External review

There has been a tendency in other jurisdictions for the FoI system to become 'legalised' with appeals to fairly formal tribunals and courts and the consequent development of precedents and so on. In an effort to contain costs and to ensure that the *FoI Act* remains 'user friendly' the Act provides that appeals are made to the Ombudsman. As well as reviewing decisions on appeal the Ombudsman will have the power to order that information be released and any order must be complied with.

The Ombudsman will be able to determine the rules and procedures that apply in relation to the appeal mechanisms. This will ensure that the appeal mechanisms are informal but effective without the need for excessive legalism.

Publication of information and documents

Unlike other FoI legislation in Australia there is no requirement in the Act for Government Agencies to publish information regarding their operations and functions. The reason for this is that Government Agencies are already required under the Tasmanian *State Service Act* to publish annual reports regarding their functions and operations. Quite clearly, to have required such a reporting function under the *FoI Act* would simply have been a duplication of existing procedures.

In addition, the Act does not require that a register of Cabinet Decisions be maintained.

Administration of Act

The administration of the Act rests with the Department of Premier and Cabinet. An FoI Unit is to be established in that Department. That unit is to have the responsibility for training the bureaucracy and/or have an ongoing advisory and co-ordinating role to assist Government Agencies in dealing with requests for release of information.

Conclusion

I think it can be seen from the foregoing that the Tasmanian Act has the widest scope of any FoI legislation in Australia and it may also be the most open. However, despite this, it must be recognised that in order to work effectively the Act will require the commitment of the bureaucracy. It is critical that people working in public sector agencies should be aware of their obligations and the processes under the Act before it takes effect. To this end a properly resourced FoI Unit is essential to train and educate the bureaucracy in relation to their responsibilities under the Act.

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Access to public records in Victoria — the 30 year rule

Since World War II, the 30 year rule has been adopted by an increasing number of governments all over the world as the basis for the release of government records for public study and historical research. Under these arrangements, the majority of government records are handed over to the archives authority and made available in search rooms.

The key features of a 30 year rule are:

mandatory transfer of records to the archives authority within 30 years;

a statutory right of public access to government records after 30 years;

unlike Freedom of Information (FoI), access is given on request, without delay, without charge, and without limit;

a formal procedure for 'closing' selected records after 30 years for specified periods;

- some statement or policy outlining the basis upon which such records are closed;
- a procedure to periodically review closures until all records are eventually released.

It is under these policies that every 1 January newspaper stories appear detailing Cabinet deliberations and other 'secret' government activities of the past as each new crop of documents is released by, for example, the Public Records Office (PRO) in London and the Australian Archives in Canberra.

Although the position varies from government to government, it may be fairly claimed that most records (about 80% seems a fair average) are opened after 30 years. Of the remaining 20%, the common experience is that almost all (quantitatively) are withheld from general release on grounds of personal privacy — e.g. health and welfare case files, police records and the like relating to individuals.

This is not to say that governments willingly give up their secrets even after so long an interval. Complaints are constantly heard about how governments continue to withhold records of most interest to them even after 30 years — on various grounds and by various methods.

How FoI relates to the 30 year rule

More recently, however, FoI has given stronger access rights to government records less than 30 years old and a refusal to release records under FoI can be appealed against to an independent tribunal. In consequence, it is necessary to strengthen access rights to older records. The question is: how should this be done?

The kind of access given under FoI is quite different from that given through archives arrangements. FoI access is not free. The applicant has to specify in advance which documents are wanted and to wait (up to 45 days in Victoria) to see them. If the documents are released and a scrutiny of them leads to a further request, the whole process begins again.

It is this essential difference between FoI and archival access which is of most immediate concern to users of archives. It is an essential part of the research process that the researcher is able to scrutinise the records to discover the records he or she wants. This search of the records is an integral part of the research process, involving (in many cases) as much time as a reading of the records once they are found. The way records are scrutinised and selected before the actual study of them begins is not merely incidental to the research process,

a cumbersome but unavoidable preliminary. It is an integral and vital part of research in archives which is not available under FoI procedures.

For this reason (and because the volume of records to be searched is often large and FoI-type charges would be prohibitive), users of archives have a profound interest in ensuring that FoI procedures are not made a substitute for release of records for inspection under public records arrangements.

The 'FoI gap'

The potential conflict is not at first apparent. FoI is usually limited to the most recent records. In Victoria, it applies only back to 1978. There would be no overlap with a 30 year rule until 2008. Eventually, however, the same records would be subject to both systems.

