

FREEDOM OF INFORMATION AND DEMOCRACY IN AUSTRALIA AND BEYOND¹

Freedom of Information laws (FOI) throughout Australia have been routinely studied by law and media scholars. These authors have revealed widespread challenges to functioning FOI regimes, which range from government hostility to public sector restructuring to globalisation. Nevertheless, analysts have failed to fully appreciate and explore the symbolism of FOI. Access laws are situated at the very heart of state and citizen relations, they are especially sensitive to broader assumptions about citizenship and democracy. This paper aims to explore this sensitivity through a contextual examination that is as much about democratic theory, as it is about access law. Many of the deficiencies outlined by various studies, it is argued, can be best viewed as a cluster of concerns that relate to one major problem—a lack of popular sovereignty. Australian and global democracy must be viewed and conducted in a more generally robust manner in order to strengthen FOI.

¹ This article has been submitted for publication—confirmation is pending. Rhys Stubbs at University of Tasmania (rbstubbs@utas.edu.au)

Introduction

Freedom of Information legislation (FOI) provides citizens with a universal right to access documents in the possession of government departments and agencies (with minimum exceptions relating to national security and privacy, for example). Information rights were first adopted by Sweden in 1766. The United States enacted FOI legislation in 1966, whereas New Zealand and Canada did the same between 1982 and 1983. The Federal parliament of Australia also enacted FOI in 1982, with the States and Territories all embracing similar legislation (with some variance) in the space of just over two decades of the Commonwealth. A progressive explosion of information rights has occurred at the beginning of the 21st century: roughly two thirds of all existing FOI laws (40 of 66) were introduced between 1999 and 2005 (Ackerman and Sandoval-Ballesteros 2006, 98). The legislation has gradually become a badge that symbolises the existence of ‘true’ democracy.

The rationale for FOI law is democratic. At a basic level, access to government-held information is essential for the populace to participate effectively in policy formulation, within the arena of open and accountable government. Moreover, some argue (cf. Roberts 2006, 166) that access to government-held information forms the cornerstone for the realisation of a number of fundamental human rights.² So, in addition to ensuring open government through information disclosure, the laws contribute to freedom of expression and opinion by increasing the amount and nature of information available. Recently, FOI has been regarded as a ‘tool for market regulation, more efficient government, and economic and technological growth’

² For instance, Article 19 (www.article19.org) is an international NGO that pursues human rights through the liberalisation of information.

(Blanton 2002, 50). Above all, however, the right to information is increasingly seen as a basic political participation right within the context of substantive democracy; and this clearly relates to participatory and accountable government, as well as freedom of expression and opinion (Ackerman and Sandoval-Ballesteros 2006, 88-93).

Australian FOI

FOI in Australia has been heavily scrutinised. The laws have understandably been predominately studied by legal scholars, focusing on interpretation and functionality (cf. Bayne and Rubinstein 1994; Paterson 2005; Snell 2001a and Zifcak 1991). Media analysts have also examined access law, with an emphasis on the use of FOI in journalism (see Lamble 2004 and Lidberg 2001 for example). Both schools of analysis have revealed different aspects of a failing system. A critical conclusion drawn from both fields would suggest that the Federal, state and territory statutes are, to different degrees, inept, and therefore unable to be used effectively by the media. Nevertheless, FOI has rarely been studied from the point of view of political science (Snell 2000, 28). The task of this paper is to begin filling that gap.

Of the utmost importance to this endeavour is the (perhaps elementary) assumption that the manner in which access law operates is likely to be heavily influenced by broader conceptions relating to citizenship and democracy. FOI, an intricate link connecting the citizen and the state, runs across not only legal but bureaucratic and political lines (cf. Snell 2000, 615). The paper draws on this assumption of sensitivity in a historical and institutional examination of FOI that aims to demonstrate how a number of issues that confront Australian FOI (and other access regimes) relate to general trends in governance. In short, the central thesis of this

paper is that the problems of access law can be better addressed by looking outside the legislation itself, to the nature of the political framework in which it is embedded.

FOI stems from the liberal democratic paradigm. However, the relationship between FOI and liberal representative democracy is not devoid of complexity and contradictions. Liberal democracy is founded on notions individualism: limitations are placed on public involvement in government and the public sphere itself in order to prevent the creation of an all-powerful state. Citizens are allocated certain rights, such as freedom of speech, freedom of the press and universal education, for instance, to enable checks on the activities of representatives. Such privileges are negative in nature, they do not necessarily allow for formal participation in government. Other rights, like voting, are more positive. FOI represents a positive right that could provide citizens with a generous formal avenue in which to participate in governance. A mechanism for 'thick' democracy, the philosophy of FOI has the potential to clash with the fundamentals of liberal citizenship in the context of the nation-state.

