect of a fundamental transformation in the relationship between citizens and state decisionmakers. Every jurisdiction (except the Northern Territory) made available a statutory instrument which ideally would contribute to 'improving public understanding of the policy-making process and protecting citizens against arbitrary decisions by public bodies.'⁴

Using software design terminology the Australian state FOI statutes can be depicted as ranging from version 1.0, Victoria to version 1.3, Queensland and Western Australia. The design template of the Commonwealth and Victorian legislation was adopted by each state with a few key changes added to each succeeding version. Apart from Queensland, most of the states adopted the legislation on the basis of its perceived inherent capacity to combat official secrecy rather than a substantial consideration about the design elements which would achieve that purpose in each jurisdiction.

The Queensland process involved the circulation of an Issues Paper,⁵ publication of public submissions,⁶ a report by the Electoral and Administrative Review Committee⁷ and a final report by the Parliamentary Committee for Electoral and Administrative Review.⁸ However the basic operating premises appeared to be the adoption of a standard model of FOI legislation⁹ and the concession that many aspects of FOI operation would need to be configured to preserve certain fixed and fundamental

³ South Australia, New South Wales and, in particular, Tasmania.

⁴ A Roberts, 'Retrenchment and Freedom of Information: Recent Experience Under Federal, Ontario and British Columbia Law,' 42 (4) *Canadian Public Administration*, 423.

⁵ Electoral and Administrative Review Commission, *Issues Paper No. 3: Freedom of Information*, Brisbane, May 1990.

⁶ Electoral and Administrative Review Commission, *Review of Freedom of Information Issues: Public Submissions Vols 1 and 2*, Brisbane, July 1990.

⁷ Electoral and Administrative Review Commission, *Report on Freedom of Information*, Brisbane, GoPrint, December 1990.

⁸ Parliamentary Committee for Electoral and Administrative Review, *Report on Freedom of Information*, Brisbane, GoPrint, April 1991.

⁹ Electoral and Administrative Review Commission, above n 5, 9.

elements of the Australian Westminster system.¹⁰ The Information Commissioner model, introduced after the Issues Paper and later adopted in Western Australia, was the key upgrade to Australian FOI design introduced in Queensland.

Australia lacks a comprehensive comparative historical study of the introduction of FOI at the state level. A similar lacuna at the Commonwealth level was partially rectified by Terrill's study on communication policy development.¹¹ Nevertheless a few important commonalities can be gleaned from the scraps of available published information.¹² Freedom of Information Acts, and their introduction at the state level in Australia, can be depicted as having four critical shared historical characteristics. First, as reforms externally generated, to the core agencies of government, or initiated. Secondly as reforms introduced with significant but limited political support. Third, reforms that were greeted by initial bureaucratic responses ranging from the lukewarm to the hostile. Finally, reforms that were subjected to a refinement process that would, if administered in a neutral way, produce a significantly lower quantity and quality of information than the original proposals.

In those shared historical antecedents lurked the source of the majority of critical defects in FOI at state level which have been exposed or commented upon by the reform movement mentioned in the introduction to this paper. Much of the history remains to be researched and the precise interplay between these features and the deviation between jurisdictions is yet to be adequately explored. There is, however, enough for an initial thesis to be generated; namely, that several important elements surrounding the conception and initial adoption of FOI at state level produced heavily compromised laws which had limited prospects of achieving their perceived promise. The quest for the holy grail of open, accountable and responsible government at the state level needed too many miracles to succeed in its initial attempt. A Commonwealth model of FOI, reconfigured to various degrees in different states, has achieved only what critics of access laws like John Ralston Saul have depicted as carefully stage managed processes that are more illusory than real.¹³

A TROJAN HORSE TAKEN, TURNED AND TAMED

Inspired by a combination of political hopes and democratic motives, FOI at the state level was formulated on the fringes of the state apparatus by law reform institutions¹⁴

¹⁰ For a more detailed discussion of this point see the Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland, Discussion Paper No.1*, Brisbane 1999. See also R Snell and N Tyson, 'Back to the drawing board - Preliminary musings on redesigning Australian freedom of information,' (2000) 85 *FoI Review*, 2-6.

¹¹ G Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and beyond*, (2000).

¹² For the most comprehensive of these see A Cossins, *Annotated Freedom of Information Act New South Wales*, (1997), 8-14. The other major contributor is John Cain, the former Premier of Victoria see J Cain, *John Cain's Years: Power, Parties and Politics*, (1995), 265-267 and J Cain, 'Some Reflections on FoI's early years,' (1995) 58 *FoI Review* 54-58.

¹³ J R Saul *The Unconscious Civilization*, (1997), 46.

¹⁴ As in Queensland where the Electoral and Administrative Review Commission (EARC) took up the initial recommendation of the Fitzgerald Commission. See above n.7.

or agents of influence,¹⁵ or by those in opposition to the government including major political parties and/or reform movements.¹⁶ The purpose was to introduce into the governmental process a key transformational mechanism which, whilst not acting in isolation, would be the main contributor to a new process of informed and accountable decision-making.

Many cartoons, at the time of the inception of State FOI legislation and since, have visualised the process as those on the outside the citadel walls seeking entry, in a non-violent way, to the informational treasures held within. It is a sad commentary on the fate of this reform that a decade later the leitmotiv of cartoonists remains fixated on scaling the walls, gaining access to the locked cabinet, uncovering the deliberately buried treasure and too few, if any, cartoonists can conceive of the next stage in the process.