In building an archives system for the next century and beyond it is necessary for Victoria to decide within this decade whether to replace FoI with a public access system once records reach the magic 30 years. The Commonwealth Government, for example, limits FoI to records less than 30 years and substitutes archives procedures after that time.

This impending choice — whether records should be available for research under archives or FoI procedures — cannot be avoided. It might seem a long way off but the vast quantities involved will require much groundwork. In 1992, ten of the 25 years available to sort this question out will have been frittered away. The clock is ticking and time is growing (slowly but inexorably) short.

It was to find a satisfactory method of dealing with these problems that the Legal and Constitutional Committee of the Victorian Parliament (LCC) directed its attention when it set out, in 1988, to examine the interrelationship between FoI and the *Public Records Act*. That investigation was directed primarily at proposed changes to FoI itself. The archives issue was one of four references dealt with in the Committee's 38th Report to Parliament in November 1989.

As a result of its investigation, the LCC recommended introduction of a 30 year rule in Victoria.

What the Committee did

In June 1988, the Committee issued a Discussion Paper which canvassed the major issues in the terms of reference. The Discussion Paper posed specific questions for consideration by the community. Seventy-two written submissions were received.

The Committee then held public hearings. It invited 43 separate individuals and organisations to address it in person.

The options

> The aim of any proposed scheme for integration must be to ensure that the most appropriate system of access to public records is operative at each stage in a document's life. However, there are essential differences between the systems. The FoI system is concerned purely with access delivery, while the public records system involves preservation of records and a commitment to cost/benefit advantages in records management (see Mr C. Hurley, Keeper of Public Records, transcript of Evidence, pp.633-635).
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> *LCC 38th Report, p.116.*

The Committee developed three Models for integration of the two systems.

Model One (the Commonwealth Model)

This Model involves limiting FoI entirely to records less than 30 years old. After 30 years, a completely new system of access is to be administered by the Archives. Records are released in Archives' search room for public inspection and free of charge (unlike FoI) but in all other respects the process is the same. The Archives is required to examine documents to determine which are open and which are closed. Applicants can appeal against closures to the Administrative Appeals Tribunal (AAT) in the same way as under FoI and the Archives must defend its decisions in appeal.

Model Two (the 'Victorian' Model)

This Model also restricts FoI to records less than 30 years old with one important exception — FoI continues to operate over 'closed records' (about 20%) after 30 years. Instead of examining all documents to determine which are open and which are closed (as in the Commonwealth Model), the PRO would continue its existing practice of releasing and closing whole 'consignments' of records — leaving about 20% of records in closed consignments after 30 years. These closed consignments would continue to be subject to FoI until released under the archives system. Under this Model, government agencies would continue to administer access to closed records under FoI and they would defend appeals to the AAT until the records are released.

Model Three (Building on the Existing System)

Under this Model, the overlap between FoI and archives access would continue. At present, records may be available under FoI until they are released by the PRO. Under s.12 of the *Public Records Act*, records must be transferred to the PRO after 85 years but may be withheld by unfettered Ministerial discretion for a further 25 years. The 85 year transfer requirement is widely ignored. If the Government persists in leaving most of its records outside the PRO scheme, a time will inevitably come when FoI will be the only way to see most of them.

Argument

Given the choice between these three models the weight of opinion favoured Model Two. Even the Government (compelled for once to take its head out of the sand and consider the long-term implications of what it was doing — or failing to do) preferred this alternative.

As Chris Hurley pointed out before the Committee, the cost savings from public records reform are prospective. The Government is now spending far more on its non-current records than it needs to as a result of its past neglect.

But this situation was predicted in 1970 (the PRAC Report) and in 1979 (the Records Management Task Force Report). It could have been avoided if the recommendations of those reports had been implemented. It will now cost more to remedy that neglect than to leave things alone.

Similarly, the consequences of further neglect have been predicted (the O'Brien Report of 1990). The important point is that we cannot change the past, but the future remains within our control. If the Government persists in its do nothing attitude, we know what the consequences will be. Ten years from now some committee will look back on another decade of neglect and conclude the whole business could have been managed more cheaply

if only the program of public records reform had been implemented. For this reason the program of change recommended by the Committee must be supported.