Democratic Innovation

Like its monarchical predecessor, the conventional Westminster political system typically had a closed nature. Official Secrets Acts and a general ethos of guarding information characterised Westminster public administration in line with certain conventions in government (i.e. Cabinet solidarity) (Terrill 2000b). Until recently, representatives governed society with little interest in direct accountability to citizens (O'Faircheallaigh et al. 1999, 208). Hence, until recently Australian governments were under no obligation to release information and stringently reserved the right to disclose information or not (SSCLCA 1979, 35-39). The public service was (and is)

forbidden from releasing unauthorised information, because of its apparent non-partisan nature (SSCLCA, 25-27 and 33-55).

Alterations were made to the generally closed structure of the Australian liberal Westminster system between the 1960s and 1980s. Change was propelled during this time by a series of official inquiries, including the Federal Coombs and Victorian Bland Inquiries, for instance, that found the public service to be cloaked in secrecy and isolated from the community (Caiden 1990, 39-41). As a response to such findings, 'New Administrative Law' (NAL) was widely introduced as a reform agenda to increase transparency in government. NAL regularly entails four initiatives: the Ombudsman, Administrative Appeals Tribunal, Administrative Decision Review and Freedom of Information. Often referred to as a form of 'citizen-based accountability', a key function of NAL is the regulation of the relationship between the citizen and the state (Streets 2000, 5). While other NAL reforms have their own purposes, FOI aims to appropriately regulate the disclosure of public information within the framework of open government.

FOI is often considered a landmark in the development of Australian democracy. Hirst argues (2002, 339) FOI is as important as other signposts like the separation of church and state and universal suffrage. The key to the potency of FOI is in the intention of the legislation. In theory, FOI removes the power of the state, which typically existed under traditional monarchical and Westminster systems, to determine what community members' view of government affairs. Access rights mean the state no longer gets to decide what information sees the light of day. Convenient and damaging information are theoretically one and the same under the law and open to request; provided they are not legitimately exempt in the public interest.

The central objects of FOI in Australia are threefold and universal. They were originally made explicit by a 1979 Senate Standing Committee set up to review the first Australian FOI Bill. The Committee went to considerable length in discussing the philosophical issues and principles associated with FOI, finding ‘three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based’ (SSCLCA 1979, 21-22):

With certain national security exemptions... we believe that every individual has a right to know what information is held in government records about him personally... Second, we believe that when government is more open to public scrutiny, it in fact becomes more accountable... The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears... Thirdly, we believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself... Unless information is available to people other than those professionally in the service of government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at nought.

Institutional Resistance

Nations of the New World, such as Australia and New Zealand, inherited and, at times, championed the liberal democratic ethos, which derived from the work of thinkers like Thomas Hobbes (1588-1679), Edmund Burke (1729-97) and John Stuart Mill (1806-73). In accordance with the liberal philosophy of rational individualism, governing is the task of representatives, while the masses are principally disengaged citizens who vote once every few years. The conventional liberal Westminster system therefore provides that, outside elections, governments are horizontally and upwardly accountable through a structural framework consisting of constitutional provisions, legal requirements or conventional understandings (O’Faircheallaigh et al.1999, 208;

Dahl et al. 2003). Citizen-based or *downward* mechanisms of accountability and participation, like FOI, have been introduced into the liberal scheme only recently. Consequently, a form of institutional resistance has been widespread. New Zealand and Canada and have experienced varying degrees of government resistance to the idea of access rights (cf. Roberts 1999). However, the institutional resistance to FOI exhibited in Australia is perhaps unique and arguably the main reason why the local legislation has experienced an apparent shortfall in aims to increase accountability and participation in government.

Nobel Prize winner for economics, Joseph E. Stiglitz (2002, 33), argues the intention of FOI is to remove traditional unevenness of information possession in the public sphere. The way FOI has been introduced in Australia, though, perpetuates traditional information asymmetries between the citizenry and the state: one party continues to hold better and more information against the other. Representatives have historically held the right to withhold information from the public under notions of parliamentary sovereignty and responsible government: elections and parliamentary rules constitute accountability. The principle and manner of FOI introduced within the different Federal, state and territory jurisdictions do not fundamentally challenge this tenet (Snell 2006, 11). Instead, the laws have been designed so as to work around the assumption of closed representative government, forming a barricade that distinguishes what the public can and cannot access. This barricade means individuals are left to struggle for information with deficient legislation against governments with ‘institutional memory, specialised expertise and... a longer term interest in influencing the evolution of case law’ (Terrill 2000a, 31).

