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INTEGRITY IN GOVERNMENT

INTERIM REPORT I

OFFICIAL INFORMATION

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PREFACE

This is the first of five Reports to be compiled as part of the *Integrity in Government* project being conducted at the Australian National University. While that project has received support from all Australian governments, and while valuable comment and criticism has been made by a variety of government officials on the contents of this Report, the views expressed in the following pages are those of its author.

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SUMMARY OF PROPOSALS.

1. RULES OF GENERAL APPLICATION TO PUBLIC OFFICERS AND EMPLOYEES.

(a) The Information Disclosure Rule.

An officer is authorised to disclose information obtained in office:

(a) if the disclosure is required to be made as part of the officer's official duties;

(b) if the disclosure is made with the permission of another officer who is reasonably believed to have authority to give that permission;

(c) if the disclosure is not of information the disclosure of which could possibly prejudice government in the conduct of the public business;

or,

(d) if the disclosure is not of information concerning the private, personal, business or other affairs of any person, group or body in the community, the disclosure of which could possibly prejudice the interests of that person, group or body.

It is envisaged that guidelines be issued in association with this rule that relate the types of information referred to in paras (c) and (d) to the exemption provisions of *Freedom of Information* legislation,and, in para (d) in its application to personal information, to Information Privacy Principle 11 of the Commonwealth's *Privacy Act, 1988.*

(b) The Information Misuse Rule.

An officer shall not make improper use of information obtained in office:

(a) *to gain, directly or indirectly, an advantage for himself or herself, or for any other person or body; or,*

(b) *to prejudice the government or any other person or body.*

2. RULES OF APPLICATION TO PARTICULAR PUBLIC OFFICERS AND EMPLOYEES.

(a) Ministers of the Crown.

(1) *A minister is expected to maintain the confidentiality of information acquired in the Executive Council, or in or for the purposes of cabinet and its committees.*

(2) *While a minister has a general authority to disclose, or to authorise the disclosure of, information obtained in his or her portfolio that authority should be exercised both in conformity with any rule of law or cabinet direction applying to any particular portfolio information, and in the public interest.*

(b) Government Employed Professionals

Officers rendering services to members of the public on a professional-client basis should, unless otherwise authorised or required by law, maintain the secrecy of information acquired by them when acting in their professional capacity.

(c) Officers and Employees of Commercial and other "Non-governmental" Enterprises.

While no specific proposal is made for the conduct rule to be applied to such officers – such a rule could only be stated in the most general of terms – it is recommended that:

Where a person's employment in an enterprise is such as gives or is likely to give access to the confidential information ("trade secrets") of the enterprise, consideration should be given to the use of express provisions in that person's contract of employment which both identify whether by way of genus or otherwise, and regulate the uses that can be made of, trade secrets acquired in employment.

3. OFFICIAL SECRECY AND THE CRIMINAL LAW.

While this Report does not consider the role which the criminal law *should* have in sanctioning the abuse of at least some species of official information, it recommends that:

As a matter of urgency, the relationship of the general criminal law to the duties of non-disclosure imposed by or under public service legislation be reviewed in the Commonwealth, the A.C.T., Queensland, Western Australia and Tasmania.

In the Northern Territory doubts as to the scope of s.76 of the *Criminal Code* should be clarified.

4. PUBLIC COMMENT AND THE POST-OFFICE USE OF OFFICIAL INFORMATION.

While the law on the latter of these two matters is set out in Part B, Section 5 of this Report, no specific recommendations are made in relation to either matter. Each raises issues which are more appropriately dealt with in the later *Report on Compromising Relationships and other Activities*.

5. WHISTLEBLOWING

The Report proposes that a three-tiered set of procedures be established to facilitate the exposure and correction of governmental or official misconduct and maladministration, and that specific steps be taken to protect from reprisal persons who avail of those procedures.

SUMMARY OF WHISTLEBLOWING PROPOSALS

A. THE REPORTING PROCEDURES

1. Infra-Agency ("In-House")

(i) Notwithstanding any duty of secrecy to the contrary, it should be lawful for any officer or employee of an agency of government (including a State owned company) to make a confidential report to [a designated officer or officers] of that agency concerning —

- (a) non-compliance within the agency or by agency officials, with legislative, governmental or administrative policy;
- (b) maladministration particularly where this results in fraud or waste or is likely to pose an immediate threat to public health or safety;
- (c) misconduct of an agency official; or
- (d) serious misconduct of a person or body in dealings with the agency.

(ii) Any report so made (whether or not anonymously) should be treated as confidential and appropriate steps should be taken to maintain the confidentiality of the identity of the reporter (if known) and, so far as is practicable, of any person impugned in the report.

(iii) The designated officer to whom a report is made should later inform its maker of the general nature and outcome of any investigation made as a result of the report.

(iv) The Annual Report of an agency should itemise the number of reports made under the procedure, the general nature of matters reported, and the outcomes of their investigation.

2. Independent Agency

(i) Notwithstanding any duty of secrecy to the contrary, it should be lawful for any public officer or employee, any officer or employee of a State-owned company, or any other person, to make a confidential report to the Ombudsman [or in relation to specified matters, to some other designated agency] concerning —

(a) significant non-compliance by an agency or by an official, with legislative, governmental or administrative policy;

(b) maladministration where this results in fraud or waste or is likely to pose an immediate threat to public health or safety;

(c) serious misconduct by an official; or

(d) reports, whatever their subject matter, which have been made using in-house procedures but which have not been dealt with to the reporter's satisfaction.

(ii) The Ombudsman should ordinarily investigate the report but may refer it to another agency of government (excluding that to which the complaint relates) if this is considered necessary and appropriate to deal with the matter raised in the report.

(iii) Any report so made (whether or not anonymously) should be treated as confidential and appropriate steps should be taken to maintain the confidentiality of the identity of the reporter (if known) and, so far as is practicable, of any person impugned in the report.

(iv) The Ombudsman [or designated agency] should later inform its maker of the general nature and outcome of any investigation made as a result of the report.

(v) The Annual Report of the Ombudsman should itemise the number of reports made under this procedure, the general nature of matters reported, and the agencies to which they relate, and the outcomes of their investigation (whether or not that investigation was undertaken by the Ombudsman).

(vi) The Ombudsman, in its discretion, should be empowered to make ad hoc reports to Parliament concerning any matter raised by a report to it, or in any investigation conducted by it.

(vii) The Ombudsman should be empowered to disclose to the public any matter which it considers is in the public interest so to do.

(viii) The nature of the activities of certain types of agency or of parts of agencies can be such that their affairs should be excluded from inter-agency reporting procedures. Consideration needs to be given to those which properly should qualify for such exclusion.

3. "<u>Going Public</u>"

1. Notwithstanding any duty of secrecy to the contrary, it should be lawful for a public officer or employee or an officer or employee of a State-owned company
   (a) to make a (confidential?) report to a parliamentary committee of any matter which could have been reported either "in-house" or to an independent agency under the preceding proposals;
   (b) where that parliamentary committee has undertaken an inquiry into a matter in relation to which that report would be a relevant consideration.

2. A reporter who fails to or refuses to avail of established reporting procedures but who "goes public", will nonetheless be entitled to the protection of anti-reprisal procedures including immunity from criminal prosecution if, and only if, that person can show —
   (i) that he or she had reasonable grounds for believing that the report made was accurate;
   (ii) that the allegation made is substantially accurate; and
   (iii) that, notwithstanding his or her failure to avail of established procedures, the course taken was excusable in the circumstances.

B. REPORTER PROTECTION

(A) <u>Preconditions for Protection of Reporters</u>

(1) That the report relates to a matter falling within the categories enumerated in the reporting procedures;

(2) That the reporter reasonably believes in the accuracy of the allegation made in the report; and

(3) In the case of a person who fails to or refuses to use available reporting procedures and who instead "goes public", additionally (a) that the report is substantially accurate; and (b) that notwithstanding that failure or refusal, the course taken was excusable in the circumstances.

(B) Elements of the Protective Scheme

(1) That there be a general criminal offence covering serious harassment or discrimination. While there are several possibilities to be considered that proposed is:

A person who occasions or procures, or who threatens to occasion or procure, damage loss or disadvantage to any person on account of that person's having made a report which is authorized or justified under the reporting procedures is guilty of an offence.

(2) That the agency charged with responsibility for the protective scheme (the Ombudsman) be empowered to apply to a court for an injunction to restrain the commission or repetition of, or the threat to commit, the above offence.

(3) That discrimination in employment related matters be made an improper personnel management practice justifying a "grievance appeal." A formula proposed for consideration is:

It is an improper personnel management practice to discriminate against an employeee in any matter relating to that person's employment on account of that person's having made a report which is authorised or justified under the reporting procedures.

(4) That the appropriate employment appellate body be empowered to take such steps as are necessary to nullify the effects of any discrimination that may have been practised.

(5) That harassment or intimidation or the threat thereof by a co-worker be acknowledged expressly to be a form of employment misconduct. A formula

proposed for consideration is:

An employee is guilty of misconduct who intimidates or harasses, or who threatens to intimidate or harass, another employee on account of that other employee having made a report which is authorized or justified under the reporting procedures.

(6) That the Ombudsman be empowered to make such arrangements as are necessary to protect a reporter if he considers that the reporter's safety may be prejudiced or that the reporter may be subject to intimidation or harassment.

(7) That the persons entitled to seek the benefit of protective measures be extended so as to include (a) persons who reasonably believe that they are being discriminated against etc. because they are erroneously assumed to have made a report; and (b) former officers and employees and third parties who have made reports which would have entitled them to protection if their report had been made by a serving officer or employee.

C. RESPONSIBILITY FOR PROTECTION

(1) That an independent agency (the Ombudsman) be assigned responsibility for the oversight and implementation of the protective measures proposed.

(2) That complainant-reporters be entitled to look to that agency for confidential advice and protection and for the proper safeguarding of their interests.

(3) That that agency take such steps as are appropriate in the circumstances to implement protective measures in a given case and where this involves the participation of another agency of government, to monitor the actions taken by that agency.

(4) To report to appropriate authorities dissatisfaction with responses made to complaints dealt with by other agencies.

(5) To report to Parliament generally on complaints made, on their resolution and on the effectiveness of the protective scheme itself.

D. RELATED MATTERS

That the making of reports known to be false or misleading be made both a criminal and a disciplinary offence.

INTRODUCTION

It is one thing to propose what could or should be considered appropriate standards of conduct to be maintained today by public officers and employees in their use or disclosure of information acquired in public office or employment. It is quite another to state what is even legally permissible given the highly unsatisfactory condition of the law in almost all Australian jurisdictions today. Conduct which governments and the public may well wish to encourage, presently can be a criminal offence. Conduct one would wish to discourage is often enough left unregulated. In the absence of systematic reform and modernisation of the law, it is impossible now to formulate standards of conduct which at once are suited to the circumstances of modern democratic government in Australia, and which also comply with statutory and other requirements currently imposed on officers and employees. To exaggerate this unsatisfactory state of affairs, it clearly is the case that much in the practice of contemporary government, much in contemporary official behaviour, departs markedly from what is lawfully permitted. Though the Australian community can for the most part be thankful that this is so — government under some of our present laws would be intolerable to the public and officials alike — we have allowed a situation to develop which does little credit to the very system of government in which the public is asked to repose its trust.

The gulf which now often exists between what is lawful and what is even justifiable let alone desirable, has itself ordained the structure of this Report. It falls into two Parts. Part A advances what are considered to be appropriate standards of conduct to be expected of officials in contemporary Australia in their use and disclosure of official information. Adoption of these, it needs to be stressed, would require significant amendment to the law of most jurisdictions. Part B contains a detailed treatment and criticism of contemporary Australian law governing official information. Given the present complexity of the law, this Part is somewhat technical in character and may in consequence be found to be not always easily accessible to a lay reader. Nonetheless there is much in its analysis and criticism which provides the constitutional and legal foundations for the proposals of Part A.

The extraordinarily diverse issues which the subject of this Report raises make it impractical to present recommendations which are both general and all-encompassing. Though it is possible and appropriate to formulate some number of standards which should be adhered to by all officials whatever their station and function, the specific "employment" situation in which many officials find themselves is such that only particular and particularised standards can cater for their circumstances. The form of secrecy to be expected of a government employed health professional rendering services directly to the public, for example, differs markedly from that of an official involved in policy formulation, which in turn differs from what is to be expected of a financial manager in a State-owned business enterprise. Part A strikes only an imperfect balance between the general and the particular. While making proposals which should be applied to all officials, it does not attempt to tabulate exhaustively the standards which should be applied to individual officials or classes of officials because of their particular functions. What those latter standards are (or should be) is, for the most part, outlined in the course of the detailed analysis contained in Part B.

Perhaps the most obvious conclusion to be drawn from any national study of Australian government even where, as here, there is a specific subject focus, is that both the formal structure and the actual practice of administrative government differ markedly from jurisdiction to jurisdiction, particularly in matters of detail. In the arena of official secrecy these differences can be striking. For this reason, it has been found necessary in Part B to treat at least some aspects of official secrecy on a jurisdiction-by-jurisdiction basis. An important effect flowing from structural differences is that if the proposals made in this Report are to be adopted (with or without modification), the means of their adoption and implementation will of necessity differ from jurisdiction to jurisdiction. Simply by way of illustration of this, if it be considered that the adoption of a "whistleblowing" regime is desirable (as proposed here), the institutional arrangements which exist in a particular governmental system will influence significantly the form and detail of that regime. While some number of the proposals made in the Report advert directly to the effect differing institutional arrangements may have on the manner of their implementation, the Report itself does not consider in anything approaching exhaustive detail the particular steps which could or should be taken in a given jurisdiction to give effect to its proposals. Again it should be noted that where these steps are discussed, it is, in the main, in Part B.

It needs to be emphasised that it is not the object of this Report to consider the obligation and responsibility government has — or should have — in its management and handling of official information as such. It does not, for example, consider data protection or information management and security systems. Rather *its focus is on the individual official and on the personal obligation and responsibility that official should bear in his or her use or disclosure of information acquired in office.* Its concern, in other words, is with the conduct to be expected of officials in their dealings with official information and not with an evaluation of the means availed of by government in collecting, storing, disseminating, etc., such information.

One final word of exclusion. A major portion of the Report is devoted to official secrecy and to the scope official secrecy regimes should be given in Australia today. The Report does not, however, canvass the role which *should* be given the criminal law in protecting official information, other than in a negative way. It is highly critical of the manner in which the criminal law is presently framed in the six jurisdictions which have general criminal offences proscribing the unauthorised disclosure of official information. And it suggests that there is an urgent need for reform in at least five of those six jurisdictions. It does not, though, consider directly the extent to which (if at all) it is appropriate to protect at least some species of "official secret" through criminal legislation. While that question raises important and controversial issues about the manner in which significant State and public interests should be safeguarded, and in consequence about the manner in which one form of official misconduct might be sanctioned, its answering takes one into realms of public policy far beyond the province of this Report.

PART A

For ease in exposition this Part has been divided into two Sections. Section I is concerned with the standards of conduct to be expected of public officers and employees in their use and disclosure of official information; Section II, with the contentious, but important, topic of "whistleblowing."

SECTION I

OFFICIAL INFORMATION AND STANDARDS OF CONDUCT.

Australia today is in a period of constitutional transition. The power and authority of governments in our society are at once strengthening and weakening: strengthening, with the seemingly inexorable expansion of governmental activity into most facets of community life; weakening, because of actual or apprehended loss of public confidence in the institutions of government and because of developments in the public accountability of government. Both of these contrary movements are of immediate relevance to the concerns of this Report.

Information today is being gathered, generated and held by governments on scales which even only recently would have been considered inconceivable. This phenomenon has enhanced governmental power. But it has brought with it an enlarged responsibility in government. For the individual citizen now obliged to supply increasingly more personal and private information to government, vulnerability to information abuse at the hands of government and its officials is no longer a matter of indifference. For the public generally, it is no longer tolerable that government remains an unfettered master of information about its own actions and operations, merely informing the public of these as and when it feels the need so to do. More so than at any period in our history, government is being called upon to give effect to principles basic to the proper working of a liberal-democracy: to respect the interests of the individual citizen; and to allow its actions and activities to be subjected to the discussion, criticism and review of the public it serves. Strongly apparent in emerging constitutional and legal principle (and especially in common law doctrine), and in *Freedom of Information* and *Privacy* legislation, this liberal-democratic theme provides the underpinning for the standards of conduct for officials which are proposed in this Report.

By way of background to these proposals, it is appropriate, first, to give a brief historical survey of the approaches taken in Australia to the use or disclosure of information in the hands of government. It is very much a story of official secrecy.

A brief history.

From the colonial period until the last decade the Australian story has been one of Governments' retaining for themselves the power to control the public availability of official information, and of maintaining that control through stringent official secrecy regimes contained, primarily, in *Public Service* legislation. Originating in colonial Victoria in the 1860's, this approach held sway throughout the country for well over a century. Such secrecy obligations as were considered to bind ministers, rested, it was thought, upon political convention and Executive Councillor oath. This said, ministers nonetheless enjoyed considerable individual discretion to release and to authorise the release of official information. For public servants in contrast all was different. Public Service legislation characteristically required that information acquired in office could only be disclosed (even to a fellow officer) (i) in the course of official duty; or (ii) with the express authorisation of a minister or chief executive officer. To exaggerate the coercive nature of the public service secrecy regimes, six jurisdictions went on to enact general criminal offences outlawing the disclosure of information which an official was obliged to keep secret.

Those general offences – which subsist to this day in all jurisdictions except New South Wales, Victoria and South Australia – did not seek to identify types of information which, on grounds of public interest, it should be a criminal offence to disclose. They simply imposed criminal sanctions for breach of the essentially "employment" obligation of secrecy created in public service legislation.[1] Ministers apart, official secrecy was made the norm to be adhered to by Australian public officials.

The hallmark of this system lay not so much in its control of what information was disclosed by public officials, as in its control of when and by whom that disclosure could be made. In its restrictions it was seen as securing for Governments the loyal and faithful service of its officers and employees. Its effects over time were several. First, in form at least, it achieved a high level of protection for the interests of Government itself. Secondly, it produced systemic non-compliance if for no other reason than that even the most scrupulous public official could not be expected to comply with its more severe demands. Thirdly, in the main, it made the public availability of official information a matter of ministerial discretion. The scheme, in short, had a brutish simplicity. The only uncertainty it created lay, curiously enough, in one of the two grounds on which an official could justify disclosing official information — the "in the course of official duties" ground. Depending on the nature of the function an officer performed and upon such lawful instructions as may have been given him or her, this ground reserved to an officer some level of "individual authority" to determine what and to whom official information could be disclosed in the course of duty.[2]

The deficiencies in this regulatory scheme were many. It made the public the hostage of government, at least in its access to information about government and its

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[1] The Northern Territory departed from this somewhat in its refurbishment of its criminal law: see *Criminal Co* s.76.

[2] The concept of "individual authority" is considered in Part B, Section 2B.

operations. It imposed, as will be seen, an impossible obligation on officials and this because it was massively over-inclusive in the information it protected from unauthorised disclosure. Anomalously, while tightly controlling disclosure, it did not in most jurisdictions address the pernicious practice of personal misuse of information particularly for private gain. It elevated the interests of government over the public interest and, through strict employment regulation, obliged public servants in particular to serve the former even at the clear expense of the later: the effects of this are most clearly seen today in the impediments which exist in most jurisdictions to any lawful form of "whistleblowing". And, in its very generality, it failed to provide officialdom with any principled basis for the official secrecy it demanded: in the very subservience it sought, it invited non-compliance.

Objectionable as a basis for regulating both the dissemination of official information and the conduct of public officials, this older regime no longer holds undisputed sway in a majority of Australian jurisdictions. Reflecting a more explicit commitment to liberal-democratic ideals, the power of government to act in the manner of its own choosing in the management of official information is being subordinated progressively to wider considerations of public interest. This re-orientation is evidenced in three notable developments. The first has been the modification or abandonment of strict public service Act regimes of official secrecy in three jurisdictions — New South Wales, Queensland and South Australia. In South Australia in particular, the province of official secrecy has been contracted markedly and its maintenance has been made in some degree a matter of individual judgment and responsibility for officials and not simply one of coerced subservience. The second has been the progressive enactment throughout the country of *Freedom of Information* legislation – to the point where almost all jurisdictions have, or are committed to having, such legislation in place. An unfortunate anomaly in this otherwise benevolent development, is that in form, our *Freedom of Information* legislation is compatible with the most illiberal official secrecy regimes to be found in the country. The third development has been in the common law. Having affirmed that "governments

... are constitutionally required to act in the public interest",[3] but that "the interests of government ... do not exhaust the public interest",[4] our courts have now held that for common law purposes, a government's own information[5] will not be protected from unauthorised disclosure "unless disclosure is likely to injure the public interest."[6]

This trend in this particular sphere is not an isolated one, even if its embrace by government is not uniformly enthusiastic throughout Australia. It reflects a wider and more general commitment to liberal-democratic ideals now evident in Australian public law generally. For this reason it has been taken in this Report as providing the constitutional foundation upon which legal and ethical regimes regulating public officials should be built. To date the public has been the principal beneficiary of this trend. *Freedom of Information* legislation and the common law (a) have enhanced public access to the information of government; and (b) have heightened the protection given to the information of the citizen in the hands of government. For the individual official, however, little formally has changed in most jurisdictions. Despite *Freedom of Information*, despite the common law, most Australian public officials today remain subject to the enduring demands of the strict and illiberal official secrecy regimes noted above. The need for their reform is pressing.

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[3] *Attorney-General (U.K.)* v *Heinemann Publishers Australia Pty Ltd.* (1987) 10 N.S.W.L.R. 86, at 191 per McHugh J.A.

[4] *Glasgow Corp.* v *Central Land Board* [1956] S.C. 1, at 18-19, endorsed by Stephen J. in *Sankey* v *Whitlam* (1978) 142 C.L.R. 1, at 59.

[5] A quite different view is taken of a citizen's information in the hands of government, a matter discussed in detail Part B, Section 3.

[6] *Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 32 A.L.R. 485, at 493 per Mason J.

INFORMATION IN THE PUBLIC SECTOR[7]

Despite enormous diversity in character and sensitivity, information in the hands of the officers and agencies of government can be — and for modern legal purposes is — divided into four distinct information types. The first is simply that stock of knowledge publicly available in the community for use by whomsoever wishes to utilise it ("*public information*"). Information of this type would be quite irrelevant to this Report were it not the case that the official secrecy regimes of some jurisdictions purport to regulate even its disclosure by officials if, in fact, they happen to acquire such information in office. The second is information supplied to government by third parties — individual citizens, groups, business and the like — about their private, personal or business affairs ("*third-party information*"). What is distinctive about this type of information is not only its source but also the direct interest that the information supplier can have in its use or disclosure. The third is information of and about government generated by the officers and agencies of government ("*governmental information*"). This provides the heartland of official information. The fourth is an exception to the third. It is what for convenience can be called the "*proprietary information*" of government. Some types of governmental operation are not particularly or distinctively governmental in character at all. Government, for example, may conduct scientific research or engage in business activities. Some at least of the information produced in those "non-governmental" operations differs little in its character from like information produced in the private sector. It can properly be claimed to be "owned" by government in the same way that a private sector enterprise would claim a like property in its information.

While information in the public sector can doubtless be classified in other ways — and governments in the past have commonly used systems based on the relative secrecy

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[7] This term is used here to include such operations of government as are conducted by State-owned corporations.

and sensitivity of information – its classification in the above fashion has been found to be the one most useful for the purposes of this Report. Not only is it now finding reflection in modern legal doctrine, it serves a particularly important function in the way it segregates information. In a very general way it attributes "proprietorship" to information: "Public information", to the public at large; "third party information", to the information provider; "governmental information", to government acting as such; and "proprietary information", to government acting in a non-governmental capacity. The importance of this is, simply, that the question "Whose information is being used or disclosed by an official?" can have a vital bearing on how that information can properly be used or disclosed. To illustrate this, the following brief comments are made at the outset.

Public information, because it is public information, should be available for free use and exploitation by all members of the community. While government may have a legitimate interest in the possible consequences of particular uses made of even public information by public officials — and this can be so in the case of "public comment"[8] — it should have no legitimate interest to protect in the use as such of public information in the hands of an official. That information belongs to the public of which the official as citizen is a member. This said, and as noted above, the statutory official secrecy regimes in some jurisdictions can encompass even public information if in fact acquired by an official in office.

Third party information poses a very distinctive problem for government. While government regularly is given significant rights (for the most part statutory) to use and disclose such information and this for reasons of public interest, it is not dealing with what is its own. In consequence third party information is — and should be — marked out for

[8] A subject of a later Report.

special consideration and protection in the rules which regulate its use and disclosure by officials.

