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.

Unless otherwise indicated, the ma[illegible] this article stems from that Report.

Administrativ law and contracting out

The Report was informed by two central principles. First, the Council considered that the contracting out of government services should not result in a loss or diminution of government accountability, either to individuals or to parliament. Second, contracting out should not negatively affect the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service. The Council also considered that the government, rather than individual contractors, should normally be responsible for ensuring the accomplishment of these principles. The Report's recommendations fully reflect these principles.

The concern of the Council was that administrative law, at present, is incapable of dealing with the increasing use by the government of contractors to provide its services. This is because the current law is predicated on the government being the entity which conducts governmental business, and does not extend to instances where governmental functions are carried out by private parties. For example, if an individual wishes to obtain information from the government, they may request this under the *Freedom of Information Act 1982* (the *FoI Act)*. The *FoI Act*, however, will be of little assistance to that individual if the information is held by a contractor. In its current form, the *FoI Act* covers only documents that are in the government's possession. In fact, the only document to which an individual may be able to get access, is the contract itself.

Similarly, if an individual is unhappy with a decision made by a government agency affecting their interests, they may be able to seek reasons for that decision and have the decision reviewed by an independent tribunal. However, if the decision has been made by a contractor, review by an independent tribunal may not be available, because the decision is beyond its jurisdiction.

Avenues of redress in lieu of these administrative law remedies, including contract and tort law, consumer law, and industry complaints schemes, do not adequately fill the gap. There has, therefore, in practical terms, been a substantial reduction in individual rights and government accountability associated with contracting out.

The Contracting Out Report

The Report considers four main issues of concern to the continued operation of the administrative law system:

maintenance of access to information about contracts by the Parliament, the Auditor-General and members of the community;

the obligations of agencies in relation to contract drafting, management and monitoring, and in relation to the recording of information about contracts;

ensuring the adequacy of arrangements to handle complaints about contractors and to resolve disputes involving the provision of compensation for loss or damage; and

the rights of individuals to review decisions made by contractors that affect them.

This article will focus on the Council's views regarding access to information.

The situation at present

At present, members of the community may gain access to information held by government agencies through the operation of the *FoI Act*. This not only enables individuals to gain access to, and where the need arises, correct inaccurate information about themselves, it informs individuals of how decisions were made, promotes open government and allows parliamentary scrutiny of government actions.[2] Where government services are carried out by a contractor, many personal records and much information will naturally be held by the contractor, rather than by a government agency. Because the *FoI Act* does not apply to private entities, those rights to information that the community currently has *vis-a-vis* the government become very limited. At the moment only information in the government's possession relating to the service delivered by the contractor is available under the Act.

Possible mechanisms for preserving information access rights

The Council considered five options for ensuring that access to information is not lost or diminished through the contracting out process. These were:

- extending the *FoI Act* to apply to contractors;
- deeming specified documents in the possession of the contractor to be in the possession of the government agency;
- incorporating information access rights into individual contracts;
- establishing a separate information access regime; and
- deeming documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government agency.

The Council favoured the last proposal. Each proposal will be discussed in turn.

Extending the FoI Act to apply to contractors

Implementation of this proposal would extend the *FoI Act* to contractors providing a government service in respect of documents relating to the provision of the service. This option could be implemented by extending the definition of 'agency' in the Act to include private sector contractors. There is a concern, however, that if requests for access to documents could be made directly to the contractor, rather than the government, this would shift the responsibility for the maintenance of access to information rights from the government onto the private sector. In keeping with the principles established at the outset of the Report, the Council believed that it is the government which should bear this responsibility.

Deeming specified documents in the possession of the contractor to be in the possession of the government

It is also possible to amend the *FoI Act* to provide that any document that the contractor must supply to the government under the terms of their contract is deemed to be in the possession of the government once the document comes into existence. Under this proposal, access to important information could be lost in the contracting out process if sufficient skill and foresight were not exercised at the time the contract was prepared to identify the

documents which the contractor was obliged to create and provide to the government. Further, if there is no provision in the contract for the creation and provision of the documents by contractors, or if the relevant provisions suffer from lack of clarity and preciseness, the proposed deeming mechanism may be ineffective.