The trouble for Australian FOI began at conception. The campaign for our first FOI statute began outside government in the late 1960s and eventually proceeded

through two inter-departmental committees and a Senate Standing Committee.³ The inter-departmental groups, convened two years apart in the mid-1970s by separate Labor and Liberal governments, had the task of modifying the 1966 American FOI Act to suit the Australian political system.⁴ Both committees were considerably influenced by conservative thinking in the bureaucracy—documents relating to their proceedings remain secret to this day (Terrill 2000b, 98-99 and 101-104). The overarching argument put forth by influential parties within the public service was that FOI represented a threat to the Westminster system, in which confidentiality is said to be essential to the operation of certain functions (like the frank and candid advice of public servants). The two inter-departmental reports lacked vigour and vision; they were widely criticised by sources inside and outside government at the time of their release (*Canberra Times* 6 December 1974; Terrill 2000b, 106).

The Senate Standing Committee was convened in 1979 to review a draft statute produced from the conclusions of the second inter-departmental committee, engaging in considerable public consultation in the process (Terrill 2000b, 113). The Senate Committee (1979, 55) argued, in response to early opponents of FOI:

Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny.

And:

Freedom of information legislation does not relate to any specific system of government, be it Westminster, presidential or any other system. It is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to serve.

³ FOI also formed part of the well-known Royal Commission on Australian Government Administration (Coombs Inquiry). Draft legislation was produced during the proceedings of the Commission, but the Bill was not supported by the Commission as a whole and ultimately was included in the appendices of the final report (Terrill 2000b, 109)

⁴ Amending the American FOI statute involved taking into consideration differences between the American presidential system and the Australian parliamentary system. For example, cabinet confidentiality needed to be taken into consideration.

The Committee made substantial recommendations for modifying the draft legislation, aimed at a broader application and operation for FOI (ALRC/ARC 1995, 21). These were largely rejected by the Fraser Government, however, and the *Freedom of Information Act* passed by the Federal Parliament in 1982 largely resembled the uninspired Bill produced by the original inter-departmental panels.

The resistance to FOI displayed within the Federal arena has been replicated throughout the states and territories. Government bodies have shown opposition to the adoption of FOI in almost all arenas: statutes have been designed so as to fit most contentedly within a political system uncomfortable with high levels of public scrutiny. For example, in Tasmania legislation was passed in 1991 and commenced operation in 1993. Between these dates, the statute was amended to restrict access and oversight (Snell 2001c, 349). In New South Wales, legislation was enacted in 1989 and subsequent commentary indicates the law is in need of major reform. Despite this, the legislation has not been reviewed. More provocatively, in late 2006 the Labor Iemma Government opposed a Bill introduced by the Greens calling for an independent review of the law (Griffith 2007, 3). Similar attitudes have prevailed in other jurisdictions, although there have been moves of late to better the situation of FOI, particularly in Queensland and the Commonwealth (Merritt 2007; Independent Review Panel 2008 and Rudd and Ludwig, 2007).

The legislation produced through these compromises provides a number of ways in which politicians and public servants are able to rebuff unwanted requests. The 'conclusive certificate' is the most controversial and enables responding ministers to *conclusively* declare documents to be restricted on the basis that disclosure is not in the public interest. External bodies (courts, tribunals or

commissioners) may review these decisions to the extent that they are reasonable, but reviewers have no grounds on which to order the release of any documents in question. Conclusive certificates are generally linked to several important exemptions that prevent the disclosure of critical information. Cabinet exemptions, which help uphold the traditional ‘cabinet oyster’, have been readily used to withhold information. Similarly, documents relating to the deliberative process in departments and agencies are often considered exempt, because release may confuse the public and/or hinder the public service from delivering fearless advice. This is not to mention possible fees and delays that often deter requests.

Government Adversarialism

Australian governments, steeped in liberal representative institutionalism, have failed to adopt FOI comprehensively, resulting in a tempered emancipation of information. Agencies that typically receive requests for policy/administrative documents, critical type information, have been readily able to adopt an antagonistic stance towards applications. The prevailing opacity in these areas involves ‘...a practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected’ (Roberts 1998, 11). More specific characteristics of adversarial administration, notable across Australia, include (Snell 2001a, 27):

...the automatic resort to exemptions instead of trying to facilitate some degree of access; an ‘us versus them’ mentality; deliberate delays until near the end of mandatory time limits; poor or non-existent statements of reasons; rejection of fee waivers; and an agency perspective that views the external reviewer as an adversary.