Government information in contrast, can be said to be government's own. But unlike the private citizen, government for constitutional reasons and because it is government, cannot use its own simply in its own interests. It is constitutionally required to act in the "public interest" and that requirement in turn should filter what is or is not permissible in its – and through it, its officials' – use or disclosure of governmental information. Again it has to be noted that most statutory official secrecy regimes currently in place in Australia have seemingly been designed to protect government's interests and not the public interest.

Proprietary information, if also government's own information, has a quite distinctive character. Derived in a non-governmental activity it is more akin to the information developed by government's private sector counterparts and should, within appropriate limits, be accorded a like protection to that given to trade secrets, etc. in the private sector.

While the classification adopted here performs the useful function of directing attention to the unique attribute of each information type, it only provides the starting point for determining what should be the standards of conduct to be expected of officials in their use or disclosure of information of each type. Whatever those standards may ultimately be found to be, their justification can only lie in the protection they give to the legitimate interests of the public, of government and of the individual citizen. But it is precisely here that the real difficulty lies — first, because of the need to identify what interests in our society should be recognised as "legitimate interests"; and secondly, in many instances the respective public, governmental and individual interests which can be said to be of relevance, will be of unequal importance and they may well conflict one with the other. Here sensitive balances have to be struck.

INTEREST PROTECTION.

Perhaps the most obvious general comment to be made of public officials, whatever their station, is that the information they acquire — or for that matter create — in office, is not acquired for their own benefit. It is acquired in the service of another: immediately, of the authority or body under which office or employment is held; ultimately, of the public for whose benefit the institutions of government exist. The easy assumption to be made from this, and it is one made in most present official secrecy regimes, is that an official in consequence does not and should not have any right to use that information (whether or not by way of disclosure) other than in the rendering of that service. Simply by way of illustration, it is to be noted that Victoria's *Constitution Act, 1975*, debars any "person employed in any capacity ... in the service of the State of Victoria" from using "except in and for the discharge of his official duties information gained by or conveyed to him through his connexion with the public service."[9] Official duty apart, information acquired in office is simply sterilized. No matter what the information in question, no matter what the use, no matter what its purpose, no matter what its consequences, the prohibition stands. And it exceeds any legitimate claim that could justifiably be made by any democratic State of its servants. Loyalty in service can properly be expected. Information bondage cannot.

The important message of modern legal doctrine is that secrecy and loyalty are relative, not absolute values. Both are capable of protecting the legitimate interests of the citizen, of government in the conduct of its affairs, or of the public. But that protection is only justifiable if, and to the extent that, it can be sustained on public interest grounds. And where there is a countervailing public interest (and freedom of information can be one of particular importance) or where apparently legitimate interests conflict (and this

[9] S.95.

commonly arises as between the individual and government, and between government and the public), it is the balance of public interest which should determine whose interest it is appropriate to protect and in what manner. This may result in a given instance in openness being given primacy over secrecy; in the interests of the individual citizen prevailing over those of the government. What it does not do is give a prior and absolute right to government to control the manner in which information in the hands of its officials is used or disclosed by them.

Whether, to what extent, and for whose benefit, information in an official's hands should be protected from use or disclosure by that official, are first and foremost questions of interest protection and of the justifications therefor. Much in legal and other writing about secrecy and public service already acknowledges this. So it is accepted, for example, that cabinet secrecy is essential both for the proper working of cabinet itself and to maintain collective ministerial responsibility for cabinet decisions; that anonymity for ministerial advisers needs to be assured if frank and impartial advice to ministers is to be secured; that in a democratic society there is a public interest in information being made available to the community to enable it to discuss, review and criticize the actions of government; that the protection of the privacy and economic interests of the citizen can justify limits being placed on the uses made of third party information supplied to government; that public confidence in the integrity of government or its institutions will be compromised if officials are permitted to use "inside information" for private gain; that to prevent the sterilization of an ex-official's productive capacity, the post-employment use of knowledge, skill and experience obtained in public office should not be restricted unduly; that it is contrary to the public interest to allow secrecy obligations to be used to prevent the revelation and investigation of significant wrongdoing by officials; and so on. As will be seen in Part B of this Report, this "interest protection/public interest" approach is now the one acted on in the common law in determining the varying protection it will give different species of confidential information in the hands of government and its officials. The same approach is strongly in evidence in *Freedom of Information* legislation both in settling the respective provinces of the exemptions and of rights of access, and in the manner in which some number of the exemptions are to be applied.

Perhaps the most notable feature of the interest protection approach to information use and disclosure is that it is designed, first and foremost, to prevent unjustifiable prejudice or detriment to the legitimate interests of the citizen, of government and of the public. Discussion of the common law and of whistleblowing in Part B provides many and varied illustrations of this. Two vital consequences flow from this particular orientation. The first is its acceptance that there can be a considerable body of information in the hands of government which may properly be able to be used or disclosed without the likelihood of prejudice being occasioned either to the interests of the citizen or of government, or to the public interest. And while this manifestly is the case, it is this which so sharply differentiates this approach from the "Victorian style" official secrecy regimes still so prevalent in this country. The second is that even where an individual or governmental interest is in fact prejudiced, that prejudice may nonetheless be justifiable on public interest grounds. Part B again provides significant illustrations of this, the two most obvious of which being the common law rules relating to whistleblowing, and the use made of the "public interest" and not simply of "governmental interests" to determine whether or not common law protection will be given to governmental information.

Both of these consequences have influenced directly the proposals made in this Report: the first, in making possible "prejudice" to the citizen or to the government an important factor informing the standards of conduct proposed; the second, because it provides an important justification for the whistleblowing proposals made in Section II.

There is a clear and obvious connection between interest protection and the scheme for classifying information types set out earlier in this Part. That quadripartite division, by in effect attributing "proprietorship" to types of information, isolates in relation to each information-type, the interest of which special account needs to be taken when determining what will be a permissible use or disclosure of information of that type.

(a) With *public information* the only relevant interest is that of the public and neither the government nor the individual citizen should be able to claim that they have any legitimate interest to protect when such information finds its way into the hands of an official acting as such.

(b) *Third Party Information.* The individual citizen can, ordinarily does, have an obvious and direct interest in his or her information in the hands of government. And although there will almost invariably be a governmental interest as well to be considered in the matter — that interest inhering in the purpose or purposes for which the information was obtained in the first place — a standard of conduct dealing with the use or disclosure of such information must be concerned to safeguard the interests of the citizen from *unjustifiable* prejudice. "Unjustifiable" is particularly emphasised here as third party information is regularly exacted from the citizen under legislative programmes which can allow for uses of that information which may be prejudicial to the citizen, but lawful nonetheless.

(c) *Governmental Information.* While government has a vital interest in this type of information, its own interests are not the sole ones of relevance. Because government is government, because government is constitutionally obliged to act in the public interest, it is possible prejudice to the public interest which sets the limits to the protection government can claim for its own interests. But this said, it has long been recognised that very important public interests are secured by the proper and effective conduct of government itself so that for practical purposes the interests of government can be all but synonymous with the public interest in many instances. To illustrate this one need only note the virtual conjunction of the public interest in, and a Government's interest in, the maintenance of cabinet secrecy.[10]

(d) *Proprietary Information.* Though there can be difficulty in determining where governmental information ends and this species begins in some instances, the species itself is uncontroversial for interest protection purposes. It is government's own information to be used in the manner of its own choosing. It will be protected to the same extent that protection is given to private sector enterprises in respect of their own information. Perhaps the most important feature of interest protection here is that it characteristically is to be sought against the officers and ex-officers of government to safeguard the economic interests of government enterprises.

Merely by aggregating the above comments one can state in very general terms what is the essence of an official's responsibility in relation at least to the <u>disclosure</u> of information acquired in office. The limitation to disclosure is necessary because, as will be seen, mere use can, for other reasons, be offensive irrespective of whether it is likely to occasion prejudice. It should also be added that disclosure here does not mean only disclosure to the public: it can be to anyone including to a fellow officer. And the core of an officer's responsibility? It is that:

> an officer should not disclose information acquired in office where that disclosure is likely to occasion unjustifiable prejudice (a) to the interests of government; or (b) to any third party who supplied that information to government.

It should be added immediately that this is <u>not</u> being advanced as an appropriate formulation for practical use. It merely identifies in a shorthand way what is the informing idea — the essence — of the conduct to be expected of officials.

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[10] The two can and do part company the more "stale" cabinet information becomes: see e.g. *Attorney-General v Jonathan Cape Ltd* [1976] Q.B. 752.

The large practical questions are how (if at all), and if so in what manner, can this idea be translated into appropriate and workable rules of conduct to which officers can and should be asked to adhere. To answer these questions requires consideration of a variety of matters to which it is now necessary to turn.

WORKABLE RULES?

It should be stated at the outset that the discussion which follows excludes from consideration the need to make provision for "whistleblowing" in some form. It is impractical — but in any event undesirable — to attempt to formulate rules which lay down general norms of conduct but which also seek to accommodate an abnormal and exceptional activity. Whistleblowing is considered separately and as a discrete phenomenon in Section II.

The view which could be said (perhaps charitably) to underlie most official secrecy regimes currently in place in Australia is that it should be for government alone to determine how official information should be managed so as best to protect the interests of the citizen, the interests of government itself and the public interest; that it is unwise even unsafe to give other than designated authorised officers any personal responsibility at all in this matter. It can further be said in support of this that *Freedom of Information* legislation, at least in the manner in which it requires requests for access to documents to be dealt with, conforms to this view.

If our present official secrecy regimes did no more than protect legitimate individual, governmental and public interests they could not be subjected to the odium they now justifiably attract. As noted in Part B, the majority of our present regimes purport, for most public officials, to prohibit the disclosure of <u>any</u> information acquired in office save disclosure in the course of official duties or with the consent of a minister or chief executive officer. This may be effective to protect at least the interests of the citizen and of government. It can hardly be said to protect the public interest as of course (whether or not *Freedom of Information* legislation is in place). And in its information coverage it makes demands of officials with which they cannot realistically — and should not with propriety be asked to — comply. To take an extreme example, a public servant required to scan newspapers daily for information relevant to departmental interests would seemingly be precluded from disclosing to anyone information gleaned from those newspapers, unless in the course of official duties. No better reason exists to justify this than that that information was acquired in office. Such an extraordinary conclusion — and the examples can be multiplied greatly — is open on a strict reading of the secrecy provisions of public service related legislation in Victoria, Western Australia, Tasmania, and, arguably, the Commonwealth and the A.C.T.

To be inoffensive, the "Victorian style" schemes of official secrecy require considerable contraction in their information coverage at least. If this is to be done — if meaningful selection is to be made of information which warrants some level of protection from disclosure — one is drawn back ineluctably to classifying "protected information" on some form of interest protection basis. But once this conclusion is reached a strategic choice has to be made. That is as to how the protected information is to be identified and defined. There would seem to be two rival approaches: the one isolates and tabulates specific species of information – information relating to defence, cabinet decisions, financial policy, etc; the other, and here there are various possibilities, defines the information in terms of the possible prejudice its disclosure could occasion. The former is now commonly adopted in some countries in criminal legislation governing official secrecy.[11] The unique Australian example of the latter is to be found in South Australia's *Government Management and Employment Regulations, 1986* where an official is authorised to disclose information obtained in office (inter alia) if the disclosure —

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[11] See *Review of Commonwealth Criminal Law, Discussion Paper No.10*, where examples are given.

(a) is of such a nature and made in such circumstances as to create no reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies; and

(b) is not made contrary to any law or lawful instruction or direction.[12]

While, as is discussed in Part B, Section III, information protection in this particular form is considered defective — both because of its omission of any reference to prejudice to third parties, and because of the particular judgment it leaves to the individual official — the principal proposal made in this Report relating to information *disclosure*[13] does in fact use a prejudice based form of definition. An important consequence of such an approach is that it virtually necessitates that the individual officer will have some level of personal responsibility for determining whether or not information in his or her hands is protected information. Such a responsibility will be present in almost any form of secrecy regime which does not purport to embrace any and all information acquired in office. But this acknowledged, the responsibility involved where a prejudice based definition is adopted tends to be a more sensitive, perhaps more personally demanding one. Because it may be considered to be contentious, comment will be made below on the use of "individual responsibility" as a criterion in the standards of conduct to be expected of officials.

The Protected Information.

The particular function discharged by a public official can itself necessitate that particular information acquired by virtue of that function be given special or distinctive protection and that in consequence, a particular conduct standard may be required of that official for that information. Three important examples of this are given below: the first

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[12] Reg.21(1)(c) – there is an additional limitation which is not of present relevance.

[13] A separate proposal is made for mere *use* without disclosure.

relates to ministers particularly in respect of their roles in the Executive Council and in cabinet; the second, to government-employed professionals (e.g. medical practitioners) rendering services to the public on a professional-client basis; the third, to officials engaged in the "non-governmental" operations of government, who have access to "proprietary information". Such examples are not of present concern, the matter of immediate interest being the general conduct standard to be expected of officials in relation to official information generally.

The conclusion reached in Part B — and it is the one acted upon here — is that the information the disclosure of which should be regulated by a conduct rule, is information of a type which, if contained in a document, would fall within the now relatively standard provisions contained in *Freedom of Information* legislation. The reasons which have led to this conclusion will not be repeated here in detail. Suffice it to say that those exemptions in their treatment both of third party information and of governmental information represent the most considered formulation we have available in this country of information the disclosure of which could be prejudicial to legitimate individual, governmental and public interests. Lest it be thought that the conclusion requires that *Freedom of Information* actually be in place in all jurisdictions (and such is not yet the case), it is also indicated in Part B that the protection the modern common law would give to information in the hands of government approximates quite closely to that given by *Freedom of Information's* exemptions. This said, there are obvious and additional reasons of convenience why in F.O.I. jurisdictions, there should be a significant level of harmony between information protection under the legislation and in the conduct rules imposed on officialdom generally.

Importantly the sphere of information marked out by the exemptions is the one in which the public legitimately can be asked to trust in governments to discharge their constitutional responsibility to act in the public interest in their management of that information. Equally it is the sphere in which governments in turn are entitled to trust in their officials not to usurp that governmental responsibility by unilaterally assuming the right to disclose that information.

While the general proposal made below is cast in terms of disclosures prejudicial to government or to the citizen, it attempts to encapsulate in a necessarily abbreviated form the spirit and intendment of *Freedom of Information's* exemptions. For obvious reasons, though, it addresses disclosure of <u>information</u> and not simply of documents. An important advantage to government in linking a conduct rule to F.O.I. is that it allows government, through guidelines drawing on F.O.I., to elaborate in a comprehensive and comprehensible way, the burden of a rule which necessarily can only be stated in general terms.

In the Commonwealth, the A.C.T. and South Australia an additional dimension to information protection in the proposed conduct rule is added by the *Privacy* regimes adopted in those jurisdictions. With Information Privacy Principles limiting the disclosures that can be made of <u>personal information</u> supplied to government and its agencies — Principles which in large measure simply reiterate the common law — those principles should be taken as defining what disclosures of personal information would be prejudicial to the citizen. In consequence, and as with F.O.I., guidelines should also be issued which relate the general conduct rule to the Information Privacy Principles and in particular to Principle 11 of the Commonwealth's *Privacy Act, 1988*. While the specific need for such guidelines is most apparent in the three jurisdictions noted, because the Principles mirror the common law, like guidelines should be adopted in all jurisdictions.

Individual Responsibility

The disclosure rule proposed below is cast in a way which, while giving a general authority to disclose official information, makes it the personal responsibility of each individual to identify the information which is protected and which should not be disclosed. To give officials this responsibility may give some reason for pause. Nonetheless this approach is considered to be both necessary and justifiable.

It is commonly overlooked that under present strict official secrecy regimes a very large number of officials now enjoy some level of individual authority to determine what if any information in their hands they are entitled to disclose. That authority is presupposed by the "course of official duties" exception found in most official secrecy regimes, and it arises not from any process of express authorisation given to an official, but, rather from the "nature of the official's job". As was said by the Franks Committee in England in its report on that country's *Official Secrets Act*:

> "Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make and to whom. More junior civil servants, and those whose duties do not involve contact with members of the public, may have very little discretion, or none at all.[14]

This form of "individual authority" is considered in detail in Part B, Section 2B. It is mentioned here simply to illustrate that even in the most stringent of information protection regimes, the individual official commonly has some level of personal responsibility for determining what information in his or her hands should or should not be disclosed.

The principal reasons, though, for allowing such a personal responsibility in the rule proposed are threefold — one negative, the others positive. First, to deny that responsibility would necessitate the conduct rule itself being cast in terms which indicate explicitly by nature and type the information which is protected. Short of purporting to protect all information (as some regimes currently do), a viable method of differentiation has to be found. It is difficult to envisage such a method not involving some level of

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[14] *Report on Section 2 of the Official Secrets Act, 1911*, para. 18, Cmnd. 5104, H.M.S.O., London, (1972).

discriminating judgement to be made by an official which is not both arbitrary in its compass and over-inclusive in its effect. Secondly, it is considered that both the interests of government and of the public are more likely to be better served in the end by a system of conduct regulation which positively requires officials to assume some level of personal responsibility for the management of official information in their hands. Thirdly, given the relationship proposed between the information to be protected and the exemptions of *Freedom of Information* legislation, the judgment left to the official is one that can be regulated by guidelines, directions, etc. based upon the exemptions of that legislation. In other words, the individual discretion given can itself be a controlled one.

THE PROPOSED GENERAL DISCLOSURE RULE

An officer is authorised to disclose information obtained in office:

(a) if the disclosure is required to be made as part of the officer's official duties;

(b) if the disclosure is made with the permission of another officer who is reasonably believed to have lawful authority to give that permission;

(c) if the disclosure is <u>not</u> of information the disclosure of which could possibly prejudice government in its conduct of the public business;
or,

(d) if the disclosure is <u>not</u> of information concerning the private, personal, business, or other affairs of any person, group or body in the community the disclosure of which could possibly prejudice the interests of that person, group or body.

By way of brief comment on this, the following matters should be noted.

First, the rule is cast in a positive ("authorising") form and not in a negative ("prohibiting") one. This is more likely to conform to what now is encouraged in modern personnel management practice in government. Perhaps more importantly it reflects emerging legal and constitutional principle which, while accepting the continuing need for some form of official secrecy, nonetheless accentuates open government as an important value in our society.

Secondly, the first and second authorisations ("official duties" and "permission") reiterate grounds for disclosure already found in almost all official secrecy regimes in Australia. The first, it should be noted, presupposes that an official has some level of individual authority to make disclosures because of the particular function he or she performs. The second, it must be acknowledged, modifies the "permission" procedure now employed in public service/public sector management legislation. While that legislation characteristically requires the permission to be that of a minister or chief executive officer, the proposal here is premissed upon there being a hierarchy of individuals who may be able to authorise at least some forms of disclosure. It is also cast in a form which is designed to encourage officers, in case of doubt as to what their obligation requires in a particular instance, to seek the guidance of their superiors.

Thirdly, the third and fourth authorisations contain the real departure from most current official secrecy regimes. The third, which owes an obvious debt to South Australia's *Government Management and Employment Regulations*, is designed to protect the interests of government; the fourth, the interests of those who supply their information to government. Both embody some level of personal judgment and responsibility. And both, as noted earlier, are intended to encapsulate the spirit and intendment of the exemptions in *Freedom of Information* legislation. While each may appear to give governmental interests and individual interests primacy in their respective spheres (although the fourth will, in practice, be qualified significantly by the "official duties" authorisation), this conduct rule it should be stressed does presuppose that *government will adopt a whistleblowing regime in some form which will allow for the reporting, at* *least to designated agencies, of information the reporting of which is justified in the public interest.*

Fourthly, it is contemplated that, with a rule in this form, government would issue guidelines or instructions to officials which would indicate the types of information which prima facie should not be disclosed under the third and fourth authorisations. Such guidelines, which should take their substance from the exemptions of *Freedom of Information* legislation and from Information Privacy Principle 11 of the Commonwealth *Privacy Act, 1988*, could well be formulated in ways that address the particular circumstances of individual agencies and/or classes of official, given the types of official information that are likely to be in their hands.

Fifthly, the rule is not particularly appropriate to protect "proprietary information", its concern being with the mainstream of governmental activity. Proprietary information, as seen below, should be made the subject of special provision in employment arrangements.

INFORMATION MISUSE.

Such has been the obsession with information disclosure in our official secrecy regimes that, in most jurisdictions, scant attention has been given to the often more pernicious phenomenon of personal misuse of information acquired in office. The present law on misuse in considered in detail in Part B, Section 3 IV. No less so than with disclosure, the regulation of use likewise involves considerations of interest protection and this particularly where the information in question has personal or economic value either to government or to a third party who has provided it to government. But one public interest, which is only of muted significance in disclosure cases, assumes paramount significance in misuse cases. That interest is the public interest in *loyalty in public service*. It arises from the nature of public office holding itself. Public offices exist, not for the benefit of the incumbent for the time being, but to serve, immediately, the interests of the authority under which office is held (the Crown or an independent statutory authority), but, ultimately, the public interest. For this reason both that authority and the public are entitled to expect — and that entitlement has a constitutional and legal foundation — that officials will not make use of their positions for personal or other ends that are inconsistent with a loyal and faithful service of those interests they are bound to protect. The maintenance of public confidence in government, and of government's confidence in its own officers, rests in no small degree upon the honouring of this expectation .

Official position can be misused in many ways. Information misuse is only one of them. And while extreme forms of information misuse are easy enough to catalogue — and the most obvious illustrations are "insider trading" with financial information and the spiteful or prejudicial use made of official power because of information had about the person adversely affected — the phenomenon is not one which is easily reduced to a simple definition. There are several reasons for this. The first is that, as with disclosure, there is a potentially significant range of information acquired in office which should be able to be used by an official for other than official purposes with complete propriety. Skill enhancing information and information concerning programmes and entitlements which the official, as citizen, is entitled to avail of, are obvious examples.[15] Secondly, a judgment as to whether a particular use is or is not improper can be affected by a variety of considerations of by no means equal significance in a given case: the nature of the information and whether or not is is publicly available; the possible effects of allowing its use in the circumstances of its use; and the public interests which might justify or deny the use. Thirdly, a use can be objectionable even where the information itself is publicly

[15] It is noteworthy that the secrecy regimes of Victoria and Western Australia purport to deny even this.

available[16] and this because the official's conduct in the circumstances is inconsistent with what properly could be expected of a person in his or her position.

Because it is tied more directly than disclosure to what is reasonable and acceptable conduct of an official given the official position held, what constitutes misuse has been found difficult to formulate in other than descriptive terms. The most notable example we have in Australian law of a misuse rule, is that found in the *Corporations Act 1989*, s.232(5) and it is expressed merely in terms of a corporate officer or employee making an -

> "*improper use* of information acquired by virtue of his or her position ... to gain, directly or indirectly, an advantage for himself or herself or for any other persons or to cause detriment to the body corporate."

While the focus here on consequences (i.e. advantage or detriment) highlights the rule's interest protection role, the formula itself, obviously, is an imprecise one because of the use of the term "improper". If this is regrettable, it seems unavoidable. One can identify particular inquiries which may determine whether or not a misuse has occurred in the circumstances of a given case: Has the use involved a misappropriation of confidential information belonging to government or to a third party? Has it been made for a purpose inconsistent with the official responsibility placed on the officer in question? Has it occasioned consequences which are unacceptable for a person in the officer's position to occasion? These questions, though, merely illustrate what can be encompassed by an "improper use". No one formula can define such a case.

Significantly those jurisdictions which have addressed misuse directly — the Commonwealth, New South Wales, Queensland and the A.C.T. — have all been driven to

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[16] As where an official uses such information to enable a pressure group to deal with or to criticize his or her agency in a way prejudicial to the interests of the agency.

express their conduct standard in terms which refer simply to "misuse" as such,[17] or, alternatively, to a use which is "improper" in the circumstances.[18] A similar approach, of necessity, has been followed in the general conduct rule to be proposed here. Where, it departs from the Commonwealth, Queensland and A.C.T. formulae is in the scope it gives to what can constitute misuse. The rules in those jurisdictions cover only misuse designed to secure a gain or advantage. This, doubtless, is the most mischievous form of misuse. But as the *Corporations Act* formula above illustrates, as is well recognised at common law, and as is implicit in Information Privacy Principle 10 of the Commonwealth's *Privacy Act, 1988*, a misuse need not necessarily be for purposes of gain. Its object may be no more than to occasion prejudice to the government or to a third party. For this reason the following proposal proscribes both advantageous <u>and</u> prejudicial uses. Because the *Corporations Act* formula applies in any event to some number of public sector employees (i.e. those employed in State-owned companies) and because it represents the most considered formulation we have available in this country in an analogous context, it has been used as the basis for the proposal of this Report.

THE PROPOSED GENERAL MISUSE RULE

An officer shall not make improper use of information obtained in office -

(a) to gain, directly or indirectly, an advantage for himself or herself, or for any other person or body; or

(b) to prejudice the government or any other person or body.

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[17] *Code of Conduct for Public Sector Executives*, para 5.2. (N.S.W.).