> In considering the integration models before it, the issue of cost efficiency has been given particular emphasis and consideration by the Committee. It was told by Mr Hurley that 'there is no question that the cheapest available option is to do nothing. Any movement from this point to change the system in any one of the directions indicated by the discussion paper will result in increased Budget allocations somewhere' (Transcript of Evidence, p.639). The consequences, however, of doing nothing are severe, in terms of current anomalies in the level of access to public records, and, indeed, the evidence before the Committee has indicated that it will in fact be necessary to expend money in this area in order ultimately to save it.
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> *LCC 38th Report, p.133.*

The reasons for this are simple. The FoI clock is running. The economic consequences of neglecting the records management implications are already apparent. The results of failing to reform the access system will begin to become apparent in 2008 when records due for release under a 30 year rule would be available only under FoI. At this point (and thereafter) the cost of continued failure to implement the Committee's recommendations will begin to bite and will thereafter bear ever more harshly on successive governments.

All this is true of the mountain of records created by past neglect. It can be said now that we are paying the economic cost of the past failure to manage public records better.

No defence can be offered in the future by those who continue to neglect to put the problem of the ever expanding mountain of public records in government agencies under proper control. As the O'Brien Report demonstrated, no further expansion of the public records backlog (even apart from the impending problems of public accessibility) can be justified on funding or any other grounds.

On the Government's own arguments of funding constraint, it is inexcusable to allow the volume of non-current records in government agencies to grow any larger. The PRO's method of dealing with those records through secondary storage and disposal programming is demonstrably the only fiscally responsible course. If it were directed towards no more than containing the waste to current levels (created by past neglect), no government genuinely concerned with funding restraint could fail to implement these changes.

What to do about the backlog is, in one sense, a different issue. Were it not for the ticking of the FoI clock, it could be left (on purely financial grounds) where it is until it rots but for one thing. Within a foreseeable measure of time, an increasing proportion of the backlog will become available for research only under FoI. When this occurs, the Committee was under no doubt that the release of records for research under FoI procedures will cost the Government far more than if these same records had been appraised and dealt with in an orderly manner under PRO procedures.

The resourcing issue

The LCC gave extensive consideration to the resourcing implications of its recommendations. The Committee concluded, as every other study of public records reform proposals — the 1970 Report of the Public Records Advisory Committee (PRAC), the 1979 Report of the Task Force on Records Management, and the 1990 O'Brien Report — has concluded, that cost savings through better management of records offset the increased budget spending at the PRO required to give effect to them. The resulting cost reductions in other votes exceed increased budget expenditure at the PRO.

To put the matter another way, if all the alternative methods of treating the vast quantities of non-current public records are set out as options, the PRO program (including all the 'incidental' benefits of improved preservation and public accessibility) is the cheapest. The only way that the public records reform program can be represented as an increased funding requirement is by turning a blind eye to cost savings in other parts of the Budget. When the two are considered together, as each of the reports cited has done, financial considerations lead unavoidably to the conclusion that the public records reform program is cheapest.

The intrinsic benefits of those aspects of the reform program leading to improvement in the archival/heritage aspects (which the Government is trying to present as a neglected alternative to better records management) are indisputable. Yet the Government and its advisers continue to resist it. Why?

In part, as we have suggested elsewhere, it is because the reform program extends public records procedures into current record keeping which this Government finds unpalatable.

In part, it is because the Government and its advisers are now faced with disowning past policy if they adopt the program so plainly resisted for so long. In part, it is because this Government simply could not be bothered, during the free-spending 1980s, attending to simple housekeeping matters while it was pre-occupied with other less mundane priorities.

At this time, when the need for more prudent management of resources is paramount, it is not a little ironic that the neglect of this major reform is justified on grounds (however spurious) of financial restraint.

There is some justification for the Government's reluctance to embark upon a program of public records reform. The increased expenditure will be required mainly in the PRO's Budget allocation. The cost offsets will be realised in the Budget allocations of other agencies. Government budgetary procedures are admittedly not good at recovering offsets achieved in one program by expenditure in another.

It can be done, but it is hard. There is some defence, therefore, for the neglect of the past few years, but not much. What it comes down to is this: they couldn't be bothered.

It was to provide a mechanism for translating those cost savings into real dollar returns to Treasury that the former Keeper fought so hard and for so long to introduce intra-governmental charging for PRO services to agencies. In 1989-90, Chris Hurley's last full year as Keeper, PRO revenue met the targets on the basis of which Treasury approval for charging was eventually given. They have fallen well below target since.

What can be achieved in this way is demonstrated by archives elsewhere (particularly in New South Wales) which, starting from a similarly small revenue base, have moved to a position where a substantial part of cost is recovered through intra-governmental charges and the proportion of cost-recovery continues to improve.