The Federal FOI system is substantially hindered by an adversarial government culture. A 1995 investigation into the Commonwealth Act by the Australian Law Reform Commission and Administrative Review Council suggested a conflict between the old 'secrecy regime' and openness remained unresolved—thirteen years after the introduction of FOI. Its report noted that while some agencies had adopted a positive approach to processing FOI requests, applications can often '...develop into legalistic, adversarial contests' (ALRC/ARC 1995, 17-18). This view was supported in 1999 by the Commonwealth Ombudsman (1999, 13), who noted a greater use of exemptions in cases of requests for policy and administrative information. Moreover, there was evidence to suggest some officials have adopted at times a minimalist approach to information disclosure through the inappropriate application of exemptions. These types of conclusions were again reiterated by the Ombudsman in a 2006 report. In this case the Ombudsman suggested that some agencies had a firm commitment to the principles of FOI, while others exhibited less. In particular, there was concern about the timeliness in FOI request processing and the standard of exemption decision letters (Commonwealth Ombudsman 2006, 33).

Adverse behaviour towards FOI applications within some agencies has been noted in a number of states and territories. The New South Wales Ombudsman (Cossins 1997, 40) remarked in 1994 that some agencies 'find methods to deter applicants and frustrate the objects of the Act, without technically breaching its provisions.' A 2000 Legislative Review Committee (2000, 2) in South Australia heard evidence from a number of witnesses that there is a 'public service culture of antipathy and even antagonism to the concept of open government.' Similarly, the 2001 Queensland Legal, Constitutional and Administrative Review Committee heard evidence of persistent government secrecy. The Queensland Information

Commissioner (LCAR 2000, 11) submitted that ‘some government agencies have not willingly embraced the notion that they should be more open.’ Likewise, a 2001 parliamentary committee in the Australian Capital Territory (Standing Committee on Justice and Community Safety, 26-27) found ‘some public servants appear not to accept the spirit of FOI legislation and instead appear to believe it is appropriate to stymie the release of government-held information, particularly information likely to cause embarrassment to the Government and/or public servants.’ A recent investigation by the Victorian Ombudsman (2006, 4) unveiled malpractice within some departments handling FOI requests, including time delays and inadequate reasons for exemptions.

Judicial Conservatism

Departments and agencies have evidently felt the need to subdue the usefulness of FOI in accordance with traditions of Australian democracy. Review bodies might be expected to play a role in curtailing these activities. However, courts and tribunals have largely sided with officials, arguably because of the way Australian legislation has been produced. The attempt to modify American FOI law, which originally operated within an arena of mechanisms like the Bill of Rights, so as to fit into the secretive Australian political system produced adverse results. Broad categories of information have been withheld from the public upon notions of government paternalism, because of little emphasis on democratic objects and rigid exemption types within the legislation.

FOI exemptions predominantly rest on interpretations of the ‘public interest’. The ‘public interest’ is basically ‘an amorphous concept’ (ALRC/ARC 1995, 95) that helps determine if information should be released to the public or not. The ‘public

interest' is best served in the circumstances of a single FOI application by judging whether the public will benefit from the release or restriction of the information in question. For example, an argument to release a particular document may be that it will inform public debate; while an argument to restrict the document may be that it will confuse public debate. Officials interpret the public interest in the circumstances of each request for documentation.

Many commentators have argued that a pro-disclosure approach to the public interest is required to transform political culture and, in turn, increase accountability and public participation within government. Indeed a number of arguments support a 'leaning' in favour of disclosure when it comes to the public interest and FOI exemptions. The most prominent of these rests on the claim that it is consistent with the spirit of FOI legislation. Additionally, a major political free speech case in Australia (*Australian Capital Television Pty Ltd and Ors v The Commonwealth* (1992) 66 ALJR 695 (HC)) and the adoption of a narrow approach to the application of exemptions in the United States Supreme Court also gives weight to the adoption of a pro-disclosure approach (Bayne and Rubinstein 1994, 107-112 and Bayne 1995, 114-119). The Queensland Information Commissioner (Douglas and Jones 1999, 108-109) has commented:

The FOI Act must be applied in a manner that pays appropriate regard to the objects which the framers of the legislation sought to achieve... Unless the exemption provisions... are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged...