[18] *Public Service Regulations*, reg. 8A(h) (C'wealth and A.C.T.); *Code of Conduct for Officers of the Queensl Public Service*, para 4.1.

Only two additional comments need be made of this. First, the rule is designed to prevent misuse not only of governmental information but also of third party information, hence its reference to "prejudice to any other person or body." Secondly, as disclosure can constitute a form of improper use, this rule in fact shares considerable common territory with the disclosure rule proposed earlier. Two separate rules are, nonetheless necessary. Disclosure is a subject of sufficient importance in its own right to warrant separate treatment. In any event the thrust of the two rules is somewhat different. The disclosure rule aims to guide officials in the management of information in their hands. The misuse rule is directed more towards outlawing personal conduct which is designedly disloyal.

PARTICULAR CONDUCT STANDARDS.

The two rules so far proposed are intended to be of general application to all public officials. This said, the *disclosure* rule proposed is not particularly suited to the distinctive circumstances of three classes of officials: (i) ministers; (ii) government-employed professionals rendering services to the public directly on a professional-client basis, for example, doctor-patient; and (iii) officers whose employment give them access to the "proprietary information" of government (including of State-owned corporations). Each of these requires separate consideration.

(i) *Ministers.*

When acquiring official information the individual minister may be acting in any one of three distinct capacities: (a) as an Executive Councillor; (b) as a member of cabinet or of its committees; or (c) in his or her portfolio. As discussed in Part B, Section 2A, these differing capacities themselves impose different constraints, legal and conventional, on the disclosures a minister can properly make of information acquired in each. In the first two capacities (Executive Councillor and cabinet member), legal obligation and political convention combine to impose a secrecy obligation which is virtually absolute in character — at least for as long as the minister remains in office.[19] That obligation can only be relaxed, if at all, by the Governor-General (etc.) acting on advice, in the one case and by the Governor-General (etc.) acting on advice, or in some instances, by the cabinet, in the other. In the third capacity (the minister in his or her portfolio), while in form subject to a duty of secrecy to the Crown, the minister, as the Crown's (and the Government's) representative in the portfolio, enjoys a considerable authority to disclose and to authorise the disclosure of, portfolio information. That authority is not unlimited. It is of no effect or avail (a) where legislation regulates the lawful uses that can be made of specified information - in which case a minister has no right of disclosure or of authorisation beyond what is legislatively permitted; (b) where the information in question is subject to a duty of secrecy owed to a third party — as commonly occurs where a third party supplies information to government — in which case the minister can only act consistently with that duty save and insofar as legislation or the common law allows to the contrary; (c) probably, where cabinet has resolved how, if at all, particular portfolio information is to be used; and (d) where information has been received by way of inter-portfolio communication in circumstances where it should be reasonably apparent to the recipient minister that that information is not being made freely available to the recipient minister for his or her portfolio purposes. And even when a minister does enjoy the right to disclose or to authorise the disclosure of portfolio information, that right is required, as a matter of constitutional obligation, to be exercised in what the minister believes to be the public interest.

Expressing the above in terms of general rules of conduct,it can be said that:

1. *A minister is expected to maintain the confidentiality of information acquired as an Executive Councillor, or acquired in or for the purposes of cabinet and its committees.*

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[19] Post-office secrecy is not as demanding, though it remains stringent: see Part B, Section 5.

2. *While a minister has a general authority to disclose or to authorise the disclosure of information obtained in his or her portfolio, that authority should be exercised both in conformity with any rule of law or cabinet direction applying to any particular portfolio information, and in the public interest.*

It only needs to be noted that these proposals represent a composite of the oaths of office (Executive Council), of constitutional and legal obligation, and of the conventions of collective and individual ministerial responsibility, which bind ministers in their offices. The varying effects of these are outlined in Part B.

(ii) *Government Employed Professionals*

A range of services provided by government to the community are of such character that, for information protection purposes, the operative relationship brought about between members of the community availing of those services and the officials who provide them, is not that of the citizen and the representative of the State but rather that of client and professional. State employed doctors, lawyers, para-medicals, counsellors, financial advisers, etc. can be in relationships of this character with the client public. Information obtained from the client in such a relationship is subject to *a duty of secrecy owed directly by the professional to the client which is similar in character and compass to that owed by any professional (whether or not employed by government) to his or her client.* The important consequences of this duty are that the professional's right to disclose information obtained in that relationship, and government's right of access to such information, are, in the absence of legislation to the contrary, limited to what is allowed consistent with that duty. The duty, furthermore, while permitting the agency in which the professional service is rendered (e.g. a hospital or public defender's office) to adopt such reasonable information handling practices as are necessary properly to provide the service, imposes limits upon the extent to which client information can be disseminated through the agency. The important matter to be noted in this, though, is that the particular secrecy obligation of many professionals is designed to protect the *privacy* interests of the client so that uses by the professional or of his or her agency of client in formation which do not reveal, or which do not create the likelihood of revealing, the client's identity may be permissible. These matters are considered in detail in Part B, Section 3, I.

What should be emphasised here is that, for the purposes of the standards of conduct to be expected of them:

Officers rendering services to members of the public on a professional-client basis should, unless otherwise authorised or required by law, maintain the secrecy of information acquired by them when acting in their professional capacity.

It is noted in Part B, that this professional-client duty can affect the manner in which client information can properly be disclosed for whistleblowing purposes.

(iii) *Proprietary Information.*

As noted earlier, "trade secrets" generated in the conduct of non-governmental activities are entitled to the same protection in the hands of officers in the public sector, as is allowed in the private sector. There is now a significant body of learning on how this can best be achieved in employment relationships. Reference is made to this in Part B, Section 3. For the most part that protection can be secured adequately and appropriately by express contractual provision in contracts of employment and by direction and instruction given as to access to, and handling of, secrets in employment. The virtue in express contractual provision lies in the ability it gives to tailor obligations to the specific circumstances of a particular officer or class of officers given the function that officer or class is to perform in a governmental enterprise. Importantly it allows for the particularisation of information, by genus or otherwise, which is to be protected.

There is no particular difficulty in stating the legal obligation of an officer in respect of governmental trade secrets:

An officer should not use or disclose confidential proprietary information acquired in his or her employment, without the consent of his or her employer.

That standard of itself is not particularly helpful for practical purposes because of the need to bring home to employees what are or are not trade secrets. For this reason, it is recommended that, <u>where an officer's employment is such as to give access to proprietary information, consideration should be given to the use of express provisions in his or her contract of employment which both identify, and regulate the uses to be made of, trade secrets acquired in office</u>.

CONDUCT RULES AND THE CRIMINAL LAW

While as noted in the Introduction, it is not the purpose of this Report to consider the role the criminal law *should* have in sanctioning the abuse of at least some species of official information , one general but important comment needs to be made about the present role played by the criminal law in official secrecy. As indicated in Part B, Section 3 V, criminal legislation in five jurisdictions — the Commonwealth, the A.C.T., Queensland, Western Australia and Tasmania[20] — simply attaches criminal sanctions to the breach of whatever secrecy obligation happens to bind any given public official. This, of itself, gives reason for pause. But what makes it particularly obnoxious is that in all of the above jurisdictions, with the possible exception of Queensland, the secrecy obligations imposed by public service legislation are so all encompassing and unreasonable in their

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[20] The Northern Territory's *Criminal Code*, s.76 is atypical in this respect.

information coverage that strict compliance with them is practically impossible. In their current form those obligations have no place in a modern democratic State. There is an urgent need for their recasting. There is a like need to reconsider what their appropriate relationship should be to the criminal law even after that recasting.

POST-OFFICE HOLDING CONDUCT.

Part B, Section 5 outlines the legal obligations presently imposed on ex-officers in respect of the use and disclosure they can make of information acquired in office. No specific recommendations are made in this Report on post-office conduct for the reason that the subject of post-office information abuse merges in many instances into other species of possible post-office misconduct. These together warrant being treated separately as a specific subject for conduct regulation. They will be considered in the later *Report on Compromising Relationships and Other Activities*.

SECTION II

SECRECY, DISSENT AND WHISTLEBLOWING.

A REPORTING SCHEME.

One conclusion emerges obviously enough from the law considered in Part B, Section 4 of this Report. Notwithstanding significant jurisdictional variations, no body of law (statutory or otherwise) addresses adequately the limits that should be placed upon official secrecy where secrecy itself becomes the mask for governmental or official misconduct and maladministration. The desirability of reporting (of "whistleblowing" on) serious impropriety and maladministration is acknowledged in some degree in almost all Australian jurisdictions, be this in public service regulations obliging supervisors to report the misconduct of subordinate officers or in the statutory reporting obligation of designated officials imposed in New South Wales, by the *Independent Commission Against Corruption Act, 1988* and, in Queensland, by the *Criminal Justice Act, 1989*. But no jurisdiction as yet[21] confronts the phenomena of whistleblowing and, importantly, of whistleblower protection, in anything approaching a principled and systematic way.

For the most part it is only the common law which presently provides any real guidance on when and how the balance should be struck between secrecy and reporting. Most important of all is its recognition that secrecy is a relative not an absolute value in our civil order and that in distinctive and exceptional circumstances, secrecy should be subordinated to other values upon which the well being of our civil order depends. In its rules and approaches the common law, by defining the subject matter which is appropriate for whistleblowing, has sought to minimise the possibility of reporting being used simply as a vehicle of individual, idiosyncratic dissent from the lawful demands of secrecy. Recognising that whistleblowing should be a purposive activity aimed at facilitating investigative and corrective action, and that allegations

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[21] Issues Paper No.10, of Queensland's E.A.R.C. presages significant change in that State.

though properly made may prove false on investigation, it has attempted to channel reporting to "proper authorities." Equally it has emphasised that where avenues of complaint are available, these ordinarily should be availed of. But for all of this, there is much that the common law leaves unaddressed or inadequately addressed. If whistleblowing in some form is to be recognised as a necessary and lawful activity — and this Report recommends that it should — legislative action will be necessary to put it on a certain and secure footing.

Governments, understandably, may be circumspect in treating proposals for the institutionalisation of whistleblowing procedures. The leak, aimed more at embarrassing government in its policies than at revealing significant impropriety, possible effects on staff morale if too liberal a complaint procedure is adopted, and apprehension that reporting procedures may well become a vehicle through which to dissent from, or to re-open policies, decisions, etc., doubtless contributes to this attitude. But if it be accepted that secrecy cannot be an absolute demand made of officialdom — and the common law and longstanding rules of public policy insist that it cannot[22] — *the principal issue for government (and its agencies) is not whether it should allow some qualification to the secrecy it demands of its officers and employees but rather what that qualification should be and how effect should best be given to it.* That issue requires consideration of three clusters of question:

(i) what subject matter can appropriately be reported notwithstanding secrecy and to whom can a report properly be made?

(ii) how can or should a report be made and how should it be dealt with? and

(iii) what steps should be taken to protect the interests of the reporter and of the person, body etc. affected by the report?

Because these overlap significantly, they will for convenience be addressed under the two headings of —

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[22] See Part B, Section 4.

(1) Reporting

(2) Reporter Protection

1. REPORTING

(a) *Infra-Agency ("In-House") Reporting*

Discussion of whistleblowing in the public sector characteristically commences at the point where a reporter goes outside his or her agency to ventilate the matter of concern. The appropriate starting point is, however, one step earlier — within the agency itself and with its own "in-house" reporting procedures. Both individually and collectively, the agencies of government have the constitutional and administrative responsibility to protect and to promote the public interest. To this end each has the right and responsibility to inform itself of all and any matters relating to its own operations and to the conduct of its own officers in them. The range of matters in respect of which it can, and desirably should, establish reporting procedures is, in other words, not limited to the aberrant and the untoward. It extends to the full extent of matters relevant to its operations. Considered in this light, while reporting on misconduct or maladministration will, in one sense, always be an exceptional activity because of the personal imputations it invariably involves, such reporting itself represents merely one extreme of the matters the reporting of which an agency may wish to, and is entitled to, facilitate.

If the potential subject matter of "in-house" reporting need not be confined, the subject matter nonetheless does vitally affect the manner of reporting. It is one thing, for example, to suggest improvements, etc. in administrative processes. It is quite another to allege serious personal misbehaviour. At the point at which a report carries a serious personal imputation — be it against another officer or a third party — three distinct and immediate interests need to be taken into account:

(i) the interests of the person impugned because of the need to act fairly towards that person;

(ii) the interests of the reporter because of the need to protect that person from reprisal; and

(iii) the interests of the agency itself because of the need to secure its interests both within and beyond the subject matter of the complaint.

And in addition to these there are the interests of the public which has a vital concern in the detection and correction of malfunctioning in the governmental system.

1. <u>The interests of the person(s) impugned</u>

Irrespective of whether the report is of significant misconduct, incompetence or maladministration, because it involves a serious personal imputation which may or may not be found accurate in the event, it obviously needs to be channelled so as to limit its dissemination while ensuring that it reaches the appropriate responsible officer to instigate consequential action. The need to limit dissemination is exaggerated by the consideration that a report may be baseless or ill-motivated.

2. <u>The interests of the reporter</u>

Save where the reporter is a senior/supervising officer performing his or her statutory or contractual duty to report the misconduct of subordinate officers[23], it is desirable that the anonymity of the reporter be maintained until that point is reached in consequential investigation where revelation of the reporter's identity is necessary (if at all) so as to accord due process to the "accused". This is not to suggest that the report itself should necessarily be anonymous. Rather that it be handled by the appropriate responsible officer in a way that maintains its confidentiality. But because reporting itself may to some be an unwelcomed and potentially prejudicial activity, consideration necessarily has to be given to subsequent anti-harassment and anti-discrimination procedures. These are considered below.

3. <u>The interests of the agency</u>

While having a vital interest in the proper consideration and investigation of reports, an agency has a subsisting institutional interest in maintaining ordered, harmonious and effective

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[23] The nature and scope of this duty is considered in Part B, Section 4.

administration. In particular it has an interest in minimising such disruptive effects as a reporting procedure itself can occasion and, more generally, in maintaining its ability effectively to discharge its administrative mandate notwithstanding a particular report made. These considerations again suggest the need for containment in the reporting procedure and for localisation, so far as is practicable, of the disruption occasioned by a report.

4. <u>The interests of the public</u>

Though mentioned last, these are by no means the least important. Consistent with the need to maintain public confidence in the integrity of government, its institutions and officers, it is important both that the public be made aware of serious instances of maladministration and misconduct and that the public be reassured that allegations of these are properly investigated and, where substantiated, are remedied appropriately. What should, however, be emphasised is that the public's interests, if ultimately the overarching ones, are themselves served by giving appropriate recognition to each of the three preceding interests mentioned. To make the very obvious point, we would not, for example, be concerned with whistleblower protection if we did not acknowledge that the interests of the public are best served by protecting the interests of a reporter. The controversial question lies in the degree to which the public's interests should accommodate those other three interests. This necessarily requires the making of value judgments.

While the relative demands of those other interests will be uneven in individual cases, their point of convergence, it is suggested, is in the proposition that, as a rule, "in-house" reporting procedures should be *channelled and confidential,* at least where a report involves a personal imputation against an official or, for that matter a third party. The public's interest, however, necessarily involves some level of publicity both for reports and for the workings of the reporting procedures themselves. The following proposals suggest how these apparently conflicting demands can be reconciled in "in-house" reporting procedures. What should be emphasized at this outset is that this Report will propose other procedures to complement or supplement in-house ones — a matter which must be taken into account when evaluating how the balance between interests is struck in each separate set of procedures.

What is proposed then is that, while the actual form in-house procedures take will depend necessarily upon the particular structure and practices of a given agency, the *procedures* themselves should —

(a) *channel reporting to an appropriate responsible officer;*

(b) *ensure, so far as is practicable, confidentiality both to the reporter and to the reported; and*

(c) *require the agency in its Annual Report to Parliament to notify specifically the number of reports made, the general nature of the matters reported, and the outcomes of their investigation.*

It is the third of these requirements which, in this context, encapsulates the public's interests but only in a measured way.

A central consideration in this proposal is that while individual agencies should be required through their Annual Reports to acknowledge publicly and with some specificity that reports have been made and dealt with, the primary emphasis in "in-house" reporting should be on the development of effective *internal measures* to remedy maladministration etc. within each individual agency. While not denying the public's interest in being informed of allegations of wrongdoing and of their resolution, this emphasis does accentuate somewhat the interests of the agency and of its officers whether as reporters or reported. And it aims to promote effective self-regulation.

The proposed limiting requirements of channelling and of confidentiality raise a number of associated matters. First, if channelling is to be effective it presupposes that agency officials will, or will be likely to, have trust in the particular line of communication proposed. Secondly, if confidentiality is to be respected as a virtue by agency officials, it must be seen by potential reporters not to be a likely facade for the suppression of reports made. Meeting these concerns depends in some measure upon the actual ethos of the agency in question. But two practices may at least partially assuage scepticism about “in-house” procedures.

(i) Save where a report is made anonymously, the responsible officer to whom it has been made should be obliged within a specified reasonable time to inform the complainant in writing of the consideration that has been given to the report, of the investigations (if any) made in consequence of it, and of the outcome of those investigations. Such “reporting back” has a two-fold purpose, the one to reassure the complainant, the other to allow for the possibility of use of alternative reporting procedures (noted below) in the event of dissatisfaction with the treatment given the report.

(ii) The requirement of notification of reports etc. in the agency’s Annual Report to Parliament, though designed primarily to serve the public’s interest, has itself some potency as an anti-suppression device.

In any event, as noted below, in-house reporting should be only part of a composite scheme of reporting procedures so that if, for whatever reason, a complainant is unwilling to stay in house, the facility will nonetheless exist for the proper making and investigation of serious allegations of maladministration and misconduct.

With “personal imputation” being the qualifying criteria for the distinctive in-house procedure suggested, the general subject matter that should be brought within those procedures seems tolerably clear. It is proposed that it encompass the following four categories:

(i) *non-compliance within the agency or by agency officials with legislative, governmental or administrative policy;*

(ii) *maladministration particularly where this results in waste or fraud or is likely to pose an immediate threat to public health or safety;*

(iii) *misconduct of an agency official* (whether this be in the misuse of official position or of knowledge or of opportunity provided by office; in the treatment of subordinate

officers or of agency clients; or in the violation of any law, rule or instruction binding on that official); or

(iv) *unlawful conduct of a person or body in dealings with the agency.*

While these four categories would seem to cover the broad spectrum of instances where a report would necessitate a personal imputation being made, their actual content may be said to be unduly imprecise. But given that our present concern is simply with an "in-house" procedure which is channelled and confidential, this is not considered to be a matter of great moment. Equally the categories are not qualified in ways which would necessitate that the report must be of a grave or serious matter. Again the "in-house" nature of the report justifies the liberality in this.

(b) *Reporting to an Independent Agency*

While it is manifestly desirable to encourage individual agencies to self regulate and to be seen to do so, neither the interests of the public nor the general constitutional responsibility of governments are likely to be satisfied adequately by reliance on in-house procedures alone. Systemic failure, official distrust, that the agency itself is an interested party, the possible impact of personality factors, personal relationships and infra-agency loyalties, agency misperceptions of the public interest, etc. provide some of the more obvious reasons for this view. In any event, the particular in-house procedures proposed have been biassed somewhat in favour of the agency's interests and this, as noted, so as to promote internal corrective measures.

Short of allowing complainants a virtually unfettered right to "go public" — and there are significant objections to countenancing this course — the adoption of acceptable procedures for reporting to, and investigation by, an independent agency (or agencies) is a necessary and vital step if government is to discharge and is to be seen to be discharging its constitutional responsibility and, more importantly, if the public is to be both reassured and kept informed that this is so. The immediate justifications for the provision of an external and independent reporting agency — and it will be suggested that it should be the Ombudsman/Parliamentary Commissioner (save where a particular agency e.g.The I.C.A.C. is constituted to deal with a particular species of matter e.g. "corrupt conduct") — are fairly self-evident and include:

(i) facilitating the exposure of misconduct/maladministration;

(ii) the provision of a disinterested and publicly trusted vehicle for the receipt and investigation of complaints;

(iii) the enhanced capacity to constitute an effective reviewing body with the necessary and appropriate investigative, etc. powers;

(iv) the centralisation of responsibility and accountability for reports, investigations, etc.; and

(v) negatively, by providing such an avenue of complaint, minimising the need and the justification for a complainant's "going public".

While the choice of the independent body to receive reports will in some degree affect the nature of the subject matter to be reported, the potential subject area for reporting seems, nonetheless, capable of relatively precise identification. "Whistleblower" protection apart, it seems unlikely that most jurisdictions would wish to include ordinary employment related matters within procedures of the variety proposed. Employment matters, increasingly, are falling within the domain of merit protection procedures; and they characteristically are excluded from the compass of Ombudsman type legislation. But this case excepted, the appropriate subjects for reporting should be similar to those provided for in-house, though with some necessary modification. Consistent with the focus on misconduct and maladministration the following are proposed:

(1) significant non-compliance by an agency or by officials with legislative, governmental or administrative policy;

(2) maladministration where this results in fraud or waste, or is likely to pose an immediate threat to public health or safety;

(3) serious misconduct by an official; and

(4) *reports, whatever their subject matter, which have been made using in-house procedures but which have not been dealt with to the reporter's satisfaction.*

These categories differ from those suggested for in-house reporting in three respects. First, the insertion of the qualifying adjectives "significant" and "serious" in categories (1) and (3), and the limitation of maladministration in (2) to fraud etc., are designed (a) to emphasize that one is concerned with matters of some gravity; (b) to reduce the possible incidence of trivial reporting; and (c) to provide a threshold limit before procedures designed to protect "whistleblowers" can be availed of. Depending on the level of positive encouragement a government may wish to give to reporting to an independent agency, these qualifications may or may not be considered to be desirable. Secondly, the proposed categories do not encompass reporting merely of wrongdoing by a person or body dealing with government. As noted later in this Part, such wrongdoing should be reported "in-house", and reporting beyond the agency should only be undertaken by a properly authorised officer. When, however, an agency official is implicated in third party wrongdoing, or where the agency fails to deal with the in-house report to the reporter's satisfaction, the matter is then a reportable one under the proposed categories. Thirdly, though the proposal contracts somewhat the subjects of reporting, category (4) allows for repeat reporting to the independent agency even where the subject matter would not otherwise be reportable to it, if the reporter is not satisfied with the in-house treatment of his or her report. An object in this particular proposal is to provide an additional incentive to agencies to maintain credible procedures of their own.

Because reports within the proposed categories will almost inevitably involve the making of a personal imputation, the same considerations of interest protection that arise in in-house reporting are relevant here. The interests of the reporter require that his or her identity be kept confidential; the interests of the person or persons impugned in the report as also the interests of the agency require, as a rule, that any investigation be conducted in private, that the impugned person be accorded natural justice and that, to the extent that is reasonable in the conduct of an investigation, the identity of the person impugned be kept confidential unless and until an adverse finding is made. (It is noted that some of these features are already present in

Ombudsman type legislation in Australia). But because a primary purpose in establishing an independent agency to receive reports is to make it the institutional focal point in protecting the public's interests, the expectation that the public is entitled to have of that agency in publicly revealing complaints, investigations etc. is correspondingly greater than in the case of in-house reporting. Here in balancing interests, greater weight is to be given to the public's "need to know". The Ontario Law Reform Commission, for example, proposed that in that jurisdiction the file of the independent agency (after completion of an investigation) should be put on a special register which, subject to certain "public interest" exceptions, would be open to the public. The procedure which it is proposed should be considered in this country draws upon that already in place (though with some important variations) in Australian Ombudsman legislation. It would require that in its Annual Report to Parliament the agency itemise the number and nature of the complaints received, the agencies to which they related, the nature and outcome of the investigation (if any) conducted, and the consequential action taken by the agency concerned. It would also enable the agency in its discretion to report to Parliament any matter the subject of investigation. And it would, as only some number of Ombudsman Acts do, allow the agency to make disclosures directly to the public where, in the opinion of the agency, it is in the public interest.[4] Three levels of publicity are thus proposed: (1) mandatory general reporting to Parliament; (2) discretionary ad hoc reporting to Parliament of specific matters; and (3) discretionary direct reporting to the public in the "public interest". Equally, and as is mandatory now in Ombudsman legislation, the agency should be obliged to inform the complainant of the investigation (if any) undertaken and of the results.

If the Ombudsman/Parliamentary Commissioner is used as the independent reviewing agency (either generally or as a complementary body in those jurisdictions having specific investigative agencies such as the I.C.A.C. or the C.J.C.) obvious attention would need to be

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[4] See e.g.*Ombudsman Act, 1976*, s.35A(1) (C'wealth); *Ombudsman Act, 1978*, s.31 (Tas); *Ombudsman Act, 1972*, s.26 (S.A.); and cf *Ombudsman Act, 1973*, s.26 (Vic.); *Ombudsman (Northern Territory) Act 1980*, s.29; *Parliamentary Commissioner Act, 1974*, s.27 (Qld.); neither the N.S.W. or W.A. Acts contemplate disclosure of this variety.

given to consequential amendments to Ombudsman legislation itself. Some of the more significant matters are noted here.