FOI legislation, like the original Trojan horse or the modern software equivalent, was designed to be absorbed into the system, and activated so as to remove entry barriers and gain access to a greater amount of restricted information. Yet, in contrast to what occurred in the ancient rendition of this story, our modern day citadel protectors knew and counteracted the intended mission of this unsolicited gift from these heralds of democracy. The modern day version would have our software hackers conceding final design details and activation passwords to the system administrators.

The historical exclusion of the bureaucratic leadership at state level, or at the very least the next generation of leadership, from the initial design stages delayed the opportunity for a constructive dialogue that might have broken the linkage between Westminster system and secrecy. After outlining the significant steps already made towards more open government in Australia, Zifcak concluded that:

[d]espite the achievements and despite its promise, the Victorian case demonstrates plainly how halting, contingent and fragile the fledging movement towards more accountable and participatory administration can be. Constitutional, political and personal pressures can and still do coalesce to provide leaders of government of whatever ideological persuasion with powerful incentives to maintain the secret State.¹⁷

The relationship between FOI and the Westminster system in Australia has already been extensively explored.¹⁸ Nevertheless the New Zealand and Irish experience indicates the opportunities which can be gained from the involvement of a bureaucrat leadership who can be persuaded to turn their minds to the shaping of future policy-making processes and away from a passionate preservation of an existing system that

¹⁵ The initial efforts of Professor Wilenski in NSW for example. For a more detailed coverage of Wilenski's reforms see A Rath, *Freedom of Information and Open Government*, Background Paper No 3 2000, NSW Parliamentary Library Research Service, Sydney, September 2000, 7-10 or Cossins above n 12, 8-11.

¹⁶ The position in the other states. For examples see J Cain, above n 12, 265-267 or H Sheridan and R Snell, 'Freedom of Information and the Tasmanian Ombudsman 1993-1996,' *University of Tasmania Law Review*, 16(2) 1997, 110-111.

¹⁷ S Zifcak, above n 1, 221.

¹⁸ Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978, *Freedom of Information*, AGPS, Canberra, 1979 at paras 4.2 and 4.63. See also S Zifcak, above n 1 and Snell and Tyson, above n 10.

accords secrecy a prime position.¹⁹ The Tasmanian Government submission to the Legislative Council Inquiry was a well crafted exposition of the view that FOI was not a critical means of transforming the Westminster system but a subordinate and secondary addition to the system. The Tasmanian Government argued:

that the foundation of Australian democratic institutions and their unique expression in Tasmania can continue to be found in the rich tradition, conventions and cultural underpinnings of Westminster style government. This is not a rigid or weak foundation but rather one which is able to accommodate change and diversity, a strength which arises in part from the federal elements of our democracy and in part for its long and hard fought for traditions. This understanding of the cultural foundations of our system of Government is critical to placing Freedom of Information legislation in context.²⁰

LONE CRUSADERS AND RELUCTANT STEWARDS—POLITICAL LEADERSHIP ON FOI

An intriguing feature of FOI at the state level is the limited cohort of Ministers who could easily verify their proven and implemented commitment to FOI as opposed to tokenistic public pledges to the legislation. John Cain has claimed that '[W]hen we came to implement the much-publicised party policy on freedom of information, I found myself virtually alone in Cabinet.'²¹ His story is one that would find many echoes in the unwritten history of FOI in most other states.

In some states the political leadership was hostile to the concept²² and it required a binding election commitment and expressed support of the new Premier to bring the legislation into force.²³ In others, like South Australia, it was the prospect of the opposition making the electoral and media running on FOI that finally converted a decade old issues paper into legislation.²⁴ Political imperatives were also important in Tasmania where a commitment to introduce FOI was a central element in the Labor-Green Accord.²⁵

Justice Kirby has long promoted the view that FOI is the type of legislation that requires White Knights, both political and bureaucratic, to help the reform towards its

¹⁹ The Irish and New Zealand experience is outlined in R Snell 'Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand,' *Freedom of Information - One Year On*, Department of Finance and Department of Law, University College Cork, held at St Patrick's Hall, Dublin Castle, 23 April 1999. Available at <<http://www.ucc.ie/ucc/faculties/law/foi/conference/>>

²⁰ Tasmanian Government Submission to the Legislative Council Select Committee on Freedom of Information 1995, 5.

²¹ J Cain, above n 12, 265.

²² See Cossins on the views of Premier Wran in 1988 where he is quoted as stating 'what I found wrong about the FOI system is that it provides a plundering instrument for political opponents. I know the principles of FOI, but so much of the expenditure is on the basis of some ratbag backbencher in the Opposition who gets some bee in his bonnet and then wastes tens of thousands of public dollars.' Alaba, *Inside Bureaucratic Power: The Wilenski Review of NSW Government*, (1994) quoted in Cossins above n 12, 9.

²³ See D Roden, 'Some considerations about implementing FOI legislation in New South Wales,' (1992) 41 *FoI Review* at 54.

²⁴ V Evans, 'Freedom of Information in South Australia,' (1993) 43 *FoI Review* at 2.

²⁵ See M Haward and P Larmour, *The Tasmanian Parliamentary Accord and Public Policy 1989-92*, (1993) 219.