A pro-disclosure approach has been adopted on a number of occasions in Australia, particularly in the states and territories. Courts and tribunals in Queensland, Victoria, New South Wales, Western Australia and Tasmania have—at times—supported the view that there should be a leaning in favour of disclosure in judging

whether or not information is exempt (ALRC/ARC 1995, 29-30 and Snell 1995, 197-216). A pro-disclosure interpretation supports the presumption that disclosure of government information is generally in the public interest. That is, it tends to narrow the situations in which public bodies can legitimately claim information as confidential. The approach does not promote overlooking case specific arguments in favour of non-disclosure.

In contrast to the pro-disclosure position occasionally supported in the states and territories, interpretation of the Commonwealth Act has been overwhelmingly restrictive. In contrast to the philosophy behind the pro-disclosure approach, interpretation of key exemption provisions by the Administrative Appeals Tribunal (AAT), the primary appeal body within the Federal sphere, has, in effect, widened the scope of exceptions to public access (Zifcak 1991, 163-168). The 1985 decision of *Re Howard v Treasurer of the Commonwealth* ((1985) 7 ALD 645) is regarded as a seminal case in the Federal arena. Factors in support of non-disclosure were broadly categorical and decisive in this judgement and have since been used to great effect by officials arguing for the prevention of information disclosure. A recent instance is the AAT case of *McKinnon v Secretary, Department of Treasury* and its High Court counterpart.

In fact, the McKinnon story is exemplarily of the restrictive relationship that often occurs between government and judiciary bodies regarding Australian FOI. McKinnon, FOI editor for *The Australian*, requested two separate sets of documents, relating to the first home buyers scheme and a bracket creep within the taxation system, from the Federal Department of Treasury in 2002. These requests were largely rejected by the Treasury, so McKinnon went the AAT on appeal. Shortly before the appeals were listed the Treasurer issued conclusive certificates under s

36(3) of the FOI Act on the documents in question. Administrators essentially used the general arguments presented in 1985 to justify this action: release of the information would be contrary to the public interest as it would breach public sector confidentiality and potentially confuse the public.

The adoption of the certificates by the minister impacted the whole review process. It meant (Paterson 2007, 39), in effect, that the task of the AAT was no longer (as it would have been without the certificates) to undertake a *full merit* review 'of the claim that disclosure of a document would be contrary to the public interest'. After which, the court may order the release of documents in question. Instead, the Treasurer's actions now required the AAT to perform a more limited task under s 58(5) of determining whether there exist *reasonable* grounds for the claim that the disclosure of the document(s) would be contrary to the public interest. After which the reviewer has now power to demand release, although the corresponding minister may have to table reasons for the exemption in parliament.

The AAT ultimately found after inspecting the documents and hearing evidence from both sides that there were reasonable grounds to withhold the documents. Unhappy with this decision, McKinnon pursued the specific legal question of *how the AAT should go about the task of deciding if there were reasonable grounds for a conclusive certificate* through the Federal Court and, ultimately, the High Court (McMillan 2007, 43). Although the Courts and their judges differed in approach to the issue, a Majority of both agreed the AAT had undertaken its task correctly and 'it was not the task of the Tribunal to make its own assessment of the public interest, or to decide if the evidence or arguments for disclosure were more reasonable or persuasive than those preferred by the Treasurer' (McMillan 2007, 43). In other words, a Majority in the Federal and High Court found conclusive

certificates are beyond the scope of full judicial review and there need only be some reasonableness behind the claims for a certificate for it to sustain legitimacy.

The chain of events surrounding McKinnon is a case in point to the argument presented thus far. That is, FOI was conceptualised and implemented in a backward looking bureaucracy that perceived the initiative as primarily a threat to the traditional Westminster system, in which secrecy is said to be an essential component. The existence of this orthodoxy facilitated the in the production of FOI legislation with ample room for the continuation of obstinate secrecy in the public sector: public officials have considerable avenues to frustrate requests, either through exemptions, fees and charges or delays. Moreover, the statute is such that judiciary bodies are nullified when desired through the issuing of conclusive certificates. Yet, even with the removal of these certificates, its probable judicial interpretation and official administration will not be exemplary because of other legislative weaknesses, such as limited Object provisions.

Circuitous Issues of Liberal Representative Democracy

So far it has been shown that FOI did not have consummate beginnings. The implementation and subsequent operation of Australian access law has largely failed to meet moderate expectations. The pervasive institutional resistance to FOI in Australia arguably exists because of a continuing clash between the philosophy of access rights and more dated conceptions of responsible government. Yet there are two other major issues that concern the functionality of FOI regimes in Australia and worldwide. Like institutional resistance, these issues also stem from wider assumptions regarding citizenship, liberal democracy and nation-state. First, neo-liberalism, a theory of the individual and the state, often encourages public servants to

implemented policies at the expense of FOI. Second, in an era of globalisation, influential global governance institutions that exist outside national citizenship rights have, to an extent, evaded the topic of information access.