Incorporating information access rights into individual contracts

Under this proposal, access to information rights would arise by establishing an access scheme in the contract itself. Contracts for the provision of government services could incorporate terms which require the contractor to disclose specified documents to either the government or to the service recipients. The difficulties with this proposal are manifold. First, access to information would depend entirely on the terms of the contract. Second, a situation where public information rights are bargained away in the contract negotiation process may arise. Finally, by reason of the privity of contract principle, only the government would be able enforce the information access scheme. It follows that public information rights would then be dependent on the government's willingness to enforce the terms of the contract.

A separate information access scheme

Another option would see the establishment of a new statutory information access scheme which applies specifically to contracted out services. This regime could either be entirely separate from the current FoI regime, or it could operate as an adjunct to the present Act, laying down certain requirements for disclosure specific to government contracts. This proposal, however, would involve the duplication of the existing FoI regime.

Deeming documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government

This proposal recommends that the *FoI Act* be amended to provide that all documents in the possession of the contractor that relate to directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government. Applications for information could then be made through the existing *FoI Act*. An additional amendment of the Act would be required to ensure that contractors have a legal obligation to provide the relevant documents to the government when an FoI request is made.

There is, of course, scope for disagreement between the contractor and the government or member of the community as to which are the documents which relate specifically to the performance of the contract. This is in contrast to the relative certainty that would prevail if the types of documents were spelled out in the contract for service. It should also be noted that the effectiveness of a scheme established in line with this proposal would depend on the inclusion and enforcement of terms in the contract relating to appropriate record-keeping obligations.[3]

The advantage of this proposal, however, is that it is not limited to those documents that are identified at the time the contract is signed. It also ensures that individuals have access not only to personal information, but also to a wider range of information necessary to ensure the accountability of the government as well as of the contractor. In addition to personal information, this proposal would cover records such as staff instructions and running sheets which may provide important information about the way in which the service is actually delivered to service recipients.

At the same time, the proposal recognises that not all documents held by the contractor will be relevant in terms of public access. In particular, contractors would wish to protect their business interests from inappropriate disclosure of commercially sensitive information. This proposal, therefore, would not require contractors to provide access to documents, such as records of suppliers, sub-contractors, and so forth, which do not relate directly to the performance of the contractual obligations. Indeed, records of this type are unlikely to be of value to individuals who are experiencing problems with the service delivered by the contractor. Nor is it likely that excluding documents of this type would hamper community and parliamentary scrutiny of government agencies.[4]

The Council felt that the merit of this proposal outweighed concerns of uncertainty about the types of documents which relate directly to the performance of a contract. As against the other proposals examined it has several advantages:

- it avoids the constraints of needing to prescribe in the contract for the provision of services those documents intended to be accessed by individuals;
- it provides access to a wider scope of documents than simply those to which the government is legally entitled;
- it ensures that FoI rights will not be bargained away in the contract negotiation process;
- members of the community will continue to be able to enforce their FoI rights directly in the courts; and
- it ensures that the government remains responsible for the access to government-related information.

An FoI commissioner

To monitor the effect of contracting out on FoI access, the Council recommended that a statutory office of FoI commissioner be set up. The commissioner's functions would include auditing the government's FoI performance, providing FoI training to the government, and providing information, advice and assistance in respect of FoI requests. It would also be within the compass of the commissioner's duties to develop guidelines on how to administer the Act. Failing the establishment of an FoI commissioner, the Council was of the opinion that the Attorney-General's Department should be responsible for the issuing of guidelines on how the exemptions to the Act should be administered (discussed below). The Council also recommended that all agencies involved in contracting out should provide regular training to staff on the meaning and operation of the *FoI Act*.

Exemptions in the *FoI Act*

The *FoI Act* contains a number of exemptions to the release of information. Two in particular, were of concern to the Council in the contracting out situation. These were the 'confidential information' exemption (s.45) and the 'documents relating to business affairs' exemption (s.43). Because of its business connotations, in the contracting out situation these exemptions may be used more frequently (and inappropriately) to withhold information from the public. After due consideration the majority of the

Council did not recommend changes to the exemptions to the *FoI Act*.

In the case of the s.45 exemption, the government has to establish the elements of a general law breach of confidence action. The elements of such an action are onerous, in particular the requirement that a given document must be 'inherently confidential'. Therefore, the mere fact that a document is marked confidential, or that the contractor and government agency have agreed to treat it as such, would not suffice to bring the documents within s.45.