No-one suggests that reform can be achieved effortlessly. It will take hard work and persistence. Above all, it will take a change at the top. Government must make a commitment to get the thing done. It is worth doing,

however. The economic return for the Government is substantial and demonstrated. The public policy benefits are equally clearly worthwhile.

It is worth fighting for.

The Government seeks to obscure the consequences of its own neglect and, in so doing, is seeking to discredit the only feasible plan for getting out of the mess it has created.

The incoming Labor Government of 1982 cut funding for the program of change begun in 1973. It stopped funding new shelving at the Laverton repository which has prevented the PRO from doing its work.

It did this either because it was unconvinced by the cost benefits, had other priorities, or simply mistook the nature and benefit of the program. When the financial consequences of this policy were pointed out in the Keeper's Reports, the Government grew resentful and preoccupied with silencing criticism. Its chosen tactic was to deny the validity of the economic argument which was the basis for the reform program. The Government (together with a number of senior policy advisers who have had the implementation of this tactic and whose reputations are now consequently tied up with denying the validity of the economic argument) is now locked into an alternative program — Archival Heritage. The Government and its advisers cannot afford to acknowledge the validity of the financial argument without acknowledging the error of past decisions — a thing they are now unwilling to do.

The Government is entangled in a great paradox. The 1970 PRAC and the 1989 LCC Reports both identified a vast and growing mass of material lying neglected outside the PRO. The archival/heritage goals of the public records program cannot be realised within the constraints of 'available funding' unless corresponding offsets are achieved through the total package of public records reform. The only way the Government can save an 'archival heritage' from this mountain of records is to abandon its mistaken policy and accept the fiscal arguments for the package as a whole.

The whole problem, in access as in all other aspects of public records policy, is its stubborn refusal to do so.

Where to from here?

The 30 year rule is not merely incidental to public records reform. It is a central plank in the program of change conceived, developed and advocated for over 20 years through a succession of reports and studies including the unwelcome annual reports of the sacked Keeper.

Those opposed to public records reform know they must take the heart out of the advocates of change if they are to retain the *status quo*. Opponents of change in this or any other sphere of public policy habitually have recourse to two powerful lines of argument —

'It isn't practical'

This, essentially, is what the Government's response to the Committee's recommendations amounts to. Yes, it acknowledges, what you want is all very well but we cannot afford to have everything. The Government has many calls on the public purse. Our current financial commitments do not allow us to do anything about it right now. Wait until the effects of the recession (or the drought, or the bushfires, or whatever else comes to hand) are over; then we might consider it.

When these excuses for delay wear thin, others (however implausible) are used. Why not microfilm everything? Why not 'educate' agencies to look after their records better? Why not launch a rocket and put everything on the moon? Such suggestions can only be made if the audience to which they are addressed is confused as to the essential facts of the situation and the policy objectives to be achieved.

An articulation of the facts and a determination of the policy objectives must remain at the heart of the discussion so that such obfuscation can be shown up for what it is. Pedlars of this line must be forced to show why it is not practical for the PRO to do what other archives do as a matter of course.

The current threadbare response is to suggest that, while there are problems in the management of public records, these can be solved if the PRO shifts its emphasis away from 'hands on' work in disposal and secondary storage to raising the profile of records management in agencies through 'education' and 'advice'.

How is this to be done? All the PRO's publications addressed to agencies in the areas of records management are being rewritten to replace PRO by 'Archival Heritage'. The PRO's records management training program (suspended while the new charging policy was being introduced) is being dusted off while revenue targets fall behind. The substance remains unchanged but the image is new. There is nothing wrong with revitalising records management training, but it is no substitute for real achievement in disposal and secondary storage.

'It isn't effective'

This is an even better line because it denies the force of logical argument. 'You may be right' opponents of change say 'but no-one is listening. Stop beating your head against a brick wall. Politicians don't understand public records reform. They understand archival heritage. Win their support first by stressing heritage values instead of public records reform and then an understanding of the rest will follow.'

Perhaps only Lewis Carroll could do it justice: 'It's no use telling me to look at a rose,' the Queen said crossly, 'I can't see roses today, only tulips. Why don't you call it a tulip? Then I might be able to see what you hold in your hand.' 'But it isn't a tulip,' said Alice (close to tears), 'it's a rose.' 'I can't help that,' said the Queen. 'You must either tell me it's a tulip or come back tomorrow. I may be seeing roses then.'