Dilemma of Managerialism

Economic rationalism or, perhaps more modestly, managerialism, was adopted by Australian representatives (with little public discussion or consent) as part of a global trend in the 1980s. The approach to public sector management has its roots in neo-liberal philosophy, which suggests that rational individuals should be able to pursue self-interested activities, with little desire or need to involve themselves in politics, devoid of the interference of a clumsy, overarching state. The managerial reform program has been aimed at streamlining the state (Paterson 2004, 316), with initiatives revolving around ‘deregulation, commercialisation, corporatisation, public sector down sizing, outsourcing of services and privatisation’ (Taggart 1997, 1-2). The influence of managerialism since the 1980s has certainly been deep and widespread: some consider it to be no less than a cultural revolution in public administration (Yeatman 1990, 13). Whatever outcomes have resulted from these reforms, however, FOI—and other mechanisms for transparency and accountability—have been negatively affected by the market orientated policies.

Managerialism often encourages the adoption of private sector organisational practices in the public sphere to increase efficacy. For instance, it is sometimes argued that the public sector is not subject to the market discipline which the private sector faces. Public bodies should therefore mimic practices of private organisations in order to increase efficiency. Under managerial custom, traditional values within the public service, like bureaucratic routines, public service ethics and professional codes

of conduct, are (to some degree) devalued in the quest to become more like a privately run business. The public sector is more decentralised, mission driven and entrepreneurial than ever before. Networks of organisation are fragmented and internal structures respond to individual incentives rather than corporate values (Minogue 1998, 24). User-pays and cost cutting initiatives are popular in the contemporary public sector environment.

With emphasis on efficiency, through the elimination of ‘non-essential’ spending and a heavy focus on results, the managerial ethos does not sit well with potentially expensive and time consuming FOI law. The same can be said for the Ombudsman, which, like FOI, concentrates more on equity and process than efficiency and results. In fact, the Commonwealth Ombudsman, who has had a statutory role under the corresponding FOI statute to review public complaints about the handling of requests, received significant budget and staff cuts in the late 1990s as a direct result of managerial practices (Commonwealth Ombudsman 1998). Similarly, the New South Wales FOI Unit was disbanded as a cost cutting exercise in 1991 (Cossins 1997, 26). The Unit’s objects were to ‘facilitate the introduction and implementation of FOI’, as well as ‘monitor and review’ its operation (NSW Premiers Department 1990). The tension between the objects of managerialism and access law are also evident in the fact that Queenslanders recently incurred a significant increase in the cost of obtaining documents under FOI on the basis of cost recovery (Snell 2001b).

Managerialism involves more than the adoption of efficacious procedures, the model also implies that the vast majority of services provided to the public should be delivered by private—not public—bodies. According to the World Bank (1996, 110), ‘[state provided] provisions must become the exception rather than the rule. State

intervention is justified only where markets fail.’ Government departments and agencies are to develop guidelines and contracts, while leaving the execution of associated policy to non-government bodies. Hence, around the world authorities have sold enterprises, outsourced functions and corporatised agencies, making them competitive commercial entities with a quasi-private status. Australian governments are recognised globally as some of the most enthusiastic proponents of such activities.

The recent restructuring of service delivery in accordance with managerial approaches fundamentally challenges the effectiveness of FOI legislation. Access laws were initially constructed to apply to documents in the possession of government departments; or other agencies closely linked to departments. Therefore, the diffusion of authority, away from clear public entities, to a wide range of private and quasi-private service providers has made the functionality of FOI problematic (Roberts 2001, 244). Many of the new service providers, both private and quasi-private, evade the ambit of FOI legislation. A large number of bodies now undertake similar tasks to those performed by traditional public entities in the past, yet they remain outside the scope of FOI; documents relating to their activities are subject to the Act only to the extent that paperwork is in the possession of contracting or associated agencies (ARC 1998, 52) . Moreover, access to documents held by agencies that relate to their business dealings, including contracts negotiated with private contractors, is considered to be subject to commercial confidentiality and therefore exempt from FOI (Paterson 2004, 323-336). The extent to which such restrictions are in the public interest is strongly debated (cf. Finn 1998, 122; Taggart 1992, 368-373 and Legislative Review Committee 2000, 26-27).