(i) In some jurisdictions the right to complain is premissed upon the complainant's having been affected by the conduct in question.[25] This limitation is obviously inappropriate in this context.

(ii) While most jurisdictions allow for a complaint to be made to the Ombudsman notwithstanding any duty of secrecy to the contrary,[26] some do not do so explicitly.[27] Particular attention needs to be given to the precise terms of the secrecy override in all jurisdictions as the type of complaint presently under consideration will for the most part be made by a person who as a matter of course is subject to secrecy restrictions.

(iii) If the reporting procedure proposed is to embrace the public sector generally including State-owned companies and Ministers — and such is desirable — the investigative jurisdiction of the Ombudsman will require enlargement for this purpose.

(iv) While the Ombudsman as of course is required to notify the C.E.O. and (usually) the responsible minister of the agency in respect of which complaint has been made, where the complaint relates to the C.E.O. or that Minister, an alternative notification is required — in the case of a C.E.O., e.g. to the minister administering the Public Service Act or to the Public Service Commissioner or to the Secretary of the Premier's, Chief Minister's or Prime Minister's Dept.; or in the case of a minister, to the Prime Minister, Premier or Chief Minister.

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[25] See e.g. *Parliamentary Commissioner Act 1971*, ss.14, 17 (W.A.) and those jurisdictions whose legislation is modelled on the W.A. Act — Tas, s.14; S.A., s.15, (3a); Qld, s.16(2); and cf Vic., s.14.

[26] (N.T., s.17; W.A., s.17; Tas., s.17; Qld, s.16; S.A., s.15).

[27] E.g. Commonwealth, N.S.W. and Victoria (but cf. s.18.

(v) There is very considerable diversity in the powers of Ombudsmen to report ad hoc to Parliament or to go public. Some jurisdictions, for example, deny[28] or limit[29] the right of the Ombudsman to go public and those which allow such a right ordinarily impose restrictions (e.g. that an investigation be completed) before a public interest disclosure can be made. Under the proposals being made, the present reporting obligations and the limits and restrictions on these require reappraisal though only for the purpose of discharging the particular jurisdiction envisaged in these proposals.

(vi) The powers of the Ombudsman to act on complaint should not be affected in any way by whether or not the complaint is made anonymously. In this area the legislation should expressly envisage the investigation of anonymous complaints.

The above list does not purport to be comprehensive. And to balance it, it must be said, that much in the present Ombudsman/Parliamentary Commissioner legislation provides an adequate and satisfactory basis for the effective discharge of the type of jurisdiction envisaged here.

Several additional comments should be made on reporting to independent agencies.

(a) Those jurisdictions which already have in place (or in contemplation) specific purpose investigative agencies, need to give particular attention to the secrecy override provisions in their legislation. As noted in the second Part B, Section 4, while both the I.C.A.C. and C.J.C. legislation expressly override the secrecy obligations of those prescribed officials who are obliged to report wrongdoing,[30] these do not in terms so protect any other official or person who makes a report to these bodies.

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[28] E.g. N.S.W. and W.A).

[29] Vic., s.26; N.T., s.29; Qld, s.27.

[30] *Independent Commission Against Corruption Act, 1988*, s.11 (N.S.W.); *Criminal Justice Act, 1989*, s.2.28 (Qld.).

(b) Whatever agency or combination of agencies is or are used to receive and investigate reports, the decision to investigate etc. should lie with the agency or agencies concerned. A system is not being proposed under which a complainant could compel an investigation. Neither is it being proposed that a complainant could terminate an investigation by seeking to withdraw a complaint made. Once a complaint is made to an agency that agency should then have control of the matter including the decision not to investigate if it considers that there is no reasonable basis for so doing.

(c) Simply by way of emphasis, whatever reporting procedures are adopted they should accommodate anonymous complaints.

(d) Though proposing reporting to the Ombudsman, and while envisaging that it would ordinarily conduct investigations, it is obviously necessary that the Ombudsman be empowered to refer particular reports to another agency where this is considered to be appropriate for its proper investigation in the circumstances. But where such a reference is made, the Ombudsman would nonetheless remain responsible for monitoring its progress and would remain subject to the same reporting obligations as if it had conducted the investigation.

(e) While the procedures proposed are intended to be of general application across the public sector, it may well be the case that specific agencies or sub-agencies of government (e.g. security services) should be exempted expressly from these proposals. It is, however, suggested that if exemptions are to be made, adequate in-house and/or other procedures should be in place and for very obvious reasons.

"Reporting by Third Parties".

Discussion so far has proceeded on the premise that the person reporting to the independent agency is someone in employment in the public sector. If a comprehensive and not arbitrarily limited scheme is to be put in place it should both envisage and allow reporting by third parties, and particularly by ex-officers and ex-employees. The former (from their dealings with an agency), the latter (from their prior employment) may well possess information as to official misconduct etc. which it is in the public interest to have disclosed and investigated. In the case of ex-officers, because they may well remain subject to a duty of secrecy, this facility becomes the more necessary — if only so as to allow them the advantage of the "secrecy override" in the reporting procedures proposed. While allowing third parties other than ex-officer's to report to the agency may be thought to open up the possibility of frivolous or ill-informed complaint, it is to be emphasised that in the proposed procedures, the agency itself would have the discretion to determine whether or not to institute an investigation. It should be added simply by way of note, that if anonymous reporting to the independent agency is to be allowed — and it is proposed that it should be — this necessarily would admit of reporting by third parties as well as by serving officers and employees.

(c) "*Going Public*"

The primary considerations informing the proposals made so far are that the relative and several interests of reporter, reported and government justify the channelling of reports, but that the public interest requires that the public be kept informed (via Parliament and possibly directly) of reports made and of the outcomes of their investigation.

The outstanding issue, though, is whether the value to be placed on the reporting of misconduct or maladministration is such that the community, as a matter of public policy, would wish to encourage disclosure to the point that it is prepared to be indifferent both as to whom the disclosure is made and as to the interests affected by the mere act of making such disclosure. At the Federal level in the United States, the public policy choice has favoured relatively unrestricted disclosure by civil servants (there are exceptions), the federal government and the Congress seemingly being prepared to accept both the disruption to government and the prejudice to persons accused, as being of subordinate importance to the promotion of reporting. That such a stance has been taken in the U.S. provides no justification of itself for taking a similar stance in this country. Despite the apparent enthusiasm in the

Fitzgerald Report[31] for seemingly unrestricted public whistleblowing,[32] it is of marked importance to evaluate this matter dispassionately and with sensitivity to Australian circumstances.

If reporting procedures are put in place of the types suggested, such justification as there may be for allowing reporters to disclose to whom they wish (and whether to the media or otherwise) depends very much on the evaluation to be made of the likely credibility, integrity and effectiveness of the procedures proposed. If there is no reason to believe that they will not be effective in securing the revelation etc. of misconduct and maladministration (save possibly in exceptional circumstances), the argument against reporting without restriction becomes a formidable one. The proposal that the Ombudsman be constituted an independent investigative agency is premissed on the view that this official has established a place in our systems of governmental review which can reasonably reassure potential reporters that their report will fairly and adequately be investigated and that remedial measures will be prosecuted. And to bolster that reassurance the parliamentary and other reporting obligations and powers of the Ombudsman have been accentuated in the present proposals. Unless and until this premise is demonstrated to be too optimistic, it is suggested that the proposals made should *as a rule* be taken as setting the appropriate limits to what should formally be authorised as unobjectionable in reporting by public officers etc. "As a rule" is emphasised. In two circumstances departure from the suggested procedures may be justifiable.

The exceptional cases

1. Disclosure to Parliament

No Australian jurisdiction seems as yet to have established a standing committee of parliament with an explicit remit to receive allegations of misconduct etc in public

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[31] *Report of a Commission of Inquiry Pursuant to Orders in Council*, 3 July, 1989, Qld.

[32] Ibid, p.134.

administration. Committees do, however, exist which have general responsibilities which encompass oversight of the administration or of a part or facet of it. The matter which needs to be considered is whether, and if so in what circumstances, an official should be allowed to report directly to such committees. In posing this, it is noted that under Ombudsman legislation based on the Western Australian model, express provision is made for the parliamentary reference of matters to the Ombudsman for investigation and report. It is equally noted, however, that in all jurisdictions parliament (i) has constituted the Ombudsman as a parliamentary officer to receive complaints directly from complainants and that direct complaint is the general procedure adopted in the legislation; and (ii) has provided the Ombudsman with appropriate investigative machinery to handle complaints.

Though the question posed may be taken by some to raise large questions concerning constitutional responsibilities, its answering it is suggested depends, by and large, on practical considerations. If, as proposed, Parliament is to create an independent investigative agency which is accountable to it, the procedures laid down for reporting to that agency should as a rule be the ones to be followed. In one situation, though, it may be considered appropriate to allow direct reporting to a parliamentary committee. That is where a committee is itself inquiring into a particular facet or part of the administrative system and a proposed report relates to the subject of that inquiry. Here there do seem to be constitutional arguments in favour of allowing direct reporting to such a committee notwithstanding that the reporter has not availed of such other reporting procedures as are available. It is, however, a question of judgement as to whether such reporting should be countenanced or encouraged given (a) the alternatives that are available; (b) the likely relative effectiveness of a parliamentary investigation versus an Ombudsman conducted one; and (c) the lack of protection that a parliamentary inquiry might involve for persons and agencies affected by an allegation made to a parliamentary committee. In any event this suggestion — and it is no more than that — goes no further than this: it would be the action of Parliament itself in instituting a committee inquiry into a matter which would trigger a right to report to that committee in relation to that matter.

2. Disclosure justified in the Public Interest

One encounters here the most difficult and controversial situation: the person who fails to or refuses to avail of established procedures for reporting, who goes public (either directly or via an M.P.) and whose revelations are justified in the event. Though the issue, formally, is with whether such a person should be considered to have acted in a way which is unobjectionable, it becomes in substance one of the extent to which, if at all, that person should be protected from reprisal etc. for having made the disclosure and in the way adopted. It should be noted that in the Commonwealth, the A.C.T., Western Australia and Tasmania, going public is, at the moment, a criminal offence for most officials. In Queensland and the N.T. it can be such.

The three important background propositions that need to be kept in mind when considering this matter are —

(i) that the common law's duties of secrecy and fidelity in their "public interest", whistleblowing exception, while increasingly emphasising that where proper avenues of complaint are available they should be used, does not in all circumstances preclude a person's going public;

(ii) that while the common law accepts a public interest defence, statutory or statute derived duties of secrecy commonly do not; and

(iii) that, when applied to the same fact situation, the two preceding propositions can produce the anomalous result that while the courts will not restrain the disclosure (even the public disclosure) of certain information in some circumstances, the discloser may nonetheless be liable (even criminally so in some jurisdictions) for making that disclosure.

Any response to be made to the problem of the reporter who goes public needs to address two questions:

(1) should going public itself be a *formally authorised* practice at least in respect of matters which could be disclosed to an independent agency constituted for the purpose? and

(2) whether or not formally authorised, to what extent (if at all) should going public entitle a person to the *benefit of anti-reprisal or anti-harassment procedures?*

"Formal authorisation"

For reasons earlier given it is not considered appropriate at present to institutionalise a right to go public in any legislative, contractual or administrative procedure. Having said this, it is equally considered unwise expressly and legislatively to prohibit going public and for two reasons. First, such a prohibition would simply accentuate the anomaly, noted above, that can arise between the common law and statute and could result in the attribution of something like public martyr status to a person who violates the prohibition but whose disclosure is justified by the common law. Secondly, no system of prohibition will, in all likelihood, put an end to the practice of going public however unjustified in the circumstances.

"Anti-reprisal procedures"

The appropriate stance to be taken to going public seems, for practical purposes, to arise at this point. Before a person should be entitled to the protection of anti-reprisal protections (whether from the criminal law, from discrimination in employment, etc.) where that person has not availed of established reporting procedures but has gone public, it is proposed that it should be necessary for that person to show —

(i) that he or she had reasonable grounds for believing that the report made was true;

(ii) that the allegation made is substantially true in fact; and

(iii) that, not withstanding his or her failure to avail of established procedures, the course taken was excusable in the circumstances.

These limiting requirements serve a variety of functions. First they acknowledge that, despite the stringency of our secrecy regimes, the public interest exception of the common law should be recognised as serving a legitimate public purpose in our society and should in consequence receive some limited recognition in any reporting regime. Secondly, within their scope of operation they provide a limited and necessarily circumscribed "public interest" defence to secrecy laws binding officials etc. But thirdly, they provide a very positive incentive to reporters to avail of established avenues of complaint in that while resort to those avenues will attract anti-harassment protection as of course, going public will only attract protection, if at all, *after the event.* It is noted that a somewhat similar approach to that above has been recommended by the Ontario Law Reform Commission in its Report on whistleblowing.[33]

"After the event" protection is obviously a contentious proposal in that it requires both that the allegation be shown to be substantially true and that the failure to use established procedures was excusable in the circumstances. The effect of the first of these requirements is, in substance, to put the whistleblower in much the same position as a person seeking to justify a defamatory statement. And the defamation analogue provides some justification for the requirement. Given the damage that can be inflicted on the person or body the subject of an allegation, the reporter should be required to justify inflicting that damage if he or she wishes to publicise his or her allegation rather than avail of alternative procedures which protect the subject person's interests while allowing for investigation of the allegation. If, as proposed below, an agency or composite of agencies be made responsible for the oversight and administration of whistleblower protection, the twin "proofs" noted above will have to be made to the satisfaction of that agency or agencies.

REPORTER PROTECTION

For understandable reasons this topic tends to be the tail that wags the dog in any discussion of "whistleblowing". While it needs to be addressed in its own right, as the previous discussion illustrates, the reporter's interests are *not* the only ones for which protective provision needs to be made in any sensitive and comprehensive system of reporting.

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33 See *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, p.335, (1986).

A primary object in the procedures previously outlined is to ensure so far as is practicable that reports of misconduct/maladministration are both channelled and kept confidential (particularly in respect of the reporter's identity). These requirements should of themselves go some distance in reducing the prospect of a reporter's — or for that matter of a suspected reporter's — being subjected to reprisal, harassment or discrimination consequent upon a report made. "Suspected reporter" is to be noted in this, because such a person can erroneously, but just as effectively, be subjected to actions of reprisal, etc. But if channelling and confidentiality are necessary, they are insufficient alone to guard against what can be a particularly offensive form of activity.

Reporter protection would seem to have two primary dimensions or points of focus. The one looks at the matter from the perspective of the reporter and is concerned (i) with securing to him or her the continuing enjoyment of both civic rights and, where relevant, employment rights and opportunities; and (ii) with such preconditions as need to be satisfied by the reporter before that protection will be accorded. The other looks at the matter from the perspective of the person threatening or taking action against the reporter and is concerned with the circumstances in which, and the nature of, sanctions which should be visited upon that person. Beyond these the special position of the person discriminated against in employment because he or she is erroneously believed to have been a reporter requires consideration, as does the position of the person who knowingly makes a false or misleading allegation.

THE REPORTER'S PERSPECTIVE

(A) Preconditions for Protection

It is not at all controversial to suggest that a person who makes an allegation of misconduct or maladministration which he or she knows to be baseless not only should not be entitled to invoke protective provisions, but also should be subjected, potentially, to sanctions for having so done. The wilfully false allegation is returned to below. But this clear case apart, the circumstances which entitle a reporter to protection can become quite blurred and this, primarily, for reasons relating to the state of mind and of knowledge of the reporter.

Accepting that the report itself must relate to a matter in respect of which reporting is provided, what significance, if any, is to be attributed —

(a) to the reporter's motives in making the report?

(b) to the reasonableness or otherwise of the reporter's belief in the truth or accuracy of the report made? and

(c) to the objective accuracy of the report?

Each of these need to be considered in turn.

"Motive"

Given that the object of reporting is to have misconduct etc. revealed and remedied, the particular motive of the reporter — be it altruistic or spiteful — should be a completely irrelevant matter. If the reporter has made a report which would otherwise qualify him or her for protection, that protection should not be lost because of the reasons which inspired the report. As noted in Part B, such is the position at common law.

"Belief"

Save in those (rare?) cases where a reporter is fully aware of all facts relevant to the allegation made, reports necessarily will be based on less than perfect knowledge and information. And as relative certainty becomes suspicion, as known fact becomes hypothesis, the point can be reached at which it can no longer be said that what is known and what can be inferred therefrom could justify the making of an allegation at all, no matter how much the reporter believes (or wishes to believe) in the accuracy of the allegation. Unless we are prepared to countenance — and to protect — purely speculative allegations, unless we are prepared to relieve a reporter of any responsibility to provide a credible justification for the allegation made, it is necessary to prescribe some minimum standard of belief as to accuracy below which a reporter is not entitled to protection — and this notwithstanding that the reporter acted honestly and with good intention.

Although both the channelling of reports and, in the case of the Ombudsman, a discretion not to investigate have been proposed, it is nonetheless suggested that some level of personal responsibility should be expected of a reporter for the report made. Given that motive has been discountenanced as a consideration relevant to the grant of protection, and given the suggestion below that accuracy in fact should not be a precondition for protection, it is considered that personal responsibility should be exacted in the belief requirement to be expected of a reporter. This necessarily involves the imposition of some objective criteria linking the reporter's belief to the accuracy of the allegation made.

Legal formula dealing with effective levels of knowledge or belief short of actual knowledge have often proved to be difficult to formulate. And they almost inevitably are imprecise. The two possible formulae which can be suggested here are either

"knows or has reason to believe in the accuracy of the allegation made";

or

"reasonably believes in the accuracy of the allegation made".

The latter, which has the virtue of simplicity, is that favoured in U.S.federal whistleblowing legislation and in the Ontario Law Reform Commission's Report. The former, which is a little less stringent, but which is very much a lawyer's technical formula, is most likely less attractive because of its possible technicality.

While it may be said that a "reasonably believes" requirement could enhance the possibility that some wrongdoing will remain undisclosed, in common with the Ontario Law Reform Commission, this Report considers that to be "a reasonable price to pay"[34] when considered in the light of the effects which could possibly ensue if that requirement was not insisted upon.

"Accuracy in Fact"

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[34] *Report on Political Activity*, etc. p.338.

Save in one exceptional case noted below, entitlement to protection should not be made to turn upon whether or not the allegation made is found, on investigation, to be substantially accurate. Such a precondition — which currently exists in the common law's "just cause or excuse" exception[35] — provides a marked disincentive to reporting, the more so given that the conduct of any consequential investigation is not in the hands of, or controllable by, the reporter. Consistent with the policy of facilitating the discovery of misconduct etc., entitlement to protection should depend, not upon an ex post facto judgement of the accuracy of an allegation made, but upon reasonable belief in its accuracy *at the time of its making*.

The exceptional case is that noted earlier where a reporter, instead of using available reporting procedures, goes public. In this case, as previously suggested, entitlement to protection should depend (inter alia) upon the allegation made being substantially accurate in fact.

Put in summary form the three preconditions for protection should be –

(1) that the report relates to a matter falling within the categories enumerated in the reporting procedures;

(2) that the reporter reasonably believes in the accuracy of the allegation made in the report; and

(3) in the case of a person who fails to or refuses to use available reporting procedures and who instead "goes public", additionally (a) that the report is substantially accurate in fact; and (b) that notwithstanding that failure or refusal, the course taken was excusable in the circumstances.

Persons Erroneously Believed to be Reporters

A person who has not in fact made a report may nonetheless be subjected to discrimination or harassment because others erroneously believe that he or she was a reporter.

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35 See *A.* v *Hayden* (1984) 56 A.L.R.82, at 89.

This possibility is exaggerated rather than diminished by the emphasis on confidentiality in the proposed reporting procedures themselves. It is proposed that persons who reasonably believe that they are being discriminated against etc. for this reason should be entitled to the same benefit of protective measures as a person who has made a report in fact.

THE PROTECTION GIVEN AND SANCTIONS

Though reprisal can come in a variety of forms, it would seem to be of two primary types: first discrimination by superiors having employment-related powers over a reporter; and secondly, harassment and intimidation by co-workers or by third parties — both practices being related to the fact of, or to the consequences of, a report having been made. Somewhat different approaches are needed to meet each of these practices.

Discrimination

The objectionable phenomenon is the illegitimate use of power over an employee which prejudicially affects the rights and expectations a reporter has, or is entitled to entertain, in his or her employment. Its manifestations can be various ranging, for example, from dismissal, denial of promotion, demotion, or transfer through to oppressive supervision and work allocation. Put in a general way what is at stake is merit protection and the object to be achieved in protection is to proscribe or to nullify the effects of an improper personnel management practice. That practice can be cast in the following general form:

> *It is an improper personnel management practice to discriminate against an employee in any matter relating to that person's employment on account of that employee's having made a report which is authorised or justified ["justified" is used to cover those "going public" cases which can attract protection] under the proposed reporting procedures.*

The central requirement in discrimination cases is an effective "grievance appeal" procedure in which challenge can be made to employment decisions and actions affecting the reporter which are, or are alleged to be, tainted by this improper practice. Equally, the appellate authority must be enabled not only to vary or reverse such decisions but also to nullify the effects they may have already occasioned. In extreme cases, for example, this latter may necessitate the making of orders for reinstatement, recommending ex gratia payments or proposing affirmative action in promotion etc. for the reporter. It will be suggested below that responsibility for policing etc. of protective measures be assigned to an independent agency (the Ombudsman is that proposed). In consequence, that agency would monitor grievance appeals on the appellant's behalf.

Harassment and Intimidation

While discrimination can constitute a form of harassment or intimidation, the latter practice is not necessarily based on any misuse of power over the reporter. It involves no more than offensive or threatening behaviour directed at the reporter. As such it is not a form of improper personnel management. It is a species of personal misconduct. And it can be practised either by a co-worker or by a third party (e.g. a person affected by an allegation of third party wrongdoing). The twin needs in harassment cases are first, to insulate the reporter from adverse or threatening conduct [36] and secondly, to provide sanctions against persons engaging or threatening to engage in harassment or intimidation.

As to insulation, this may require in extreme cases a capacity to make protective arrangements for the safety and security of the reporter. In lesser cases the matter may be addressed adequately through appropriate personnel management practices. But to cover the range of possibilities attention is drawn by way of example to the protective power given to the I.C.A.C., the National Crime Authority and the E.A.R.C. under their respective Acts. These bodies are empowered to -

> "make such arrangements as are necessary to avoid prejudice to the safety of [witnesses, informants, etc.] or to protect any such person from intimidation or

[36] Cf. *Independent Commission Against Corruption Act, 1988*, s.50; *National Crime Authority Act*, 1984, s.34.

> harassment", "if it appears that ...the safety of the person ... may be prejudiced or the person ... may be subject to intimidation or harassment."[37]

A provision modelled on the above lines would seem adequate to allow dedicated responses to be made to meet the exigencies of individual cases involving whistleblowers.

As to sanctions, two distinct possibilities require consideration both because the person engaged in harassment need not necessarily be a co-worker and because the form the harassment takes may be of such seriousness as to warrant the imposition of criminal sanctions. Harassment by co-workers is, perhaps, the most easily addressed and this because it can be attacked through regulation in the employment relationship itself as a disciplinary matter. given that harassment or intimidation constitutes a departure from the standards of conduct to be expected of public officers and employees it is proposed that it be declared expressly that:

> *An employee is guilty of misconduct who intimidates or harasses, or who threatens to intimidate or harass, another employee on account of that other employee having made a report which is authorised or justified [under the proposed reporting procedures].*

Harassment by third parties is less easily dealt with. While there are at the moment a disparate number of possible civil and criminal remedies which may be able to be invoked against a third party (or for that matter a co-worker) in individual cases e.g. trespass, battery, assault etc., consideration needs to be given to whether a specific criminal sanction should be imposed to sanction at least serious manifestations of harassment, etc. There are a number of existing provisions in State I.C.A.C. and E.A.R.C. legislation which could be considered.

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[37] *Independent Commission Against Corruption Act*, 1988, s.50; *National Crime Authority Act*, 1984, s.34; *Electoral and Administrative Review Commission Act*, 1989, s.2.25.

The *Independent Commission Against Corruption Act* offence is of relatively narrow compass. It provides[38] that –

> "A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of his or her [having been a witness, etc.] is guilty of an indictable offence."

The *Electoral and Administrative Review Commission Act* provision[39] and the proposed amendment to the *Criminal Justice Act* [40] are much more expansive in character. These make it an offence where a person:

> "(a) prejudices, or threatens to prejudice, the safety or career of any person;
>
> (b) intimidates or harasses, or threatens to intimidate or harass, any person;
>
> (c) does any act that is, or is likely to be, to the detriment of any person
>
> because the person referred to in paragraph (a), (b) or (c) ... has assisted the Commission etc."