Similarly, the categories of documents to which s.43 applies are quite limited, and do not cover ordinary business matters. Generally, this exemption would only apply where the release of the information would be reasonably likely to have an adverse effect on the contractor's business affairs and such an adverse effect is unreasonable.

The role of the FoI commissioner in issuing guidelines and training, as well as overseeing agencies' FoI performance would be especially important in relation to these exemptions. The majority of the Council, therefore, was of the opinion that with appropriate guidelines, and subject to its being used correctly, the legislation, in its current form, would not inappropriately exclude information.

In contrast, a minority of Council members were of the opinion that guidelines would not be enough, in practice, to prevent a diminution in FoI rights in the contracting out context. They proposed a number of legislative amendments which would apply in the contracting out situation. In particular, they suggested that ss.43(1)(b) and 43(1)(c)(ii) be furnished with unreasonableness tests. In this way s.43(1)(b) would exempt information only if disclosure would be unreasonable. Section 43(1)(c)(ii) would exempt information only if disclosure would unreasonably prejudice the future supply of information to the Commonwealth. In the case of s.45, documents would not be exempt if it were in the public interest that they be disclosed.

Conclusion

The task of balancing the rightful wish of contractors to preserve their business interests against the legitimate anxiety that there will be a rise in the number of documents claimed to be exempt under ss.43 and 45 is but one of the difficult issues dealt with in the Council's Report. Current developments in governmental processes and their consequences on the administrative law system merit a wide debate, not only regarding FoI, in all interested quarters. The Council's Report will provide a framework for this debate. Arguably, if its recommendations were implemented, they would provide a fair, effective and inexpensive means of ensuring the continued realisation of the aims for which the administrative law system was initially set up.

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The views expressed in this article are personal to the author, and should not be taken to be those of the Council.

Copies of the *Contracting Out of Government Services Report* are available on:
http://crgow1/webvol/WOTL/aghome/other/arc/arc42_report/arc42.htm.
Otherwise, contact the Administrative Review Council:
Tel: +61 2 6250 5800. Robert Garran Offices, National Circuit, Barton, ACT 2600.

References

1. *Contracting out of Government Services Report*, Report No. 42, August 1998.
2. Australian Law Reform Commission and Administrative Review Council. *Freedom of Information*, Discussion Paper 59, May 1995.
3. ibid.
4. Administrative Review Council, *The Contracting Out of Government Services: Access to Information*, Discussion Paper, December 1997.

FoI, the Crimes Act and Yes, Minister

The lessons of the following experience with FoI are both positive and negative. On the one hand, much of what was discovered would almost certainly not have come to light without FoI. On the other hand, what was found highlights practices and attitudes that need to change before the underlying open government purposes of FoI can be achieved. The implementation of a specific ALRC/ARC recommendation may be a step in the right direction.

In May 1995, I made the following FoI application:

> Access is sought to all documents relating to any study undertaken since 1 July 1993, and/or proposed to be undertaken, into the environmental consequences of any nuclear accident that might affect Australia. Such studies include, but are not restricted to, any relating to the accidental release of nuclear material in the Indonesian area.

The same application was sent to the Commonwealth Department of the Environment, and to the CSIRO.

At the time of the application some individuals and community groups were publicly expressing safety concerns about Indonesia's nuclear power generation plans. Moreover, it was well known to atmospheric scientists and to informed environmentalists that computer modelling tools existed to investigate the environmental consequences of hypothetical nuclear accidents. Since Chernobyl, many accounts of such investigations had appeared in the scientific literature,[1] and a few had appeared in the mainstream media. So one would not have needed to be Sherlock Holmes to suspect that the Australian government might have some interest in the same matters.

It turned out that there were indeed many documents within the scope of my application. They all related to a study commissioned by the Department of Foreign Affairs and Trade (DFAT). The purpose of the study was to investigate the environmental effects of a hypothetical accidental release of nuclear material from specified sources in the Indonesian area. Some documents, including those relating to the terms of reference of the study and its scientific methodology, were released. Other documents, relating to interim results of the study, which was still in progress, were claimed as exempt. On appeal to the Administrative Appeals Tribunal, but before the appeal could be heard, the DFAT agreed to provide deferred access to the documents it had previously