More broadly, the transformation of government services into a marketplace is arguably challenging views about the place of accountability and the role of the

citizen. The process of privatisation and outsourcing has stripped away most of the accountability mechanisms that have operated within the public sector, including FOI, the Ombudsman, scrutiny of the Auditor-General and ministerial responsibility (Taggart 1992, 371). In the wake of this process, an emphasis on some kind of active citizenship has been replaced by an ideology of the passive consumer of different goods and services (Schoombee 1998, 90). This naturally correlates with the neo-liberal perspective of the masses and their role in the political system. Elections are to be 'free and fair' but participation outside the electoral arena is by no means a priority or, even, a preference.

Global Democratic Deficit

In addition to managerialism, globalisation is a major concern to national and sub-national FOI supporters around the world at the dawn of the 21st century. Rapid advances in transport and communication technologies over the past 40 years have facilitated a compression of time and space, which now means geography has been transcended and macro-social relations have been broadened (Scholte 2000, 46-55). While the extent to which macro-social relations have been expanded is certainly debated, there is general agreement that a mix of actors has developed to manage the affairs of a connected global population. These organisations constitute a complex of formal and informal institutions through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated (Held and McGrew 2002, 8-13). These complexes are often referred to as a form of global governance.

Global governance exists in an array of political, economic and social spheres. Of these, the economic arm is most advanced and, as a result, demands the greater

focus here (Wilkinson 2002, 2-3). Yet as policy formulation increasingly takes on a global nature the issue of information access will naturally spread into other arenas. Within the economic dimension of global governance several formal actors are dominant, especially the International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), World Bank (WB) and World Trade Organisation (WTO). The G8 Summit and World Economic Forum are informal counterparts to these larger bodies. These formal and informal institutions are, to some extent, deliberative; however, they consider as a fundamental truth that unrestrained market forces, as well as the efficient and minimal liberal state, will bring prosperity and democracy to humankind (Scholte 2000, 34).

Organisations like the OECD and WB help co-ordinate an apparent universal economic and political framework. The market focused liberal democracy is inherently superior to other socio-political systems, according to these bodies; and, such organisations often impose substantial constraints on policymaking by national and sub-national governments. These constraints are not a one-way street—influences run between individual states and these bodies. Nevertheless, much of the power exerted on national authorities by the formal economic bodies is best characterised as ‘agenda setting’ (Heywood 2004, 125-127). So, there are a set of policies that states ought to adopt and anything outside of this agenda is not recommended. States, including Australia, are thus encouraged to routinely use OECD reports, for example, to further certain market based policies (cf. Commonwealth Department of Treasury 2005). To ignore these reports and, indeed, pursue a line of policy contrary to the market model, like raise taxes or welfare for instance, would attract substantial criticism from the global governance institutions, which hold significant authority within international politics.

FOI applies to national and sub-national governments on the basis that they yield substantial power over the populace, on behalf of the populace. This notion does not seem to apply on the global level, however, because, in spite of their authority, global economic bodies predominantly operate in secrecy (Roberts 2000). Within each arena of global public policy consultation, participation, transparency and accountability are generally weak (Scholte 2001, 12), despite some degree of improvement. The organisations of economic global governance are certainly not subject to anything like FOI legislation and lack any kind of liberal policy relating to the release of information. For example, the WTO, which is responsible for the enforcement of international trade rules, has a very limited code of information access (Roberts 2006, 178-184). Similarly, the IMF, responsible for co-ordinating the exchange rate policies of its member states and providing financial aid to countries dealing with balance-of-payment problems, operates without sufficient information disclosure (Roberts 2006, 188-193). This blanket of opacity over the institutions of economic governance has caused critics to argue that important policy decisions are being made behind closed doors by unelected bureaucrats (Nader and Wallach 1996, 94).

The fact that influential global governance organisations associated with economic policy are substantially secretive is certainly detrimental to democratic governance. The situation means that while binding economic power has seeped into the international arena, other powers to ensure popular participation and the common good, like periodic elections or FOI, have been restricted to the national level. Modern representative democracy defines the polity as the nation but power has, to an extent, now moved outside the national domain onto the international plain, where national citizenship rights have a restricted place (Saul 1999).