It has been proposed that the offence in both cases be reinforced by a power in the respective Commissions to obtain injunctions from the Supreme Court to restrain breaches, etc. of the above law. The comprehensive nature of the interim Queensland approach does raise in sharp form for other jurisdictions the question whether a like approach should be adopted if protective measures are to be established.

The three obvious points to be made about the Queensland scheme are (i) that it is designed for an independent agency which itself has the task of policing and enforcing

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38 S.93.

39 S.65.

40 See Report of the Parliamentary Committee for Electoral and Administrative Review, "Whistleblower's Protection – Interim Measures."

protective measures; (ii) given the remits of the E.A.R.C. and the C.J.C., the offence provisions are concerned as much with harassment by third parties as they are with workplace misconduct; and (iii) the offences do not presuppose that the person harassed will, in all probability, be a public officer or employee. These considerations may make the adoption of a Queensland approach less compelling in the more limited environment which is of concern to this Report. Accepting that protective provision has to be made both for ex-officers and ex-employees and for third party harassment, it may be considered that these two demands can be met in a more limited way, with the primary emphasis in anti-harassment measures being directed more specifically to the context where it is most likely to occur, i.e., the workplace (on which see above).

As a possible alternative to the Queensland scheme what is proposed for consideration are (i) an offence which enlarges somewhat upon that found in the *Independent Commission Against Corruption Act* and which would apply both to third parties and co-workers and in respect of harassment directed either at a public officer or employee, or at an ex-officer, etc; and (ii) a statutory power in the designated enforcement agency to apply to a court for an injunction to restrain the commission or apprehended commission of that offence. The offence would be along the lines that –

> *A person who occasions or procures or who threatens to occasion or procure damage, loss or disadvantage to any person on account of that person's having made a report which is authorised or justified by the reporting procedures is guilty of an offence.*

This proposal would attract penal sanctions to harassment etc. which have significant adverse consequences, but would leave more minor misconduct to be remedied (in the case of employees) only by disciplinary sanction or (in the case of third parties) by social sanctions.

The Queensland proposals for a power to seek an injunction (themselves based on the *Trade Practices Act, 1974*, s.80) provide a model for an injunctive power. The inclusion of such a power in a protective scheme seems desirable. It is proposed that the Ombudsman be empowered to apply for such an injunction if, as suggested below, that officer is given responsibility for the protective scheme.

RESPONSIBILITY FOR THE PROTECTIVE SCHEME

This, perhaps, is the most problematic matter. Yet it is the one upon which the effectiveness of the entire reporting procedure depends. It raises two interrelated issues –

(i) is a single agency (or a combination of agencies) to be responsible for the implementation etc. of that part of the scheme responsible for *reporter protection*, or is protection to depend largely upon self-help in availing of such anti-reprisal procedures as are to be established? and

(ii) if an agency is to be given responsibility for oversight of protective measures what is to be the appropriate relationship between the agency and a complainant-reporter?

"Self-help or agency oversight?"

This question, it is considered, admits of only one answer. To proscribe reprisal but to leave it to the reporter to bear the practical burden of enforcing protective measures both for his or her own and for the public's benefit is an unreasonable imposition and is likely to prejudice the utility of the reporting procedures being proposed. It is indispensable that there be an officer or agency to whom a reporter can turn for counsel and upon whom he or she can rely to protect and to represent his or her interests. The difficulty though, lies in the selection of the appropriate agency. Given the variety of supervisory bodies that now exist in at least parts of the public sector, some may be attracted to a fragmented approach giving responsibility for different parts of the protective scheme to differing bodies, e.g. employment matters to merit protection bodies, etc. In any event in N.S.W. and Queensland some fragmentation is the inevitable consequence of the creation of the I.C.A.C. and the C.J.C. given that each body has some anti-reprisal powers.

While accepting that implementation of protective measures, particularly in the employment sphere, necessarily will involve action by existing governmental agencies, e.g.

grievance or disciplinary tribunals, it is nonetheless suggested that the interests both of reporters and of the public, and the overall integrity of the reporting scheme itself, favour assigning responsibility for the protective scheme to a single independent agency (save in excepted matters where a specific body, e.g. the I.C.A.C. or C.J.C., has a peculiar responsibility). Again it is proposed that that agency be the Ombudsman/Parliamentary Commissioner. In so doing it is acknowledged that this would transform the character of that office in a number of respects: (a) in the discrimination area it would involve it in employment matters (these are currently excluded from that officer's jurisdiction); and (b) in the harassment sphere, if earlier proposals are accepted, it would result in the Ombudsman's being empowered to make security arrangements and to apply for injunctions. But this notwithstanding, it seems essential (i) that a complainant-reporter should have access to a body which can provide advice and protection and which is empowered to act for his or her benefit in the prosecution of complaints; (ii) that an independent body monitor both the treatment of complaints and corrective action taken, and (where there are not other bodies which can themselves initiate corrective action) take such action or recommend that it be taken; (iii) that such a body be empowered to report to appropriate authorities dissatisfaction with the treatment of complaints/corrective measures in any given case[41]; and (iv) that such a body in its Annual Report to Parliament, notify the number and nature of complaints made under the procedures and the manner of their resolution. Though these considerations do not of themselves necessitate the use of the Ombudsman in the way suggested, the advantage in so doing is heightened given the investigative role proposed for this officer under the reporting scheme.

"The agency-complainant relationship"

A tutelary role for the Ombudsman is clearly envisaged in the above. But should that officer become, in effect, the representative and advocate of a complainant in, for example, grievance appeals? The issue here is what should be the proper protective role of the

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[41] Cf. existing Ombudsman legislation.

Ombudsman where the invocation of protective measures necessarily involves the participation of another agency of government — as will often be the case in employment related matters. With some hesitation, this Report inclines to the view that the Ombudsman's role here at least should remain much as it does at the moment: it should ensure that a complainant's grievances are adequately dealt with etc. by the agency having particular responsibility for the matter in hand, e.g. a grievance appeal, but that it should not necessarily become a partisan advocate in that matter. It should nonetheless be entitled to make appropriate complaint and report in the event of complaints not being handled by other agencies to its satisfaction.

Protection and Ex-Employees (and others)

While the principal focus in the measures considered so far is on employee protection, consideration needs to be given to the protection of third parties (particularly ex-employees). As noted earlier, reporting procedures should enable persons other than serving officers and employees to report to the independent agency (the Ombudsman). Equally, it is proposed, they should be entitled to the benefit of such protective measures as are appropriate to their circumstances. In the case of ex-employees this need is the more necessary because they will ordinarily be subjected to enduring secrecy obligations which themselves may inhibit lawful reporting — although this hazard will be eliminated if ex-employees are allowed to report to the Ombudsman and thus take the benefit of the "secrecy override" that that reporting attracts.

(a) Ex-employees

Their need to avail of protective measures can arise for either of two reasons: (a) because, having made a report while still in employment, discrimination or harassment caused or induced the termination of their employment; or (b) because, having made a report after termination of their employment, they have been subjected to harassment or intimidation either by public officials or by third parties. In the former instance (employment report) they should be entitled through the agency responsible for protective measures to seek redress from their former employer e.g. reinstatement, compensation, etc., or to trigger possible disciplinary procedures against officials alleged to have been guilty of harassment. In the latter instance (post-employment report) they should at least be able through the Ombudsman to seek the benefit, where necessary, of security arrangements of injunctive protection, and of protection from continuing harassment from officials.

(b) Third Parties

These, for practical purposes, are in a similar position to ex-officers making a post-employment report and should be able, through the independent agency, to obtain a like protection.

FALSE OR MISLEADING REPORTING

It has already been suggested that a reporter should not be disentitled to protection because the allegation made proves in the event to be inaccurate, provided that the reporter reasonably believed in its accuracy at the time of its making. But it is altogether a different matter where the allegation made is known to the reporter to be false or misleading at the time of its making. Here the need to protect interests other than the reporter's comes into its own. A clear case exists to treat the making of such allegations as an improper activity.

Accordingly, it is suggested that a specific criminal offence be created proscribing allegations known to be false or misleading and that, for employment purposes, a like offence of misconduct be expressly declared. As to a criminal offence we have already a number of models available. The *Independent Commission Against Corruption Act,* s.81 makes it an offence for a complainant to –

> "wilfully make any false statement to, or mislead, or attempt to mislead, the Commission" etc.

The National Crime Authority Act, 1984, s.33, for its part, though extending only to persons giving evidence at a hearing, makes it an offence for that person to give evidence –

"that is to his knowledge false or misleading in a material particular."

Finally, Ombudsman legislation in all jurisdictions creates an offence "of making false and misleading statements", which in their detail are variants on either of the above two formulae.[42]

The precise form in which an offence is cast will doubtless be influenced by the draughting practices of each jurisdiction and, if the Ombudsman is selected as the independent reporting agency (as proposed), by the existing terms of the relevant Ombudsman Act. The three matters which should be addressed in the offence are –

(i) that the offence cover both false statements and misleading conduct — (not all Ombudsman Acts so do);

(ii) whether the statement must be known to be false or simply that it be false in fact and made without regard to its truth or falsity; and

(iii) whether the false statement should be limited by a requirement that it be in relation to a "material particular."

The additional comment to be made is that notwithstanding the offence in the Ombudsman Act it will be necessary to enact a parallel general offence and this because the proposed reporting procedures envisage reporting in ways other than to the Ombudsman, i.e., in-house, or "going public".

Whatever the precise formula adopted in each jurisdiction, what would seem to be necessary is a parallel disciplinary offence of making false or misleading reports.

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[42] See s.36(2)(b), C'wlth and A.C.T.; s.37(1)(b), N.S.W.; s.22(b), Vic.; s.24(c), W.A.; s.27(c), Tas.; s.24(c), Qld.;s.24(c) S.A.

SUMMARY OF PROPOSALS

A. THE REPORTING PROCEDURES

1. Infra-Agency ("In-House")

(i) Notwithstanding any duty of secrecy to the contrary, it should be lawful for any officer or employee of an agency of government (including a State-owned company) to make a confidential report to [a designated officer or officers] of that agency concerning —

(a) non-compliance within the agency or by agency officials, with legislative, governmental or administrative policy;

(b) maladministration, particularly where this results in fraud or waste, or is likely to pose an immediate threat to public health or safety;

(c) misconduct of an agency official; or

(d) serious misconduct of a person or body in dealings with the agency.

(ii) Any report so made (whether or not anonymously) should be treated as confidential and appropriate steps should be taken to maintain the confidentiality of the identity of the reporter (if known) and, so far as is practicable, of any person impugned in the report.

(iii) The designated officer to whom a report is made should later inform its maker of the general nature and outcome of any investigation made as a result of the report.

(iv) The Annual Report of an agency should itemise the number of reports made under the procedure, the general nature of matters reported, and the outcomes of their investigation.

2. Independent Agency

(i) Notwithstanding any duty of secrecy to the contrary, it should be lawful for any public officer or employee, any officer or employee of a State-owned company, or any other person, to make a confidential report to the Ombudsman [or in relation to specified matters, to some other designated agency] concerning —

(a) significant non-compliance by an agency or by an official, with legislative, governmental or administrative policy;

(b) maladministration where this results in fraud or waste, or is likely to pose an immediate threat to public health or safety;

(c) serious misconduct by an official; or

(d) reports, whatever their subject matter, which have been made using in-house procedures but which have not been dealt with to the reporter's satisfaction.

(ii) The Ombudsman should ordinarily investigate the report but may refer it to another agency of government (excluding that to which the complaint relates) if this is considered necessary and appropriate to deal with the matter raised in the report.

(iii) Any report so made (whether or not anonymously) should be treated as confidential and appropriate steps should be taken to maintain the confidentiality of the identity of the reporter (if known) and, so far as is practicable, of any person impugned in the report.

(iv) The Ombudsman [or designated agency] should later inform its maker of the general nature and outcome of any investigation made as a result of the report.

(v) The Annual Report of the Ombudsman should itemise the number of reports made under this procedure, the general nature of matters reported, and the agencies to which they relate, and the outcomes of their investigation (whether or not that investigation was undertaken by the Ombudsman).

(vi) The Ombudsman, in its discretion, should be empowered to make ad hoc reports to Parliament concerning any matter raised by a report to it, or in any investigation conducted by it.

(vii) The Ombudsman should be empowered to disclose to the public any matter which it considers is in the public interest so to do.

(viii) The nature of the activities of certain types of agency or of parts of agencies can be such that their affairs should be excluded from inter agency reporting procedures. Consideration needs to be given to those which properly should qualify for such exclusion.

3. "Going Public"

1. Notwithstanding any duty of secrecy to the contrary, it should be lawful for a public officer or employee or an officer or employee of a State-owned company
   (a) to make a (confidential?) report to a parliamentary committee of any matter which could have been reported either "in-house" or to an independent agency under the preceding proposals;
   (b) where that parliamentary committee has undertaken an inquiry into a matter in relation to which that report would be a relevant consideration.

2. A reporter who fails to or refuses to avail of established reporting procedures but who "goes public", will nonetheless be entitled to the protection of anti-reprisal procedures including immunity from criminal prosecution if, and only if, that person can show —
   (i) that he or she had reasonable grounds for believing that the report made was accurate;
   (ii) that the allegation made is substantially accurate; and
   (iii) that, notwithstanding his or her failure to avail of established procedures, the course taken was excusable in the circumstances.

B. REPORTER PROTECTION

(A) Preconditions for protection of reporters

(1) That the report relates to a matter falling within the categories enumerated in the reporting procedures;

(2) That the reporter reasonably believes in the accuracy of the allegation made in the report; and

(3) In the case of a person who fails to or refuses to use available reporting procedures and who instead "goes public" additionally (a) that the report is substantially accurate; and (b) that notwithstanding that failure or refusal, the course taken was excusable in the circumstances.

(B) Elements of the Protective Scheme

(1) That there be a general criminal offence covering serious harassment or discrimination. While there are several possibilities to be considered that proposed is: *A person who occasions or procures, or who threatens to occasion or procure, damage loss or disadvantage to any person on account of that person's having made a report which is authorized or justified under the reporting procedures, is guilty of an offence.*

(2) That the agency charged with responsibility for the protective scheme (the Ombudsman) be empowered to apply to a court for an injunction to restrain the commission or repetition of, or the threat to commit, the above offence.

(3) That discrimination in employment related matters be made an improper personnel management practice justifying a "grievance appeal." A formula proposed for consideration is:
It is an improper personnel management practice to discriminate against an employee in any matter relating to that person's employment on account of that person's having made a report which is authorised or justified under the reporting procedures.

(4) That the appropriate employment appellate body be empowered to take such steps as are necessary to nullify the effects of any discrimination that may have been practised.

(5) That harassment or intimidation or the threat thereof by a co-worker be acknowledged expressly to be a form of employment misconduct. A formula proposed for

consideration is:

An employee is guilty of misconduct who intimidates or harasses, or who threatens to intimidate or harass, another employee on account of that other employee having made a report which is authorized or justified under the reporting procedures.

(6) That the Ombudsman be empowered to make such arrangements as are necessary to protect a reporter if he considers that the reporter's safety may be prejudiced or that the reporter may be subject to intimidation or harassment.

(7) That the persons entitled to seek the benefit of protective measures be extended so as to include (a) persons who reasonably believe that they are being discriminated against etc. because they are erroneously assumed to have made a report; and (b) former officers, employees and third parties who have made reports which would have entitled them to protection if their report had been made by a serving officer or employee.

C. RESPONSIBILITY FOR PROTECTION

(1) That an independent agency (the Ombudsman) be assigned responsibility for the oversight and implementation of the protective measures proposed.

(2) That complainant-reporters be entitled to look to that agency for confidential advice and protection and for the proper safeguarding of their interests.

(3) That that agency take such steps as are appropriate in the circumstances to implement protective measures in a given case and where this involves the participation of another agency of government, to monitor the actions taken by that agency.

(4) To report to appropriate authorities dissatisfaction with responses made to complaints dealt with by other agencies.

(5) To report to Parliament generally on complaints made, on their resolution and on the effectiveness of the protective scheme itself.

D. RELATED MATTERS

That the making of reports known to be false or misleading be made both a criminal and a disciplinary offence.

PART B

THE LAW

Australian law regulating the use and disclosure of official information is in a far from satisfactory state. It suffers from both obscurity and untoward complexity. It differs markedly from jurisdiction to jurisdiction. It is ill-suited both to contemporary conditions of government and to prevailing constitutional and democratic norms. This Part outlines that law, its scope and effects, and its deficiencies. The treatment given necessarily will be fragmented for two reasons. First, the divergences in the laws of the Commonwealth, the States and the Territories are such that individual consideration often needs to be given to the laws of each jurisdiction. Secondly, within any one jurisdiction the sources of the law — common law, statute, subordinate legislation, etc. — are so various and can be of such variable significance as to require separate treatment of those sources themselves.

For the most part the ensuing discussion will centre upon the law of secrecy (or confidentiality) as it applies to the individual public official or ex-official. This emphasis itself reflects something of the nature of our contemporary constitutional and governmental systems. Notwithstanding the progressive introduction of *Freedom of Information* regimes in Australia, we have by no means reached — or sought to reach — the position where, for the individual officer, the free use and disclosure of information is the norm and secrecy the exception, although South Australia has moved the greatest distance in this direction.[43] While the balance is now changing, and desirably so, secrecy endures as the primary obligation and openness the exception, albeit a growing one.

For ease in presentation this Part will be divided into five sections. The <u>first</u> will provide a brief historical outline both of the law and of the changing constitutional and democratic attitudes which have informed the law. The <u>second</u> will consider two legal and constitutional matters which are of importance to an understanding of contemporary secrecy law as it applies to public officials. The one is the variable nature of a minister's legal and

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43 See *Government Management and Employment Regulations, 1986*, reg. 21.

conventional obligations, as the minister acts as an Executive Councillor, a member of cabinet, or in his or her portfolio. The other looks selectively at the position of public servants and ministers in the scheme of modern public service/public sector management legislation. The third section provides an analysis and criticism of the present law governing the use and disclosure of information by Australian public officials. Because of their very distinctive position and their unusual privileges, members of Parliament will be excluded from this treatment. The fourth section deals with the contentious topic of "whistleblowing" and with the extent to which it is allowed, promoted or impeded by present law. The fifth section considers the post-employment (or post-office holding) obligations of officials in relation to the use or disclosure they can subsequently make of information acquired in office.

SECTION 1.

II. A. AN HISTORICAL OUTLINE

"The counsels of the Crown are secret."

— *Australian Communist Party* v *The Commonwealth* (1951) 83 C.L.R.1, at 179 per Dixon J.

The unsatisfactory character of our present law governing official information is in large measure the product of the distinctive past of the law itself, of marked changes over time in the role and nature of government, and, until recently, of the authoritarian control Governments wished to exercise over their officials in making governmental information publicly available. Until well into the nineteenth century English legal and constitutional theory gave scant attention to official secrecy. Earlier constitutional controversies seem at least to have established the convention that secrecy attached to communications made to the Crown by its advisers,[44] a convention reinforced in turn by the secrecy requirement in the oath of Privy

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[44] See *Phillips, Law of Evidence*, Vol.I. 287 esp. fn 6, 5th Ed., London, Butterworths (1822).

Councillors.[45] That convention in turn was accepted as being a necessary adjunct to a system of Cabinet government especially if the collective responsibility of a ministry for cabinet decisions was to be maintained.[46]

To the extent that English courts gave any consideration to official secrecy this was almost invariably in the context of claims to exclude State documents and official communications from disclosure in legal proceedings. Here on grounds of public interest and public policy a generous though not absolute protection was given to the Crown[47] although a muted controversy existed in nineteenth century law as to whether or not the courts retained some residual power to inspect documents for which "privilege" was claimed and to overrule that claim.[48] Important in reinforcing an environment of official secrecy, the judges emphasised that even if privilege for State documents was not claimed by a responsible minister or senior official, the judges themselves would nonetheless prevent their disclosure in court where necessary. Significantly they were to stress that it was not open to an official who was in possession of official information to decide whether or not it should be disclosed in court and that because the official held that information as "a trustee on behalf of the public."[49] What, though, should be stressed about privilege cases is that they were not concerned with maintaining official secrecy as such. As the Privy Council was to emphasise for the purposes of Australian law, the foundation for the protection given to governmental information:

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[45] For which see *Report of the Committee of Privy Councillors on Ministerial Memoirs*, para.21, , Cmnd 6386, H.M.S.O., London (1976).

[46] *Whitlam* v *Australian Consolidated Press* (1984) 60 A.C.T.R.7.

[47] For extreme views of that protection see e.g. *Best's Evidence*, 734, 6th Ed., H. Sweet, London (1875); and the views of the reporters of *Dickson* v *Viscount Combermere* (1863) 3 F. & F.527; 176 E.R. 236 at E.R. 241 ff, 264. See generally Robertson, *Civil Proceedings By and Against the Crown*, 600 ff, Stevens & Sons. London (1908).

[48] For the assertion of such power see e.g. *Hennessy* v *Wright* (1888) 21 Q.B.D. 509.

[49] *Home* v *Bentinck* (1820) 2 Brod. & B. 130, at 161 per Dallas C.J.

> "is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which is no reason for their non-production."[50]

Beyond the "privilege" cases the common law remained silent on the theme of official secrecy. Though from the early nineteenth century it began to develop its own law of confidentiality (or secrecy) this was directed almost exclusively to secrecy in private, professional and commercial relationships. It was only in the second half of the twentieth century that its applicability to governments and to public officials was fully established. This in turn has meant that while we now have a distinct common law of official secrecy, that law, as the Spycatcher litigations reveal, is in significant respects in an embryonic and uncertain state. For the most part the Australian legal story of government's management of official information has been the story of legislatively imposed restrictions on the use and disclosure of information by public officials and, particularly, by public servants.

Though only of indirect relevance to Australia some note should be taken of Britain's early legislative endeavours in this field. In 1889 the country's first *Official Secrets Act* was passed. Under it any person, having acquired information by virtue of any office under the Crown, who communicated that information —

> "to any person to whom the same ought not, in the interest of the State, or otherwise in the public interest, to be communicated at that time, [was] guilty of a breach of official trust."[51]

To be noted in this is, first, that to be an offence the communication itself had to be shown to be contrary to "the public interest" and, secondly, that the offence itself drew upon the dual notions of public interest and of public trusteeship of official information which had developed in the privilege cases. Found by successive governments to be insufficient to discourage civil

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[50] *Robinson* v *State of South Australia* [No.2] [1931] A.C.704 at 714.

[51] *Official Secrets Act 1889*, s.2(1).

service "leaks" of which they disapproved (whether or not contrary to the public interest), this offence was repealed in 1911 and in its place was enacted the draconian s.2 of the *Official Secrets Act 1911*. That section, avowedly aimed at leaking, made it an offence for any Crown official to communicate information obtained in office to "any person, other than a person to whom he is authorised to communicate it."[52] The boundaries of official secrecy no longer were to be set by the public interest. Government discretion was in the main to determine the public availability of governmental information. The 1911 Act was finally repealed in 1989 by the new and somewhat less restrictive *Official Secrets Act,1989*.

Australia's legislative story began in Victoria in 1867. The first colony to put its public service on a statutory footing, the 1867 Regulations for that colony's *Civil Service Act 1862* provided that:

> "No information out of the strict course of official duty shall be given directly or indirectly, by any officer without the express direction or permission of the responsible Minister."[53]

Thus was set the pattern for the various public services of Australia. Stringent, though far from uniform, secrecy obligations became the norm for public servants in particular and these subsist in the majority of Australian jurisdictions to this day. Characteristic of the public service regimes has been the requirement that information acquired in office could only be disclosed (i) in the course of official duty; or (ii) with appropriate authorisation from a minister or chief executive officer. As with Britain's *Official Secrets Act* 1911, the "public interest" was given no place in settling secrecy's domain. Governments retained for themselves the power to control the public availability of official information.

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[52] For a discussion of both Acts and for a criticism of the latter see *Report on Section 2 of the Official Secrets Act* 1911, Cmnd. 5104, H.M.S.O., London (1972).

[53] Reg. 20.

To exaggerate the coercive nature of the public service secrecy regimes, all Australian jurisdictions with the exception of New South Wales, Victoria and South Australia went on to enact general criminal offences governing the disclosure of information which an official was obliged to keep secret. These general offences did not seek to identify types of official information which, on grounds of public interest, it should be a criminal wrong to disclose. For the most part they simply imposed criminal sanctions for the breach of the essentially employment obligations imposed by public service legislation. As will be seen, the criminal law is widely disregarded.

Complementing public service and general criminal legislation are specific statutes now running into many hundreds throughout the country which impose particular secrecy obligations on officials implementing the programmes created by such statutes. These particular obligations are designed, for the most part, to protect the confidentiality of personal and commercial information supplied to government by individual citizens and business enterprises. Though by no means uniform in their scope, they do evidence a long-standing concern in this country to maintain the integrity of information entrusted to government by the community. The most significant recent manifestation of this concern is to be found in the Commonwealth's *Privacy Act, 1988*. As will be seen, Australian common law in particular now draws a rather sharp distinction between the protection accorded to information generated by government itself on the one hand, and information supplied by the community to government on the other.