However persuasive the arguments for reform, they can be dismissed — not because the changes cannot be implemented (their introduction elsewhere proves they can) but because, it is claimed, change will not be implemented. The Government's own obstinacy is used as an argument for abandoning the reform effort.

Is it true that politicians cannot understand public records reform? Of course not. They have tried hard to thwart it. No fewer than four hostile 'reviews' were mounted during the last decade to derail the reform package. The efforts of successive Ministers to silence the reform argument demonstrate, if nothing else, that it was understood. Archival Heritage is not a new pathway to win the hearts and minds of politicians over to public records reform; it is the politicians' chosen weapon to derail it.

Is it true that heritage values were being sacrificed while the former management of the PRO wasted time in the futile pursuit of unattainable goals? Again, no. There is no conflict between trying to improve the system and, in the meantime, getting on with the ordinary work

of the PRO. Through records management, disposal, transfer, preservation, publication and delivery of public services — the PRO has always done just that. This work has not been 'neglected' while demonstrating the advantages of doing things better.

The danger in the Government's attempt to make it appear otherwise is that the PRO will be forced to abandon its proper work — simply those things which it (in common with archives all over the world) has been doing so well for many years within the limits of the resources available to it — to embark upon a program of peripheral activities.

So far, fortunately, this danger has not been realised. The 'new' program has very little which is new about it. Mostly, it involves a name change and attempts to present what PRO has always done as something fresh.

So long as this is all that happens, it will remain contemptible but not dangerous.

The paradox for those continuing to advocate change, however, is that our efforts may provoke those who oppose change into converting their rhetoric into reality. Then the PRO will be deprofessionalised and cease to do what it ought to be doing.

This danger is inherent anyway in the continued siphoning of limited PRO resources into the showy non-productive methods inaugurated by Minister Ian Baker and continuing under Jim Kennan which are designed to give the impression of new accomplishments. Promises given at the time that these would not draw upon existing PRO resources were hollow. Despite the danger, the Public Records Support Group is committed to continuing to present the arguments for reform.

Resource neutral recommendations

Even if the Government is not convinced of the economic arguments for changing the public records system along the lines recommended by the LCC, there are some recommendations which involve no resources. The Government response to these (Recommendations 21, 25, 30 and 31) was the same mindless incantation 'Accepted, subject to resourcing implications'. As they had no resourcing implications, the qualification was quite unnecessary. This has not stopped the Government failing to live up to its promises on these recommendations any more than it has on all of the others.

Recommendation 21: That the Public Records Act be amended to introduce a 30-year open access period for Victorian public records.

Nothing prevents the *enactment* of the statutory provisions giving effect to the LCC reforms. The Committee left it open to the Government to decide the timetable for *implementation*. Meanwhile, the drafting and enactment of the necessary statutory amendments could be proceeding. Such laws can take up to two years to get through. Two years have passed since the government pretended to accept these recommendations for statutory amendment. *Nothing has been done!* Yet this same Government was quick enough to try (unsuccessfully) to amend the Act to give substance to its silly and discredited archival heritage program earlier this year.

Recommendation 25: That the procedure for closure of records under ss.9 and 10 of the Public Records Act be replaced with the more comprehensive criteria in Part III of the Freedom of Information Act. Further, criteria should be added to allow for the closure of records where the preservation, restoration or value of records require (allowing a copy to be made available if possible).

This recommendation proposes that the Minister's unfettered discretion to withhold records from public inspection should be replaced by stated criteria for closure set out in the Act which would be similar to the FoI exemption categories with additional grounds for closure peculiar to the PRO (e.g. preservation).

Recommendation 30: That the Public Records Act be amended to include a provision equivalent to s.62 of the FoI Act providing PRO staff with protection from defamation or breach of confidence actions.

This recommendation, if enacted, would simply give PRO staff the same statutory protection from action for libel, damages, etc. as enjoyed by officers giving access under FoI and should clearly be implemented regardless of any other consideration.

Recommendation 31: That the archival status of registration and revenue generating public records be reviewed.

This recommendation recognises that certain categories of records already available for a fee (e.g. Births Deaths and Marriages; Land Titles) may have to be treated differently from the norm.

Public Records Support Group

This article is reproduced with permission from the Public Records Support Group's Newsletter. The Public Records Support Group was set up in October 1990 following changes at the Public Records Office Victoria, changes which members believe threaten the State archival authority's role and purpose. The group's main aim has been to publish a Newsletter as a forum for discussion of issues raised by these changes.

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