Remedy of Popular Sovereignty

Information rights formed part of a new philosophical and practical approach to public administration and democracy—open government. Along with other NAL reforms, FOI was set to strengthen the way democracy is conducted in Australia. However, the plan has not gone accordingly. FOI has floundered, primarily because it differs from other reforms in nature. While the Administrative Appeals Tribunal and Ombudsman, for example, look to correct past mistakes, FOI is an intricate real-time link between the citizen and the state and, potentially, political dynamite (Hughes 1983, 27-31). For this reason, FOI must be accompanied by agreeable assumptions, regarding citizenship, participation, accountability, democracy and the state within the overarching political framework in order to reach its fullest potential.

This situation does not currently exist. The polyarchy-type milieu of citizenship in Australia is probably best characterised as liberal minimalism. The principle of the liberal (minimalist) model of democracy is ‘protection’ in the context of the constitutional nation-state, against tyranny and arbitrary use of power. The role of representative government is to protect the rights of individuals, such as freedoms of speech and association, and provide a secure space in which naturally self-interested individuals are ‘free to discover and pursue their own (basically material) happiness’ (Emy and Hughes 1991, 236). Voting allows citizens a channel of influence in public affairs and a degree of government legitimisation in the form of popular consent (Stokes 2002, 28). FOI can operate within such a system, to a certain level. However, information rights, at their fullest, conflict with the minimalist paradigm, because they tend to envisage a citizenry informed by social democrat values that, individually or collectively, want to participate in government outside the

electoral arena, in all spheres relevant to the execution of public policy (national or otherwise).

The remedy for robust FOI, if that is so desired, is a democratically healthier backdrop. There is some evidence to support this solution and it comes from across the Tasman Sea. New Zealand has been consistently shown to have superior FOI compared to Australian (Snell 2000; O'Sullivan 2006). This contrast can be best understood by looking at the manner in which each FOI system has been accepted and implemented. Rick Snell (2000, 28), a leading academic on the topic of FOI, explains that while public servants played a large part in the adoption of FOI in both cases, Australian officialdom looked to the history of closed representative government and grudgingly accepted a muted US model, adapted for local conditions. On the other hand, New Zealand authorities, having rejected the US model in exchange for creating their own system, were focused on information and policy trends; they tried to create an access regime that could respond to future developments and needs in an era of greater change. That is, FOI in New Zealand was designed with a future of open government in mind, where, perhaps, citizenship has increased meaning and legitimacy (see Danks Committee). Information sharing between citizens and the state in New Zealand has subsequently become much more symmetrical.

A renewal of republicanism or popular sovereignty in Australian and global politics is needed if FOI is to strengthen. There is no shortage of opportunities if that is the preference. The liberal representative paradigm has come under considerable attack in recent years (cf. Stokes 2002, 31-44). Most notably by a nascent movement in political theory that has been pushing towards a revival of republicanism in the form of deliberative politics (see, for example, Dryzek 1992; Gutmann and

Thompson 1996; Habermas 1996; Rawls 1997 and Uhr 1998). Civic participation is at the crux of deliberative democracy, which purports to move beyond liberal representative democracy by bringing citizens closer to the forefront of decision making (Bohman 1998, 400-401). This may occur, for example, through the use of citizen juries and/or consensus conferences (Smith and Wales 2000, 54-62; Einsiedel and Eastlick 2000, 326-340).

Deliberative democracy, much like FOI, is an international phenomenon. Countries around the world, such as Denmark, Germany, the United Kingdom and United States, are constructing and implementing different ways to facilitate public deliberation on issues; but Australia lags in this regard (Carson 2007, 1). Commentators have also discussed the deliberative model as a way to bridge the democratic deficit that exists throughout global governance (see, for example, Dryzek 2006; Monbiot and Carson 2003). Australian FOI and citizen rights globally, could benefit greatly from a growth in deliberative politics and efforts to increase popular sovereignty (Snell and Upcher 2002, 39-40). A shift in legitimacy, away from elected representatives or unelected bureaucrats, towards active citizens, could certainly challenge the existing asymmetry of information, which puts the public at a clear disadvantage against officials and the state. A political environment where citizens are an active *source* of decision-making would necessitate that public information is available for all.

Conclusion

FOI is mixed up within the evolution of Australian democracy. FOI may form an integral part of an evolving democratic system, but it also cannot bring about change by itself. It is reliant on the growth of a wider environment of openness where the

relationship between the citizenry and the state is strengthened. The citizen needs to be brought to the forefront of political debate in Australia, and around the world, if FOI is going to have a future. New Zealand offers an example of how a change of mindset in the public sphere, relating to the nature and style of government, can help reform the liberal tradition so as to make it more open, participatory and accountable. New Zealanders could be joined in such a move by Australians and beyond, perhaps through the development of deliberative politics, so that FOI may be better assured of a bright future.

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