For most of our governmental history official secrecy has been the legislatively enforced norm. In the last two decades, though, a contrary current more favourable to open government has been strongly in evidence. A majority of jurisdictions have now embraced — or are in the process of embracing — *Freedom of Information* legislation. In a parallel development some jurisdictions — notably New South Wales, Queensland and South Australia — have relaxed or have abandoned public service secrecy legislation. While these innovations reflect a distinct constitutional reorientation in this country, their effects are variable in their impact on individual officials — particularly in those jurisdictions such as the Commonwealth, Victoria and the A.C.T. where F.O.I. legislation coexists beside onerous secrecy regimes.

Despite its often pervasive effect on at least some classes of public official (notably public servants), legislation by no means provides the sole, or in some jurisdictions (e.g. New South Wales) even the most important, source of the law's regulation of the permissible uses, etc. of information in the hands of officialdom. In one direction, devices which ordinarily operate through the employment relationship of officials — administrative instructions, orders, and codes of conduct — are employed to impose constraints of varying severity upon public servants in some jurisdictions (e.g. Queensland, Western Australia and the Northern Territory). More importantly and from another direction, we have the common law. Early in this century it was recognised that in its conduct of commercial and trading operations, government was in all probability to be treated for the purposes of the common law of secrecy, in much the same way as private enterprises.[54] But the more general impact of the common law upon government has only become apparent in Australia in the 1980s. Evolved primarily to protect confidential information acquired in private and commercial relationships, it has been extended (with some modification) to regulate secrecy in the citizen-State, official-employer, and official-official relationships. While of importance in all jurisdictions the common law has a special significance in New South Wales and the Northern Territory where statute has been given a correspondingly less prominent role in imposing secrecy obligations.

In general terms the common law is capable of protecting confidential (i.e. non-public) information in the hands of an official from unauthorised use or disclosure. But the degree to which it is prepared to do so depends upon whether that information is information generated by or about government itself or, by way of contrast, is supplied to government by the individual citizen, etc. In the former case, as will be seen, the "public interest" provides the yardstick for the giving of secrecy protection, in the latter for the denying of protection which

54 Cf the distinction drawn for the purposes of "Crown privilege" in *Robinson* v *State of South Australia* [No.2] [1931] A.C. 704, at 714-715.

would otherwise be granted almost as of course. The common law's possible roles in the governmental arena are various and have now been recognised to embrace such diverse matters as cabinet secrecy, the communication of information from one official to another, the protection of client information in the hands of government or of government employed professionals, the protection of the trade secrets of public authorities and of State-owned corporations, employment and post-employment duties of secrecy and "whistleblowing". Importantly, the rules of the common law conflict with the public service secrecy regimes in some jurisdictions. That conflict, as will be seen, can produce the anomalous consequence of the courts, on "public interest" grounds, being unwilling to restrain the public disclosure of information in a given case notwithstanding that that disclosure might itself be in violation of public service legislation and of the criminal law. The undoubted tension which exists with the older statutory regimes results from the quite different constitutional and democratic principles which inform the two separate bodies of law. The common law, perhaps reflecting its more recent adaptation to government, is markedly more favourable to open government and to the use of the "public interest" in setting the boundaries of official secrecy, than is the case under most statutory regimes subsisting in this country.

When one amalgamates the plethora of statutory provisions, regulations, codes, administrative instructions and common law rules one is left in almost every Australian jurisdiction with an ill-fitting, sometimes unintelligible mosaic of prescriptions and proscriptions. For the individual official the consequence of this can be conflicting, sometimes quite unacceptable, legal demands: the trivial can be criminalised, the important left in a state of lamentable uncertainty. The present legal environment is not a propitious one in which to formulate what for today should be regarded as the standards of conduct to be encouraged in Australian officials in their use and disclosure of information acquired in office.

B. THE CHANGING CONSTITUTIONAL LANDSCAPE

The manner in which government manages — and is lawfully allowed to manage — information in its hands has a marked bearing both on the quality of the citizen-State relationship and on the vitality of the democracy in which it governs. In the 200 years of our legal and governmental history the latitude given to government in this has been variable. To the extent that it is possible to make broad generalisations and disregarding the very early colonial period, [55]one can discern three overlapping phases in our law's governing of information management generally and of official secrecy in particular. Each, as will be seen, reflects rather different assumptions about the nature and proper working of our constitutional system. Each, for a period, has been the predominant influence in our law. And all have enduring — if often conflicting — effects in contemporary law. While the impact of these phases has been variable in our nine governmental systems, and while the pace of legal development in them is by no means uniform, the following discussion will proceed on a broad national basis, emphasising the changing constitutional and democratic principles which are embodied in our law, and particularly in the emerging law of the last decade.

Assigning labels to the three phases, the <u>first</u> can be described as one of "<u>public interest paternalism</u>". Its principal manifestations were in the nineteenth century Crown (or public interest) privilege cases and, in England, in the *Official Secrets Act 1889*. While using the "public interest" to set the legal limits to the protection of official information, deference to the Crown and its advisers left it very much to the Crown to determine both what constituted the public interest and what and when official information should be made publicly available. The <u>second</u> phase, and much the most influential in Australia, has been that of "<u>governmental authoritarianism</u>". This has found its strongest expression in the public service secrecy regimes based on Victoria's *Civil Service Regulations, 1867* and in the general official secrecy offences enacted in six of the nine Australian jurisdictions. In it neither official secrecy nor the public availability of information was made to depend upon the "public interest". It allowed government to elevate its interests over all others; to regulate at its discretion the public dissemination of information; and, formally at least, to coerce subservience from its officials through stringent official secrecy regimes. The <u>third</u> and much the most recent phase, can be designated the <u>liberal-democratic</u> one. Its manifestations are various: in <u>Freedom of</u>

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[55] In the period from settlement until circa 1830 the Crown not only claimed control of official information in the interests of the State, but also attempted to regulate public use thereof through press regulation etc., under a broad "sedition" umbrella.

Information and in Privacy legislation; in the common law's "public interest" test for protecting governmental information; and in the now less deferential attitude taken to government in privilege cases. While accepting that official secrecy has a proper and necessary province, the guiding ideas here are that "the interests of government ... do not exhaust the public interest";[56] that the public availability of information is an important value to be promoted in a democratic society especially where this enables "the public to discuss, review and criticize government action"[57] (the democratic theme); and that persons and bodies who supply confidential information to government about their own affairs have a legitimate interest in having the integrity and confidentiality of that information respected (the liberal theme).

For the most part contemporary Australian law is in a period of transition from the second to the third of these phases. The power of government to act in the manner of its own choosing in the management of official information is being subordinated progressively to wider considerations of public interest. This trend in this particular sphere is not an isolated one. It reflects a wider and more general commitment to liberal-democratic ideals now evident in Australian public law generally.[58] For this reason it should be taken for the future as providing the constitutional foundation upon which the legal and ethical regimes regulating information handling by government, its officers and its agencies should be built. For the present, however, a large difficulty remains in most jurisdictions for the individual official. In the absence of systematic law reform ensuring consistency and modernity in our statutes, the individual official — and particularly the public servant — is often enough caught between the present commitment both of modern legislation and of the common law to open government and the enduring demands of illiberal official secrecy regimes. As will be seen in the following section, this asymmetry obliges governments now more than ever to provide effective guidance

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[56] *Glasgow Corporation* v *Central Land Board* [1956] S.C. 1, at 18-19, endorsed by Stephen J. in *Sankey* v *Whitlam* (1978), 142 C.L.R. 1, at 59.

[57] *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485, at 493 per Mason J.

[58] This is apparent, e.g., in the "new administrative law"; in the manner in which tort law is increasingly being applied to government; in the progressive elimination or redefinition of Crown (or governmental) privileges; etc.

to its officials in the permissible uses they are able to make of information acquired in office. Failure to meet that obligation can only have one or other of two undesirable effects. The first is a systemic disregard of the more extreme demands that some official secrecy regimes now make. The second is the honouring of those regimes to the prejudice of contemporary constitutional principle favouring the enhanced public availability of official information.

If there was an advantage for government in the second phase noted above, it was that it placed government in a relatively simple and uncomplicated position in relation to the management of information in its hands. In the main it was government's discretion which determined when, what and by whom official information was publicly disseminated. And through its official secrecy regimes it had, formally at least, the vehicle for coercing the compliance of officials with its wishes. But amongst the various risks which attended this advantageous position was the not inconsiderable one of government confusing its own interests with the interests of the community it served. For so long as the Crown continued as a real, if only formal, presence in our system of executive government, for so long as governments were publicly or at least conventionally perceived as servants and advisers of the Crown — as seems to have been the case in the first and at least the initial stages of the second phases referred to above — some constitutional justification could be found for this favourable treatment of government (despite its attendant risks) and this because of the long standing legal and constitutional deference accorded to the Crown itself. With the Crown a receding influence in the practice and theory of Australian government, with contemporary constitutional principle in Australia committed explicitly to the view that "governments act, or at all events are constitutionally required to act, in the public interest,"[59] even that justification has become illusory.

The emergence of the third — the liberal-democratic — phase referred to earlier has had two important consequences. First it has robbed government of any claim it may have had to

[59] *Attorney-General (U.K.)* v *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.LR.86, at 191 per McHugh J.-A.

being the exclusive arbiter of the disclosure of official information.[60] Secondly, it is bringing government's legal responsibility in its information management into closer balance with its constitutional obligation to act in the public interest. As will be seen, the "public interest" is the unifying thread running through the common law of secrecy, the modern law of public interest privilege, and the exemption provisions of *Freedom of Information* legislation. In robbing government of its old advantage and the relative certainty that went with it, a new series of dilemmas have been created for government.

Not the least of these inheres in government's constitutional obligation to the extent that this is now reflected in the law regulating official information. What is "the public interest"? By what criteria is it to be judged? One can say, negatively, that it signifies that the interests of government are not necessarily synonymous with the public interest ("do not exhaust the public interest").[61] But its positive signification is another matter. What can be said by way of preliminary observation — and it has been said by courts — is that there is a "wide difference" between the public interest and "what is interesting to the public".[62] The term is one of constitutional and legal art, not one of popular sentiment. This said, the nature of the issue in question in a given instance — should official information be made publicly available; be made available in legal proceedings with appropriate safeguards; be able to be used for "whistleblowing" purposes despite apparently binding secrecy obligations; be accorded protection from threatened disclosure; be available for use by an official on termination of employment; etc. — as also the variety and relative weight of conflicting interests, values and considerations relevant in a given case, preclude effective exhaustive definition of what constitutes the public interest. In the end the question is an instance specific one. But it is not one for which guidance and evaluative criteria are altogether lacking. Both parliaments (in the areas of potential exemption they have identified for particular species of official information in

[60] It is doubtful that the common law ever fully conceded this privilege to the Crown though there were periods, particularly in the privilege cases, where it did little to give credibility to the contrary view: cf views of Lord Simon in *Duncan* v *Cammell, Laird & Co. Ltd.* [1942] A.C.624.

[61] *Glasgow Corporation* v *Central Land Board* [1956] S.C. 1, at 18.

[62] *British Steel Corporation* v *Granada Television Ltd.* [1981] A.C. 1096, at 1168.

F.O.I. legislation) and the common law (in the factors it has identified as being of importance in public interest determinations) have provided a reasonably workable framework within which governments can discharge their constitutional and legal responsibilities. These exemptions and factors — and there is a fair degree of congruence between them — will be highlighted in later sections of this Report. What, however, the emerging order does presage for governments is that in their management of official information they demonstrate greater sensitivity than they have needed in the past to the demands of interests other than their own.

SECTION 2

TWO LEGAL AND CONSTITUTIONAL MATTERS

To the extent that there is a unifying thread in this Section it lies in the role played by "the Crown" in giving a measure of unity and direction to the secrecy obligations of at least a range of public officials. The focus of the first part is on ministers and ministries and will consider secrecy as it affects the Executive Council, cabinet and its committees, and the individual minister in his or her portfolio. The second part shifts to the public servant and will consider some effects that bureaucratic arrangements made in modern public service/public sector management legislation can have in delineating the scope of secrecy obligations. While in both instances the matters discussed are technical in character, some understanding of that technicality is essential for an appreciation of the province of the law and of constitutional and political convention in the modern scheme of official secrecy. Neither subject has, to date, been subjected to critical analysis in the context of the Australian governmental system. For this reason the views advanced will on occasion be both tentative and speculative.

A. THE CROWN, THE EXECUTIVE COUNCIL, THE CABINET AND THE INDIVIDUAL MINISTER

The interaction of a constitutional principle, institutional arrangements and political conventions provide one major source of tension in our system of executive government —

and one which contrives the rather distinctive ways in which secrecy obligations in particular affect ministers and ministries. The constitutional principle, already noted in this Report, is that governments are constitutionally required to act in the public interest. The institutional arrangements are those which, in form, make executive government that of the Crown[63] but which, in substance, make it that of the ministry and ministers of the day. The political conventions are those which at any given time set the boundaries to the principles of collective and individual ministerial responsibility. By no means consistent in the demands they can make of ministers, their respective impacts for secrecy purposes can be variable depending upon the particular capacity in which a minister is acting in a given matter — in the Executive Council, in cabinet or its committees, or as a minister in his or her portfolio. For this reason the following discussion will use those capacities as their points of focus.

1. *Executive Councillors*

From its introduction into colonial New South Wales in 1825, the Executive Council has subsisted as an integral element of the constitutional systems of all Australian jurisdictions with the modern exception of the A.C.T.. The body on whose advice Governors-General, Governors and, in the Northern Territory, Administrators are in the main obliged to act in the exercise of their powers, the Executive Council is in each jurisdiction constituted, for practical purposes, by the ministry of the day. Though that advisory role is now a formal one, the nature of the relationship in which it brings its members to the Crown (through its vice-regal representatives in the Commonwealth and the States) or to the Administrator (in the Northern Territory)[64] carries direct consequences for those members in relation to the secrecy of information acquired as an Executive Councillor.

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[63] The situation in the two Territories, and in the A.C.T. in particular, is not free from controversy. Nonetheless, despite the distinctive and differing statutory arrangements for executive government which exist in the Territories, each is expressly constituted a "body politic under the Crown" in its respective self-government legislation: see *Northern Territory (Self-Government) Act, 1978*, s.5; *Australian Capital Territory (Self-Government) Act, 1988*, s.7.

[64] The constitutional position of the Administrator as a representative of the Crown was not determined conclusively by the High Court in *Re Toohey; Ex p. Northern Land Council* (1981) 38 A.L.R.439.

Reflecting longstanding English Privy Council practice and reinforced at least in this arena by persisting adherence to the view that "the Counsels of the Crown are secret," Executive Councillors are bound to official secrecy — an obligation reinforced in the Commonwealth, New South Wales, South Australia, Tasmania and the Northern Territory by the statutorily required oaths of office taken by Councillors.[65] While there are differences in the precise terms of the oaths taken in these jurisdictions (though all reflect the spirit of the Privy Councillor's oath), the burden of the secrecy obligation of Councillors in all jurisdictions remains relatively clear: it is to maintain the secrecy of any and all information acquired in that capacity. That obligation in the Commonwealth and the States formally is owed to the Crown and in the Northern Territory, if it is not owed to the Crown (and it most probably would be held to be so owed), it would be owed to the Administrator in his or her official capacity.[66]

Little attention has been given in our jurisprudence to the legal and other consequences attaching to Executive Councillor secrecy. Some nineteenth century English opinion went so far as to suggest that the obligation was an absolute one, admitting of no exception by an individual Councillor, and was possibly incapable of being relaxed even by the Crown.[67] Untenable today as a proposition of law,[68] this does reflect in some measure the seriousness courts in Australia are still likely to attribute to the maintenance of Executive Council secrecy. Though it is likely that the legal limits to the obligation of an individual Councillor will today be set by the "public interest" test now applied to protect governmental information generally, the application of that test would in all probability give the obligation near absolute coverage of information acquired as a Councillor, given (a) the oaths that are legally required to be taken in most jurisdictions; (b) the purpose secrecy is perceived to serve in ensuring the proper

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[65] See the Constitution, s.62 (C'wealth) — which while requiring an oath, does not prescribe its form. That used is based on the Privy Councillor's oath. *Oaths Act, 1900, Fifth Sched. (N.S.W.); Oaths Act, 1936,* s.6 (S.A.); *Promissory Oaths Act, 1869,* s.5 (Tas); *Northern Territory (Self-Government) Act, 1978,* s.38, Sched. 4.

[66] *Sankey* v *Whitlam* (1979) 53 A.L.J.R.11.

[67] See the editorial comment to *Dickson* v *Viscount Combermere* (1863) 176 E.R.236, at 264 note (c).

[68] Cf. *Sankey* v *Whitlam* (1979) 53 A.L.J.R.11.

workings of the Council as a constitutional forum in which the Crown takes its advice from its ministers; and (c) the exempt status accorded Executive Council documents under *Freedom of Information* legislation.

If for practical purposes the issue of Executive Councillor secrecy is a relatively uncontroversial one both because of the formal nature of Council proceedings and because of the dominating effect of cabinet secrecy, the obligation it imposes is not devoid of legal significance particularly in those jurisdictions which have made it a criminal offence for an official to disclose information etc. which he or she is bound to keep secret. The criminal law is considered later in this Report. But simply by way of example it should be noted that an Executive Councillor in the Commonwealth who discloses an Executive Council document in breach of his or her legal duty would, technically, be in breach of the *Crimes Act*, s.79.

The additional points to be noted about Executive Councillor secrecy are —

(a) that it only applies to ministers in their capacity as Councillors and does not affect them otherwise and especially as members of cabinet;[69]

(b) more speculatively, that if, in a particular matter, a Councillor is to be relieved of the obligation otherwise binding on him or her, that Councillor would require the authorisation of the Governor-General in Council, etc., for the disclosure he or she wishes to make of information acquired as a Councillor.

2. *Cabinet*

From the origins of the cabinet system, confidentiality has been regarded as an essential buttress to the principle of collective responsibility on which effective cabinet government itself depends. The Commonwealth *Cabinet Handbook*, for example, states as its second principle of cabinet operations that —

> Collective responsibility is supported by the strict confidentiality attaching to Cabinet documents and to discussions in the Cabinet Room. Ministry, Cabinet and Cabinet

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69 Cf *Attorney-General* v *Jonathan Cape Ltd.* [1975] 3 W.L.R. 606

committees are forums in which Ministers, while working towards a collective position, are able to discuss proposals and a variety of options and views with complete freedom. The openness and frankness of discussions in the Cabinet Room are protected by the strict observance of this confidentiality.[70]

This principle has been accepted by all Australian governments and is reinforced in F.O.I. jurisdictions by the exempt status given cabinet documents by *Freedom of Information* legislation. Binding though it is intended to be on all ministers who are members of cabinet or, as in the Commonwealth, who may be in attendance at a particular cabinet meeting, the principle has only the status of a *political convention* not a legal obligation. As such, the consequences to an individual minister which may flow from its violation are first and foremost political in character. While here is evidence enough to warrant the observation that "this convention has been honoured more in the breach"[71] it is party and political considerations which will determine both the stringency of a particular ministry's commitment to the convention itself and the nature and severity of the sanctions (if any) to be imposed by the ministry and/or party in cases of proved ministerial dereliction. But this noted, the political convention provides only one part of the story of cabinet secrecy.

Coexisting alongside the convention but quite distinct both in its scope and effects is the *legal obligation* of ministers to maintain cabinet secrecy. Though aspects of that obligation remain uncertain the following, it is suggested, represents the view of it likely to be taken in Australian courts.

(i) The obligation is one which arises at common law and its limits are set by the common law.

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70 *Cabinet Handbook*, p.5, Canberra, A.G.P.S., (1988); see also *Whitlam* v *Australian Consolidated Press* (1984) 60 A.C.T.R. 7.

71 M. Codd, "Cabinet Operations of the Australian Government" in Galligan, Nethercote and Walsh (eds), *Decision-making in Australian Government: The Cabinet & Budget Processes*, 4, C.R.F.F.R., Australian National University, (1990).

(ii) The obligation is not a discrete one relating only to cabinet and its affairs. Rather it is a general one binding all ministers in respect of their use and disclosure of information acquired in office.

(iii) While the scope given the obligation in relation to cabinet information will be affected by the acknowledged importance that cabinet secrecy has to the proper workings of our system of government (vide the political convention referred to above) its scope is not coextensive in its information coverage with that of the political convention. It will only protect cabinet information from misuse or unauthorised disclosure by an individual minister where, in the circumstances, it can be proved that that use or disclosure is likely to be injurious to the public interest.[72] This said, judicial decision in privilege cases does not suggest that recent or contemporary cabinet information will receive other than generous protection and for reasons concerned as much with the role secrecy itself plays in the effective workings of cabinet as with the intrinsic nature of much cabinet information.[73]

(iv) English authority has held that "since the [obligation of] confidence is imposed to enable the efficient conduct of the Queen's business, the confidence is owed to the Queen and cannot be released by the members of the Cabinet themselves."[74] Despite the as yet unresolved questions concerning the legal status of cabinet in our system of executive government[75] — and in consequence about its relationship to the Crown — the above view most likely represents the one which will and should be acted upon in this country if only for reasons of expediency. To treat cabinet secrecy for legal purposes as involving no more than reciprocal obligations between ministers themselves to the exclusion of the Crown (a) would ignore the vital role cabinet does

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72 See *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485.

73 Cf. *Sankey* v.*Whitlam* (1979) 53 A.L.J.R.11; *Whitlam* v *Australian Consolidated Press* (1984) 60 A.C.T.R.7..

74 *Attorney-General* v *Jonathan Cape Ltd.* [1975] 3 W.L.R. 606, at 618.

75 *Minister for Arts, Etc.* v *Peko-Wallsend Ltd.* (1987) 75 A.L.R. 218.

play "in the conduct of the Queen's business" — it is in practice "the highest political organ of the State";[76] (b) would transform an essentially public and governmental matter into a private and personal one; and (c) would give rise to all but insoluble enforcement problems in providing protection for the cabinet information of a former ministry against the unauthorised disclosure of an ex-minister. To give the Crown a central role in the legal scheme of cabinet secrecy does, however, carry a possibly inconvenient consequence. If a particular piece of information is otherwise caught by a minister's legal obligation of secrecy — and it will only be so if its disclosure would be likely to be injurious to the public interest (see (iii) above) — then any decision authorising that minister to disclose that information would in form at least have to be taken by the Governor-General, Governor, or Administrator, as the case may be, on the advice at least of the Prime Minister, Premier or Chief Minister. The difficulty in this lies, manifestly, in the lack of guidance offered to ministers as to when that formal approval is needed rather than simply the approval of cabinet itself (which would seem to be all that would be necessary where the information in question was covered by the political convention alone). For this, but also for other reasons noted below, it is of some importance for governments to have in place procedures governing both the handling of cabinet documents and authorisation for the use and disclosure of cabinet information by individual ministers and ex-ministers.

(v) The temporal aspect of the legal obligation is important in two respects. First the duty attaching to a minister is a continuing one binding each minister even after resignation or loss of office.[77] But its effect is only to protect information which, at the time of an actual or threatened disclosure by a minister or ex-minister, should be protected on public interest grounds. This leads to the second and more general matter. No single rule of thumb governs the degree of legal protection afforded cabinet information and this because the public interest itself has a temporal dimension . As was observed in the

[76] *FAI Insurances Ltd.* v *Winnecke* (1982) 41 A.L.R.1, at 23.

[77] See *Attorney-General* v *Jonathan Cape Ltd.* [1975] 3 W.L.R. 606.

Jonathan Cape case[78] in England, "Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over." In other words the protection once given to a particular piece of information is not given absolutely and for all time. It subsists only for so long as the public interest so requires.[79]

Considered from the standpoint of the individual minister the combined effect of the political convention and the common law is to create, in effect, a two-tiered secrecy obligation. At the first level both the convention and the common law preclude a minister's unauthorised use or disclosure of information where that use or disclosure is likely to be injurious to the public interest. Breach of the obligation at this level can carry political sanctions (by virtue of the convention) and legal ones (by virtue of the common law and, let it be noted, of the criminal law in some jurisdictions). At the second level, which encompasses all situations of unauthorised use or disclosure not caught by the first, the matter is one for the political convention alone. Perhaps the most important consequence to be noted which flows from this hierarchy in obligation is that ministerial leaking of cabinet information is not, as such, a legal wrong. The legality or otherwise of the leak depends on its likely effect on the public interest. This requires emphasis if only to contrast the nature of the secrecy regime legally imposed on ministers with the formally more stringent one imposed on public servants in most Australian jurisdictions.

For obvious and practical reasons, the political convention and not the legal obligation is of real importance to a minister while in office. The circumstances would indeed be exceptional in which a ministry, in the name of the Crown, would take legal proceedings for breach of secrecy against one of its own number. But this apart, because the convention no less than the common law is intended to be binding on ministers and because of the

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78 Ibid., at 615.

79 See also the views of Mason J. in the context of privilege in *Sankey* v *Whitlam* (1979) 53 A.L.J.R.11, esp. at 44-45.

convention's more absolute information coverage, it provides the practical yardstick for ministerial secrecy in this context. And while there may well not be any great divergence between the convention and the common law at least in relation to coverage of recent and contemporary cabinet information (see (iii) supra), the relative uncertainty in the scope of the common law obligation created by the "public interest" test, makes the convention the more appropriate and predictable basis upon which to formulate at least the ethical responsibility of a minister in cabinet-related matters.

For ex-ministers, and particularly for those no longer in parliament or an assembly, the legal obligation comes into its own in providing the constraints upon the uses that can be made of cabinet information acquired in office. The subject of post-office use of information is considered in the final Section of this Report. The one point which should here be made is that the inadequacy of the common law as an effective protective mechanism in the post-office context necessitates the adoption of appropriate procedures governing ex-ministerial access to, and use of, information relating to his or her period in office.

3. *The Individual Minister*

As in cabinet membership, so also in portfolio matters, the secrecy obligation of the individual minister is affected both by legal obligation and by political convention. But the impact of each differs significantly from that experienced in relation to cabinet membership.

(1) The common law

Put in general terms such common law secrecy obligation as a minister may owe in respect of information acquired in a portfolio has two possible manifestations. The first, which is not of present concern, relates to information supplied to a minister (either directly or through departmental etc. officials) by a member of the community or other body in circumstances which give rise to <u>a duty of secrecy to that person or body</u>. How this may occur is considered in the next Section of this Report. The only matter which needs to be noted presently is that the uses and disclosures that can be made of such information depend on the scope of, and the lawful exceptions to, that duty of secrecy. Use and disclosure is not simply a matter of ministerial discretion. The second manifestation flows from a minister's relationship with the Crown. No less than any other official holding office under the Crown, a minister acting in his or her portfolio may, as a matter of principle, owe a duty of secrecy to the Crown in respect of information acquired in that capacity. But this notwithstanding, the minister's constitutional position robs that duty of much but by no means all of its practical significance.

It is orthodox common law that where secrecy is owed to a person, that person has the lawful right to authorise the uses and disclosures that can be made of information embraced by that obligation. But because the Crown acts through its ministers in the portfolios assigned to them severally, each individual minister has in consequence the lawful right to authorise on behalf of the Crown the use etc. he or she can make of portfolio information acquired as an officer of the Crown. In other words, and subject to the exceptions noted below, <u>a minister is "self-authorising"</u>[80] <u>in respect of the uses he or she can lawfully make of portfolio information</u>.

Self-authorisation is not, however, an unlimited right. In at least two situations it is simply unavailable to a minister. The first is where, as noted above, secrecy is owed to a third person or body. Here, unless legislation or the common law allows to the contrary, use or disclosure can only be made with the authority of the person or body to whom the duty is owed. The second is where legislation regulates the lawful uses that can be made of specified information in which case a minister has no right to self-authorise beyond what is legislatively permitted. Beyond these are two other and more speculative cases where the right to self-authorise may be lost or qualified. These are (i) where cabinet has resolved how, if at all, particular portfolio information is to be used;[81] and (ii) where information has been received by way of inter-

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[80] See *Report on Section 2 of the Official Secrets Act 1911*, para. 18, Cmnd. 5104, H.M.S.O., London (1972), (U.K.)

[81] The contrary view which would allow a minister the legal right notwithstanding contrary direction, while properly emphasising the individual constitutional responsibility a minister has in and for the portfolio assigned him or her, does not, in the writer's view, give sufficient weight to the predominant role that the principle of collective responsibility has achieved in Australia's constitutional ordering. That principle, which emphasises that a ministry is first and foremost a "<u>partnership</u>" — cf W.E. Hearn, *The Government of England*, 204-205, Robertson, Melbourne (1867) — founds the view advanced in the text; see also *New South Wales* v *Bardolph* (1934) 52 C.L.R.455.

portfolio communication in circumstances where it should be reasonably apparent to the recipient minister that that information is not being made freely available for use by the recipient minister for his or her portfolio purposes.[82]

More important though than the exceptions to self-authorisation, are the limitations the law imposes on the manner of exercise of the power itself. The discretion a minister has in this matter is by no means an unfettered one. Clearly a minister could not practise insider trading with commercially sensitive portfolio information and then justify that action for legal purposes by asserting a right to self -uthorise for any purpose including insider trading. Both as a matter of constitutional obligation and of fiduciary duty the minister is obliged to act honestly in what he or she believes to be the public interest when "self-authorising".[83] A failure to comply with that obligation carries a number of possible legal consequences: (i) a wilful misuse of portfolio information could constitute the common law criminal offence of misfeasance in public office[84] in those jurisdictions which retain the common law for criminal law purposes; (ii) depending on whether it can be said that a wilful misuse of the authorising power has no effect as a lawful authorisation — a matter by no means free from doubt — such a misuse if it involves the minister's disclosure of portfolio information may constitute an official secrecy offence in those jurisdictions where such a statutory offence extends to ministers;[85] and (iii) more generally, any use of the power in breach of fiduciary duty would expose a minister to an extensive range of civil remedies at the suit of the Crown. Though these possible legal consequences are not likely to be ones invoked by a serving ministry against one of its own number save in exceptional circumstances, it is important for the purposes of delineating what is acceptable

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[82] Whatever may be the precise legal position in these two speculative cases, such practical consequences as are likely to flow from perceived ministerial misuse of information in either instance inevitably will be personal and political rather than legal. Such is not necessarily so in the first mentioned two exceptions above.

[83] This fiduciary duty is considered in detail in a subsequent Report.

[84] See P.D. Finn, "Official Misconduct" (1978) 2 Crim. L.J. 307.

[85] See generally the next Section this Report.

conduct in a minister to acknowledge the constitutional and fiduciary responsibility a minister has in the matter of self-authorisation.

Beyond constitutional principle and legal duty there is political convention. Perhaps more so than the law and the constitution, convention is of greater practical importance to a minister especially in the routine exercise of his or her self-authorising power. In this context, though, the operative convention is that of individual ministerial responsibility.

(2) Political convention.

It is in the nature of the power to self-authorise that its exercise is something for which the individual minister is "singly responsible".[86] As such it is not a matter for which a ministry can properly be expected to be collectively responsible. Though now somewhat shallow in the personal consequences it is likely to visit on a minister, the principle of individual ministerial responsibility provides at least the constitutional channel for attack upon a minister's exercise or non-exercise of the self-authorising power. Little considered attention has been given to the legitimate grounds upon which challenge here can properly be made to a minister. But to the extent that one can properly generalise about the grounds for justifiable parliamentary censure in contemporary Australia, those grounds would seem in large measure to be identified in one direction by those considerations which underlie and justify public sector secrecy, and in the other by those which justify public access to information under open government principles generally and *Freedom of Information* legislation in particular. The point of convergence in the two would seem to be in the concept of "likely injury to the public interest". Put in compendious form these suggest that *a minister can properly be called to account under the convention of individual ministerial responsibility,* —

(a) where the minister's use or disclosure of portfolio information is likely to injure the public interest; and

[86] W. E. Hearn, *The Government of England*, 203.

(b) *in the case of nondisclosure, where disclosure is not likely to occasion reasonably foreseeable injury to the public interest.*[87]

(3) A Northern Territory ministerial postscript.

Uniquely in Australia, ministers in the Northern Territory are statutorily obliged to make an oath (or affirmation) of office in terms that:

> "Except in the course of my official duties or as may be required by law, I will not divulge any information (including the contents of any document) of which I have become aware by reason of my holding Ministerial Office."[88]

This, it should be noted, is required in addition to the oath required to be made by a Territory minister as an Executive Councillor.[89] Efficacious these may be in bringing home to a minister the role secrecy still plays in the Territory's system of government and the responsibility in this that a minister assumes in taking office both as a minister and as a Councillor. The legal effect of the oaths, but of the ministerial oath in particular, is less obvious. A subsequent breach of the oath seems not of itself to carry direct legal sanctions. At best the oath seems to be a factor — but only a factor — to be taken into account in determining the degree of stringency with which the common law obligation should be applied against individual ministers and this primarily in the context of cabinet secrecy: in relation to portfolio information the "course of official duties" proviso seems in no way to cut down a minister's self-authorising power. For the purposes of the political conventions, and particularly that of individual responsibility, breach of the oath would seem to provide at least another possible ground for parliamentary censure of a minister. In the end one is left wondering what purpose, other than a symbolic one, is served by enshrining ministerial secrecy in this form in the primary constitutional

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[87] The latter formula, it should be noted, is similar to that currently used for government employees in South Australia under the *Government Management and Employment Regulations*, 1986, reg. 21(1)(c)(i).

[88] *Northern Territory (Self-Government) Act 1978*, s.38(2); Sched. 5.

[89] Ibid., s.38(1); Sched. 4.

document of the Territory. The emphasis given is not particularly favourable to the promotion of open government.

B. PUBLIC SERVANTS AND PUBLIC SERVICE LEGISLATION

The characteristic which sharply differentiates Australia's public services from their British civil service counterpart for legal and constitutional purposes, is our long standing abandonment of the Crown prerogative as the basis for public service employment. Following the example set in colonial Victoria in 1862, all of Australia's services are now the creatures of legislation. Though we still adhere formally to the orthodox constitutional view[90] that public servants hold office or employment under the Crown — an adherence now under strain in relation to employment in the Senior Executive Services in some States[91] — the incidents of that Crown-public servant relationship (and in consequence of the minister-public servant relationship) have been affected markedly but by no means uniformly by the public service/public sector management Acts now in force throughout Australia.

Though of obvious general importance in settling the legal and constitutional status of public servants, these Acts have a direct relevance to official secrecy, and in two respects. First, they provide one — though by no means the sole — source of such individual authority as a public servant may have to determine how official information in his or her hands may be used or disclosed.[92] Secondly, though here not uniformly, they provide a formal means by which public servants may obtain lawful permission to use or disclose official information where individual authority is lacking. The reason these twin characteristics are important is that the various obligations imposed by the official secrecy regimes in force in all Australian

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90 Itself reflected in our Constitution Acts from the very first: see e.g. *Constitution Act, 1867*, s.14 (Qld): *Constitution Act, 1975*, s.88 (Vic.)

91 See e.g. *Public Service Act*, 1978, s.35(8) (W.A.) which deems members of that State's S.E.S. to be "employed by the [Public Service] Commissioner"; see also *Public Sector Management Act, 1988*, s.42G (N.S.W.) — but note s.42 G(7) which attempts to harmonise that Act's "employment scheme" with the constitutional orthodoxy of Crown service.

92 That authority may, e.g., be derived from other sources: e.g. by delegation under *Freedom of Information* legislation.

jurisdictions, while differing markedly in legal form and effect,[93] usually presuppose in a given case —

(i) that the public servant has no individual authority to use or disclose the information in question in the manner proposed; and

(ii) that, lacking that authority, the public servant has not otherwise obtained lawful permission for such use or disclosure.

1. Individual Authority

All public service/public sector management Acts still adhere to a legislative scheme under which individual responsibilities ("official duties") are assigned to public servants. The method of assignment differs widely both within and between jurisdictions: it may result, for example, from action required to be taken in the creation of an office or position;[94] from the allocation by, or instruction of, a prescribed authority;[95] from contractual arrangement;[96] or from delegation or assignment by or under some other statute. But though the means may differ, and though the duties may be varied from time to time, the end effect for the individual public servant is to create an individualised function, commonly enshrined in a "duty statement", for which that public servant is responsible and accountable. While the manner in which a public servant discharges that function will be constrained, invariably, by a variety of factors — not least of which are the positive requirements of law, lawful instructions, orders, etc., and binding policy — the function itself will commonly leave to the public servant a discretion of greater or lesser magnitude as to how it is to be discharged. For the purposes of disclosure of official information, it is at this point (though for quite different reasons) that the position of a public servant can distantly mirror that of the individual minister. The nature of the function performed by a public servant may have inherent in it some level of authority to

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[93] Some are based on statute, others on contract; some are essentially criminal in character, others impose purely employment obligations.

[94] See e.g. *Government Management and Employment Act, 1985*, s.42(2) (S.A.).

[95] See e.g. *Tasmanian State Service Act, 1984*, s.33(1).

[96] See e.g. *Public Sector Management Act, 1988*, s.42H (N.S.W.)

disclose official information in the course of and for the purpose of the discharge of that function. And in the absence of binding guidelines, the exercise of that authority is a matter of individual discretion.

If the above view appears novel, powerful support for it is to be found in the opinion of the Franks Committee in Britain, in its *Report on Section 2 of the Official Secrets Act, 1911*[97] Speaking there in the context of employment under the prerogative (and hence in terms of the implied authority a civil servant has from the Crown to disclose official information), the Committee concluded that, in the absence of express, formal authorisation, implied authority flowed "from the nature of each Crown servant's job."[98] In consequence, notwithstanding the *Official Secrets Act* and because of that implied authority, the Committee accepted that —

> "Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make and to whom. More junior civil servants, and those whose duties do not involve contact with members of the public, may have very little discretion, or none at all."[99]

Australian official secrecy regimes, it should be noted, do not preclude a like conclusion. Characteristically they exempt from their ambit disclosures made "in the course of official duty"[100] (or some like formula).

If, because of individual authority, our official secrecy regimes are somewhat less pervasive in effect than is commonly assumed, that authority itself is not without its difficulties. First, unless a public servant is given explicit instruction as to the disclosure of official information in the course of duty, that public servant is left to determine not only whether the nature of his or her function is such as to authorise disclosure, but also the extent

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[97] Cmnd. 5104, H.M.S.O., London, (1972)

[98] Ibid., para. 18

[99] Ibid.

[100] E.g. *Public Service Regulations*, reg. 35 (C'wealth).

of that authority in terms both of the information it would justify disclosing and of the forms of disclosure it would permit. Secondly, and as with a minister, a public servant when exercising that authority will be legally constrained to act in the public interest. But depending upon that person's location in the official hierarchy that determination may well not be one that can be made with any confidence without official guidance — although in jurisdictions having *Freedom of Information* legislation, the "exempt documents" provisions of that legislation provide criteria on which to base individual judgment. Thirdly, and again in *Freedom of Information* jurisdictions, it may well be permissible for a public servant in the exercise of his or her individual authority to honour in some degree the spirit of the provision found in most F.O.I. Acts which encourages agencies to give access to or to publish documents where this can properly be done.[101] Fourthly, and again as with a minister, whatever the scope of the individual authority arising by virtue of office, it would not justify the disclosure of confidential information in respect of which a duty of secrecy is owed directly to a member of the community, or other third party, save where the particular disclosure proposed is consistent with the duty itself or else is justified by some lawful exception to that duty.[102]

It needs, of course, to be said that the extent to which individual authority will justify a public servant in a particular Australian jurisdiction will depend in the last analysis upon the actual terms of the secrecy obligation the law of that jurisdiction imposes. South Australia's *Government Management and Employment Regulations 1986*, for example, exempt from official secrecy, a disclosure which "is required to be made as part of the employee's official duties."[103] But this acknowledged, what equally needs emphasis are (i) the role that individual authority can have in justifying the dissemination of official information under our public service/public sector management Act schemes; but (ii) the uncertainties which can inhere in

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101 See e.g. *Freedom of Information Act* 1982, s.16(2) (Vic.).

102 Third party secrecy is considered in the next Section of this Report.

103 Reg. 21(1)(a); emphasis added. It should, however, be noted that the S.A. Regulations hve other, and by notional standards, particularly generous exemptions from secrecy obligations.

both the identification and exercise of that authority accentuate the need for agencies to have in place guidelines regulating the use and disclosure of agency information.

2. *Lawful Permission*

A public servant's ordinary duty of secrecy is owed to the Crown as an incident of the Crown-public servant relationship.[104] In consequence, and as a matter of legal and constitutional principle, if that duty is to be relaxed in a given instance to allow an otherwise prohibited use or disclosure of official information, the antecedent consent of the Crown (acting through that public servant's responsible minister or appropriate ministerial delegate)[105] is necessary. However, save in New South Wales and the Northern Territory,[106] the matter of consent (or "lawful permission") has been addressed directly in or under public service/public sector management legislation. In Tasmania the necessary consent is that of the responsible minister;[107] in Victoria, of the minister or the chief administrator;[108] and in all other jurisdictions, of the chief administrator,[109] save in South Australia where in the case of the chief administrator, the minister's consent is required.[110]

Apart from noting that most jurisdictions have statutorily formalised the consent procedure,[111] the one matter of general significance which warrants mention arises in those

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104 There are a number of competing rationalisations of this "incident" which variously emphasize, for example, the official or public trust which inheres in public office holding; the Crown's "property" in official information in its servants' hands; the essentially employment character of the Crown-public servant relationship; etc.

105 The principle of *Carltona Ltd.* v *Commissioner of Works* [1943] 2 All E.R. 560 would in all probability allow some level of devolution in this context.

106 Where the constitutional principle noted in the text continues to apply.

107 *Tasmanian State Service Act,1984*, s.54 (1) (i).

108 *Public Service Regulations, 1985*, reg. 16.5(7).

109 The formal title varies from jurisdiction to jurisdiction: see *Public Service Regulations*, reg. 35 (C'wealth and A.C.T.) Administrative Instruction 711 (W.A.); *Code of Conduct*, para. 4.2.

110 *Government Management and Employment Regulations, 1986*, reg. 21(1).

111 In Queensland and W.A. this formalisation has resulted from steps taken under the relevant legislation.

jurisdictions which have not included (or in South Australia's case, included for all purposes) the minister in the prescribed consent procedure. That matter is, simply, what continuing power does a minister retain to grant consents notwithstanding the prescribed procedure? The question is not a hollow one. In policy formulation in areas of political sensitivity or of direct ministerial interest, for example, some public servants may work directly to a minister's office and may for prudential reasons wish either to by-pass the prescribed procedure or else feel the need for ministerial consent to even limited dissemination of particular official information.

Given the constitutional significance of a minister's position in the conduct of executive government — the minister is both the custodian of the Crown's (or the Government's) business and the principal representative of the Crown (and of the Government) in his or her portfolio — and given that it can properly be said that the prescribed procedures are of a facilitative and administrative character enabling a legally effective consent to be obtained, it is highly improbable that any court in any of the jurisdictions concerned would hold that, because of those procedures, a minister was robbed of authority to consent to a public servant's use or disclosure of official information. This conclusion is reinforced when regard is had to the ordinary right of access a minister has to portfolio information,[112] and the self-authorising power he or she has in respect of that information. Here, as elsewhere, an accommodation needs be struck between constitutional principle and apparent legal obligation.

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112 A matter considered in the following Section.

SECTION 3

THE LAW, THE INDIVIDUAL OFFICIAL AND THE DISCLOSURE OR USE OF OFFICIAL INFORMATION

Of the tensions which exist in contemporary Australian law, one is fundamental in character. Evidenced in the unhappy relationship between laws imposing official secrecy and those promoting some level of open government, it is the product of persisting contradiction in the norms (constitutional and democratic) which today should be taken to govern the obligation and responsibility of government in its management of official information. This, of itself, exaggerates the difficulty in presenting an ordered and coherent account of the law. But that difficulty is compounded for another and technical reason. The sources of law employed to control public officials in their use of official information — statute, subordinate legislation, the common law, and employment regulation — are so diverse and are so variously balanced as to preclude a simple, synoptic treatment of the law itself.

To facilitate exposition this Section will be divided into five Parts, the first two of which more strongly evidence the open government theme in our laws, the third and fifth, our abiding commitment to official secrecy. Within those Parts jurisdictional variations will be noted as and when appropriate. The Parts are —

(1) The Common Law;

(2) Open Government, Freedom of Information and Official Secrecy;

(3) Statute and Official Secrecy;

(4) The Misuse of Official Information; and

(5) The Criminal Law.

At the outset it is appropriate to highlight a number of themes which will recur in the ensuing discussion. The <u>first</u> mirrors the official/secrecy/open government tension already noted. While both the common law and *Freedom of Information* legislation rely significantly upon "the public interest" as the criterion for determining claims for official secrecy, the secrecy obligation characteristically imposed by or under statute uses no such discriminating yardstick. The usual approach is to impose a blanket prohibition on the disclosure of any and all official information and then to exempt from this disclosures made with lawful authority. The asymmetry between the two is pronounced, the more so because the latter, but not the former, approach makes a virtue of official secrecy without regard to its public utility and justifiability in individual instances. As both approaches are to be found in varying degrees in all Australian jurisdictions, their collision can for the individual official raise, at best, invidious choices in the dissemination of official information, at worst, an invitation to prefer one approach in disregard of the other. As will be seen some statutory obligations in particular are systematically ignored.

The second theme emerges from a distinction drawn in the common law but which is finding increasing recognition in statute. That distinction is between private, personal and commercial information supplied to government by the individual citizen, business enterprises, etc ("third party information"), and information generated for and about government by its own officers and agencies ("governmental information)". Because in the former but not the latter case, the interests of the third party-supplier can be affected directly by the manner in which its information is managed by government, the protection of those interests from undue or unwarranted invasion has become a primary concern in the law itself. As will be seen, quite different legal principles inform the approach generally taken to the protection of third party information from that taken to governmental information. In the former case a liberal theme predominates in the law and particular emphasis is given to safeguarding the legitimate interests of the individual. In the latter, the predominant theme is a democratic one and the emphasis here is more on the competing demands of official secrecy and the "public's right to know" (open government).

The third theme results from the interaction of government's constitutional responsibility with the distinctive position occupied by public officials in our scheme of public governance. Most hold office as employees of the Crown or of a public authority. But all, in their own spheres, are instruments through which governments discharge their constitutional responsibility to act in the public interest.[113] For government, as will be seen, this can raise significant questions of judgment as how best to manage the employment relationship in order to realize their constitutional responsibility — and such questions arise acutely in matters of concern to this Report given that the employment relationship itself, commonly, is used to found official secrecy regimes. For the individual official, implication in the constitutional obligation of government carries with it the latent hazard of conflict between responsibility to the public interest and duty as employee. As the all but intractable problems raised by the contentious phenomenon of "whistleblowing" attest, that conflict is not one which admits of easy resolution.

The fourth theme simply tracks a notable anomaly in the statutory regimes imposed on public officials in Australia. Such has been governmental preoccupation with official secrecy that the often quite pernicious phenomenon of information misuse (particularly for personal gain) has received scant attention in legislation. The effects of this anomaly are exaggerated in those six jurisdictions which have backed their official secrecy laws with criminal sanctions. While trivial or inoffensive disclosures of official information can raise, formally at least, the spectre of criminal prosecution, the egregious misuse of such information without disclosure shares no such fate. The inference to be drawn from at least our statutory regimes is that while they demonstrate a vital, often inordinate, concern with protecting the interests of government, they have little concern with identifying standards of conduct properly to be expected of officials. In consequence they provide an inadequate and, in many instances, an inappropriate basis upon which to formulate ethical codes and guidelines for public officers.

The fifth theme encapsulates conclusions which emerge from the four already noted. There is much in our present law which is unsuited to the contemporary circumstances of government and to the expectations which both government and the public can properly

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113 *Attorney-General (U.K.)* v *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.L.R. 86, at 191.

entertain of our public officials. Furthermore our law suffers from uncertainties, deficiencies and contradictions. The case for systematic law reform in most jurisdictions is overwhelming.

Before turning to the law itself an explanatory note about three terms which have been used in the following pages for reasons of ease in exposition.

1. "Official information" refers to any and all information either possessed by government or a public authority, or acquired by a public official by virtue of office, irrespective of its source or character.
2. "Third party information" refers to information supplied to government from private or other sources concerning the private, personal or business affairs of the information supplier or of some other person or body.
3. "Governmental information" refers to information generated for and about government by its own officers and agencies.

I

THE COMMON LAW

The relative general importance of the common law to governments and to public officials is quite variable across the country. Its practical significance is the most pronounced in New South Wales, Queensland and the Northern Territory; least so, in the Commonwealth, Tasmania and the A.C.T. But this notwithstanding it provides the appropriate starting point for any general consideration of Australian law governing official secrecy. In its metes and bounds it reveals the diversity in the issues which any responsive system of law needs to address. And in the interests and values it weighs and measures in making its judgments, it, along with *Freedom of Information* legislation (which it complements to a marked degree), highlights the considerations which a responsible system of law needs to address.

To simplify exposition the common law will be treated under the following headings:

(a) general principles;

(b) "third party" information;

(c) "governmental" information;

(d) access by officials to official information;

(e) employment obligations;

(f) post-employment obligations;

(g) the "public interest" exception to secrecy;

(h) the common law and contract.

(i) secrecy and third party recipients.

(a) General Principles

These can be stated quite briefly. The primary rule, though subject to one important modification noted below in its application to government, is that —

> A person who receives or acquires information in confidence cannot use or disclose that information for any purpose other than that for which it was received or acquired without the consent of the person or body from whom or on whose behalf it was received or acquired, unless that use or disclosure (a) is authorised or required by law; or (b) is justified in the public interest.

The following matters should be noted by way of elaboration of this.

(i) To attract protection under this rule, the information in question must itself be confidential, i.e. it must be relatively secret or, as it is sometimes put, it must not be public property and public knowledge.[114]

(ii) For a person to be subject to this obligation, it is not necessary that information actually be communicated to that person. The protected information can be produced or discovered (i.e. "acquired") by that person. But what is necessary is that it be so acquired "in confidence".[115]

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[114] See e.g. *Interfirm Comparison (Australia) Pty. Ltd.* v *Law Society of N.S.W.* (1975) 5 A.L.R.527.

[115] Cf *Cranleigh Precision Engineering Ltd.* v *Bryant* [1966] R.P.C.81.

(iii) While the clearest indication that information has been received or acquired "in confidence" is an explicit agreement or understanding to that effect, it will equally be held to have been so received or acquired if the receiver or acquirer, knowing or having reason to know that the information is being received etc. for a limited purpose which does not include its being made public, then receives etc. it.[116]

(iv) Because the object of the obligation is both to maintain trust in relationships and to protect the legitimate interests of the information "owner", the obligation is not simply one of secrecy. It guards against improper use as much as against improper disclosure. This dual character is of particular importance in the public sector because while statutory regimes invariably address unauthorised disclosure of official information, they often do not provide adequately for misuse.

(v) The actual consent of the person to whom the obligation is owed will make permissible a use or disclosure which would be impermissible and wrongful without that consent.

(vi) Irrespective of the limitations imposed by the obligation and despite lack of consent, the information can be used or disclosed when and to the extent that this is otherwise authorised or required by law. This exception is of considerable importance to governments and to officials: to governments because statute commonly enlarges the uses that can be made of third party information supplied to government; to officials, to the extent that by virtue of their position they may be endowed with individual authority to determine the uses and disclosures that can be made of governmental information in the course of official duty.[117]

(vii) The common law obligation itself is qualified by a distinct but quite narrow exception which can justify disclosures made in "the public interest". To this extent it embodies its own

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116 See P.D. Finn, "Confidentiality and the Public Interest", (1984) 58 A.L.J.497, at 499.

117 This "individual authority" is considered in the previous Section of this Report.

"whistleblowing" doctrine.[118] The matters to be emphasised though are that the scope of the exception is limited and that the actual disclosure it justifies can itself be limited.[119]

(viii) Wrongful breach of the obligation can render the party in default liable to pay damages for loss occasioned by the breach; to account for profits made as a result of the breach; to deliver up documents etc. containing the information misused; and to be restrained by way of injunction from any further or threatened misuse or improper disclosure of the information.

(ix) Where the parties are in a contractual relationship it is open to them to modify and, though limitedly, to add to the common law obligation. The use of contracts in the public sector for this purpose is considered later in this Section. What needs to be emphasised is that the common law obligation does not depend upon there being a contractual relationship in existence.

(x) If, in breach of the common law duty, a person communicates confidential information to a third party, that third party likewise can be prevented from making any use or disclosure of that information.[120]

If the above represents the common law in its primary form, the rule is for certain purposes modified considerably in some of its applications to government. This, as Mason J. has indicated,[121] is because the rule itself "has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government." When asked merely to do the latter the common law all but reverses the approach it takes to the protection of the citizen's interests. Given (a) that governments are

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118 See e.g. *Allied Mills Industries Pty. Ltd.* v *Trade Practices Commission* (1981) 34 A.L.R.105.

119 See e.g. *Attorney-General* v *Guardian Newspapers (No. 2)* [1988] 3 All E.R. 545, at 649; 659-660.

120 There is a narrow defence available to the third party based, essentially, on a change of position principle.

121 *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R.485, at 492.

constitutionally obliged to act in the public interest;[122] (b) that "the interests of government ... do not exhaust the public interest",[123] and (c) that such public interest as may be served in maintaining confidentiality has to be weighed against countervailing interests and especially such public interest as would be served by allowing publication of official information (the open government theme) — the view that has been taken in Australian law is that a government's claim to confidentiality will be determined "by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."[124]

This "injury to the public interest" test itself requires some elaboration.

(i) It does not apply universally to official information in the possession of government. Save to the extent that statute provides to the contrary, information relating to "the personal, private and commercial interests of the citizen" (or for that matter of any non-governmental body), is protected by the general common law rule and not by the "injury" test,[125] and this because the relevant interests in question are not purely governmental ones. The distinction drawn here is itself reflected in *Freedom of Information* legislation and, in particular, in the exemption given to information acquired in confidence from third parties.

(ii) The "injury" test is, in the last analysis, instance-specific in character. Nonetheless the common law does provide some guidelines — mirroring in large measure the exemptions of F.O.I. legislation — as to the types of information which are likely to receive public interest protection in the usual case.[126]

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122 *Attorney-General (U.K.)* v *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.L.R.86, at 191.

123 Cf *Sankey* v *Whitlam* (1978) 142 C.L.R. 1, at 59 per Stephen J..

124 *Commonwealth of Australia* v *John Fairfx & Sons Ltd.* (1980) 32 A.L.R. 485, at 493.

125 See e.g. *Castrol Australia Pty. Ltd.* v *Emtech Associates Pty. Ltd.* (1980) 33 A.L.R.31.

126 Cases on privilege in particular illustrate this even though the public interest in maintaining secrecy is often enough outweighed in those cases by the public interest in the due administration of justice.

(iii) Application of the test may in some degree be affected by whether it is invoked to prevent a third party into whose hands governmental information has improperly come from further disclosing it, or by way of contrast, to prevent a public official from making an improper disclosure. The reason for the possible difference in emphasis here is that in the latter case but not the former the public interest in maintaining loyalty in official service may itself affect the judgment made under the test.[127]

(iv) By way of exception to the test, some at least of the information generated by governmental agencies may have such a non-governmental or commercial character as to warrant that information being accorded the same protection as would be given to private enterprises.[128] The trade or commercial secrets of a government research or trading enterprise provide the most obvious illustration.

When one aggregates the possible applications of both tests, what needs to be emphasised is the extraordinarily diverse range of circumstances in which they can be brought into play and the widely various public interests that can, as a result, affect their possible applications. The matters considered under the following headings of this Section are, in the main, simply exemplifications of this.

The final general matter that needs to be mentioned — and it is of particular importance in relation to information supplied to governments by third parties — is that a duality of common law obligations can arise between different parties in respect of the same information. The most obvious illustration of this concerns such officials as are employees of the Crown or of a public authority. As employees they will owe a duty of secrecy to their employer in respect of information acquired in office, the scope of which,for common law purposes, will be set by either of the two tests mentioned, (depending upon the nature of the information in

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127 Cf *Attorney-General* v *Guardian Newspapers Ltd. (No. 2)* [1988] 3 All E.R. 545, at 640; *British Steel Corp.* v *Granada Television* [1980] 3 W.L.R. 774, at 853.

128 See *Attorney-General (U.K.)* v *Heinemann Publishers Pty. Ltd.* (1987) 10 N.S.W.L.R. 86, at 99-100.

question).[129] But quite apart from that duty where information has been received from a third party, the official in possession of it can also owe a duty of secrecy directly to the third party supplier. The same information, in other words, can be the subject of separate and distinct obligations, the one owed by the official to his or her employer, the other to the third party.

(b) *Third Party Information Supplied to Government..*

One's dual concerns here are (i) with the nature and extent of the secrecy obligations owed to members of the public, private enterprises etc. by government, its officers and agencies in respect of information supplied to government; and (ii) with the distinct secrecy obligations owed by public officials to the authority under which they hold office in respect of the same information. The possible interaction of the two can be variable. Consideration will first be given to these concerns as they relate to private and personal information supplied to government and secondly to commercial information . The reasons for this distinction are that the character of the interests to be protected differ in the two cases, and that in the former the courts are somewhat less exacting in finding claims made out for secrecy protection than they are in the latter. What needs to be emphasised, though, is that it is the ordinary common law rule — not the injury to the public interest test — which is the operative one in both contexts.

1. Private and Personal Information.

The principal concern of the common law here is not to protect personal information as such from use or disclosure by government, but rather is to protect it from unauthorised use or disclosure in ways which reveal or which may lead to the revelation or ascertainment of the identity of the person who supplies the information to government. In consequence while "identifying" uses may be prohibited, it will ordinarily, though not always, be the case that government can make free use of "depersonalised" or "sanitised" versions of the information for legitimate governmental purposes save where even this is legislatively prohibited or has

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[129] This duty, as will be seen, is usually treated simply as an aspect of an employee's obligation to serve the employer with good faith and fidelity.

been prohibited effectively by the information supplier.[130] Privacy protection, in other words, is at the heart of the matter. It is the primary interest which the citizen has at stake when supplying personal information to government. It is the principal interest which the common law safeguards.[131] But even in this, the extent to which the common law is prepared or able so to do is affected directly by three often interacting factors: (a) the purpose for which the information is supplied; (b) the means by which it is acquired by government; and (c) the authority (usually legislative) that government has to use or disclose it in a potentially "identifying" way. Beyond these there is the narrow "public interest" exception which may itself override such secrecy protection as would otherwise be given by the law.

Purpose. The reasons for the provision of personal information to government or to a public authority can be many and varied. It may result from statutory obligation and be necessary to effectuate a particular legislative programme; it may be a precondition for participation in a programme; it may be provided voluntarily either to aid and assist government in its responsibilities or to receive aid and assistance from government. But whatever the reason, it is the purpose for which the information is provided which provides the initial point of focus for the common law. Prima facie such "identifying" use and disclosure that can be made of the information are limited to those which inhere in the purpose of its provision. As will be seen below, that limitation in turn can be overriden if the recipient agency itself is provided with lawful (usually legislative) authority to make other and additional uses etc. of the information in which case that lawful authority sets the limits of its permissible use or disclosure. Beyond those limits the citizen is entitled to expect that his or her personal interests will be respected. It is in that arena the common law's prohibitive obligation applies.

Save in one exceptional case noted below, the primary obligation of secrecy which so arises is owed by the authority on whose behalf the information is received, be this the Crown

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130 On identity protection see e.g. *G.* v *Day* [1982] 1 N.S.W.L.R. 24. For an instance in which even depersonalised information could not be used see *X.* v *Y.* [1988] 2 All E.R. 648.

131 The resaons for its so doing are not necessarily concerned with privacy protection as such: see P.D. Finn, "Confidentiality and the Public Interest", (1984) 58 A.L.J. 497.

or an independent public body. But in addition to this the officers and employees of that authority will in turn owe a duty of secrecy both to the third party and to their employer. Both of those duties will be at least coextensive in scope with that owed by the employer, but the employment duty in particular will ordinarily be more exacting and that because, even within the scope of the employer's duty, the employee's authority to use or disclose the information (whether or not in an identifying way) will itself be limited by the function the individual employee has in relation to that information. It is important to note here, if only by way of emphasis, that it is not uncommon for legislation creating a programme involving the acquisition of personal information from the public, to reinforce the employee duties by making express provision for the secrecy obligations of officials acting in that programme. Such, for example, is the case in the Commonwealth in the *Income Tax Assessment Act* and the *Social Security Act*.

The exceptional case referred to above is where information is supplied to a government employed professional, for example, a doctor or lawyer, in the course of that professional's acting in a professional-client relationship with the citizen.[132] Here, for common law purposes, it is the professional-client, not the citizen-State, relationship which predominates. In consequence, the incidents of secrecy obligations vary from the norm already noted. The professional case warrants brief mention.

The professional exception. The common law as of course implies an extensive duty of secrecy into the professional-client relationship, covering information acquired by the professional about the client while acting in his or her professional capacity. It does not matter for this purpose whether or not the professional is employed by another, or, in the case of employment, that the employer is a public or private body. The reasons for this implication are various but their effect is to accord an extensive privacy protection to the client. While the law has not definitively stated who will be treated as a "professional" for

[132] It is to be noted that not all dealings by professionals with the public give rise to such a relationship as where e.g. a medical practitioner administers a government prescribed medical examination for the purposes of the government and not simply for the benefit of the individual examined.

its purposes, it encompasses at least doctors, lawyers, accountants, social workers, psychologists, para-medicals and financial advisers. Governments and governmental owned agencies employ significant numbers of persons within these professional categories who provide services directly to the community. Such service providers are subject *personally* to a duty of secrecy to their respective clients and as such cannot without their client's consent, use or disclose information about a client in a way which would reveal at least the identity of that client.[133] While this duty is qualified by the ordinary and reasonable information handling systems that are used in the institution/agency in which the service is provided, the duty itself prevents client information which would reveal identity being passed on to the professional's employer, superiors, third parties etc. without the client's consent unless (a) the professional is legislatively authorised or required to pass on that information (e.g. by reporting legislation) or (b) is so justified in the "public interest"[134]

Several observations should be made about "professional secrecy" in the public sector. First, this duty in publicly employed professionals arises from their professional relationship with their client and the duty is to the client. To put the matter another way, it is the nature of that relationship and not the coincidental citizen-State relationship which contrives the secrecy obligation. Secondly, it would be an actionable wrong to the client to disclose identifying information so acquired to employing authorities save as indicated above. Thirdly, the professional's duty can constitute a significant fetter on the flow of potentially valuable information in the hands of government. For example, it limits the extent to which identifying medical information can be made available for epidemiological studies. If government wishes to have the capacity to exploit for public purposes information protected by the duty of secrecy it will ordinarily require legislative authority so to do – and to that extent to override the secrecy obligation. Fourthly, any Code dealing with secrecy must recognize the distinctive

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133 See *Slater* v *Bissett* (1986) 69 A.C.T.R. 25; *X* v *Y* [1988] 2 All E.R. 648.

134 See e.g. *W* v *Egdell* [1989] 1 All E.R. 1089; and see below on the "public inteest".

position of "professionals". Fifthly, the Commonwealth's *Privacy Act* in its application to professionals presupposes the law described above.

Means. All that needs be noted here is that whether or not the citizen is, or can be obliged, to provide private information to government does not of itself affect the citizen's potential right to secrecy protection. Nor should it. It is one thing to oblige the citizen to divulge personal information. It is quite another to confer on government a free and unfettered use of it once divulged. The real significance of the citizen's being obliged or otherwise to provide information is that, (a) absent such an obligation, the scope of any common law secrecy duty will be set invariably by the particular purpose for which the information was given, and received;[135] but (b) where there is such an obligation, the scope of any duty of secrecy will be set by the nature and purpose of the coercive obligation itself and, where relevant, the legislative or other context which founds it.

Authority. This, for practical purpose, is the matter of central importance in determining the limits the common law will impose on "identifying" use or disclosure of personal information. Where information is supplied voluntarily to government in circumstances where the recipient body has no independent (invariably statutory) authority to use or disclose the information, the extent to which identifying uses can be made depends upon the known purpose for which the information has been supplied and received. Such uses, if any, as are necessary to effectuate that purpose are the ones which the common law will regard as authorised by the supplier.[136] If the citizen desires to obtain protection greater than this, so that for example, even non-identifying uses are to be precluded, that greater protection in turn would need to be the understood assumption upon which the information was supplied by the citizen and received by the government.

In much the greater number of instances, though, the question of authority arises in the context of legislative programmes and the issue of use here will ordinarily be determined not by

[135] See e.g. *Castrol Australia Pty Ltd* v *Emtech Associates Pty Ltd* (1980) 33 A.L.R. 31.

[136] See e.g. *G.* v *Day* [1982] 1 N.S.W.L.R. 24.

such authority as can be said to have been given by the supplier, but by that which inheres in the relevant legislation itself (including delegated legislation).[137] The privacy interest of the citizen, no matter how earnestly prized, is here subordinated to the public interest. No matter how adverse the affects on the interests of the citizen, the common law obligation has no place in prohibiting legislatively authorised uses. One important consequence would seem to follow from this. If a particular use or uses are authorised by statute, it would not be open to government (save possibly in exceptional circumstances) to bind itself by agreement or understanding with the citizen, not to make uses of the information which are legislatively permitted.[138]

The public interest. For the most part the right government has to invoke the public interest to justify the use it wishes to make of personal information is coextensive with the legislative authority given to use that information. That authority delineates the sphere within which government exercises its constitutional responsibility.[139] But legislative authority apart, there remains a narrow public interest exception within the law of confidentiality itself. For the purposes of the common law,[140] that exception (discussed in detail later in this Report) may itself justify an identifying use of personal information.[141]

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[137] Cf. *Smith Kline & French Laboratories (Aust.) Ltd* v *Secretary, Dept. of Community Services and Health* (1990) 95 A.L.R. 87.

[138] Ibid., esp. at 113-114. Such an agreement or understanding raises the presently contentious topic of estoppel against a statute.

[139] Ibid., at 112.

[140] This needs emphasis given that statutorily imposed secrecy obligations are commonly cast in a form which leaves no scope for the independent operation of the common law exception as a justification for an unauthorised use or disclosure which would otherwise be in breach of the statutory obligation itself given its terms. However the common law may still be unprepaed to restrain the use notwithstanding the statutory breach — a possibility later discussed in this Report.

[141] See e.g. *W.* v *Egdell* [1989] 1 All E.R. 1089.

2. Commercial Information

One moves here from the protection of privacy interests to the protection of economic ones. The important change which results from this is that it is the nature of the information itself more so than the identity of the information owner which provides the reason and need for protection. In consequence the principal focus of the common law shifts to the unauthorised use or disclosure of commercial information which can be shown to be confidential. Subject to this difference the manner in which the common law applies to commercial information mirrors what is the case with personal information. There is a like duality in obligations which can affect the same information — the one owed by the recipient authority to the information supplier, the other owed to that authority by its employees. There is the like exception covering commercial information acquired by government-employed professionals dealing with the public in professional–client relationships. There are the like issues of purpose and authorisation. And there is the same limited "public interest" exception.

The additional matters which should be noted are ones essentially of emphasis but they can have important consequences particularly where the common law intersects with *Freedom of Information* legislation.

(i) For common law secrecy protection to be given to commercial information, the relevant information must be capable of being identified and particularised, and, vitally, must be shown by the person claiming the protection to be confidential in character. Commercial information as such will not be regarded as confidential per se.[142] This confidential/non-confidential distinction can be of particular significance in the application of the usual "breach of confidence" and "business affairs" exemptions of *Freedom of Information* legislation, the former, though not necessarily the latter, being premissed upon the confidentiality of the commercial information in question.[143]

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[142] See e.g. *O'Brien* v *Komesaroff* (1982) 56 A.L.J.R. 681, esp. at 687-688.

[143] See e.g. *Freedom of Information Act, 1982*, ss.45, 43 (C'wealth).

(ii) Confidential commercial information acquired by government from the private sector otherwise than with legislative authority, will be protected on ordinary common law principles.[144] Accordingly the information "owner" is obliged to show as a condition of obtaining that protection either that there was an explicit agreement or understanding as to the purpose for which the information was being supplied or else the governmental recipient knew or had reason to know of such purpose and can properly be taken to have received the information on that basis.[145]

(iii) A like proof is not required where confidential commercial information is obtained with legislative authority. Here the uses that can be made will be governed by the scheme of the legislation itself. And beyond that which is so authorised the information cannot be used "for other purposes"[146] and will be protected from such misuse.

(c) *Governmental Information*

As noted earlier, the rules governing the protection of governmental information are not identical with those governing the protection of a citizen's information in the hands of a government, and this for public interest reasons. The basis of the difference was put in the following way by McHugh J.A. in the Spycatcher case:[147]

> "...the relationship between the modern State and its citizens is so different in kind from that which exists between private citizens that rules worked out to govern the contractual, property, commercial and private confidences of citizens are not fully applicable where the <u>plaintiff is a government or one of its agencies</u>. Private citizens are entitled to protect or further their own interests, no matter how selfish

[144] See e.g. *Castrol Australia Pty Ltd* v *Emtech Associates Pty Ltd* (1981) 33 A.L.R. 31.

[145] Cf. *Smith Kline & French Laboratories (Aust.)Ltd* v *Secretary, Dept. Community Services and Health* (1990) 95 A.L.R. 87.

[146] *R.* v *Licensing Authority Established under Medicines Act* [1989] 2 W.L.R. 397, at 408.

[147] *Attorney-General (U.K.)* v. *Heinemann Publishers Pty Ltd* (1987) 10 N.S.W.L.R. 86, at 191 (emphasis added); these observations themselves draw upon those of Mason J. in *Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 147 C.L.R. 39.

> they are in doing so. Consequently, the publication of confidential information which is detrimental to the private interest of a citizen is a legitimate concern of a court of Equity. But governments acts (sic), or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which Equity determines whether it will protect information which a government or governmental body claims is confidential."

In consequence the common law test is that "unless disclosure is likely to injure the public interest, it will not be protected."[148]

If this identifies the general approach to be taken to governmental information there is one important exception to it: certain governmental activities may be so non-governmental or commercial in character as to justify information generated in the conduct of those activities being protected on the same basis and to the same extent that protection is given to private enterprise. This exception will be considered below.

By way of comment on the McHugh observation it should be noted that it is directed at the Government-public relationship. It does not as such address the relationship of Government to its own officers. This has left open the possibility that in practice the law might apply somewhat differently in the two relationships even in respect of the same information. In the English "Spycatcher" case,[149] Lord Keith, after observing that though the government has to show likely damage to the public interest before its information will be protected from disclosure, commented that in showing that damage –

> "*In a question with a Crown servant* .... the general public interest in the preservation of confidentiality, and in encouraging other Crown servants to preserve it, may suffice."

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148 *Commonwealth of Australia* v *John Fairfax & Sons Ltd*, supra, per Mason J.

149 *Attorney-General* v. *Guardian Newspapers Ltd (No.2)* [1988] 3 All E.R. 545, at 640.

In a similar vein are comments made in the House of Lords in *British Steel Corp.* v. *Granada Television* [150]::

> "[There is] a very strong public interest in preserving confidentiality within any organisation, in order that it can operate efficiently, and also be free from suspicion that it is harbouring disloyal employees. There is no difference in this respect between a public corporation ... and an ordinary company. ... Unauthorised disclosure of confidential information about either is equally liable to damage efficiency and morale."

It is unlikely that Australian courts will accept these views unqualifiedly given the greater emphasis on open government in Australian, though not British, legal doctrine. But this said the views quoted are not without significance. In the *John Fairfax* case,[151] Mason J. acknowledged that prejudice to "the ordinary business of government" could fall within the "injury" test. And *Freedom of Information* legislation for its part recognises there can be a public interest in "the proper and efficient conduct of the operations of an agency."[152] For the majority of Australian public officials, though, such uncertainty as there here may be in the common law, is of little consequence. In most jurisdictions statutory secrecy obligations imposed on public servants in particular are far more comprehensive in their information coverage than that countenanced at common law.

The following particular matters should be noted of the common law's application to governmental information.

(i) At first sight the information coverage of the common law seems problematic because the "injury" test is, in the end, an instance specific one. But judicial observation both in privilege cases and in such breach of confidence ones as we have, suggest that in the matters there weighed in balancepositive practical guidance is to be derived from the usual exemption

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[150] [1980] 3 W.L.R. 774, at 852-53..

[151] *Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 32 A.L.R. 485, at 493.

[152] See e.g. *Freedom of Information Act*, 1982, s.40(1)(d).

provisions of *Freedom of Information* legislation. Reference here is made specifically to exemptions dealing with security and defence, cabinet and Executive Council documents, internal working documents, prejudice to agency operations and information affecting law enforcement or public safety.

(ii) The common law duty is of particular significance to that range of public officials not otherwise subject to general statutory, contractual, or employment derived secrecy obligations. Notably, and as seen in the previous Section of this Report, it is the common law which regulates ministers whether acting in the Executive Council, cabinet or (usually) in their individual portfolios. Beyond ministers, the members of statutory boards are for the most part likewise so regulated.[153]

(iii) Importantly, to obtain the protection of this test – and it has been sought most commonly to prevent publication of governmental information as the Spycatcher litigations illustrate — government carries the positive onus of making out that disclosure is likely to have the required injurious effect.[154]

(iv) The role of the "public interest" in the "injury" test differs widely from that in the public interest exception to the ordinary common law rule. Here it provides the basis for determining whether protection should be given at all. There it provides the ground for denying a protection which would otherwise be given.

<u>The commercial information exception to the "injury" test</u>. Despite the test, it now seems to be accepted[155] that some governmental activities may have such a non-governmental or commercial character as would warrant information generated in the conduct of those activities being accorded the same protection as would be given to private

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[153] Cf. *Bennetts* v *Board of Fire Commissioners of New South Wales*(1967) 87 W.N. (N.S.W.) Pt.1.307.

[154] See e.g. *Commonwealth of Australia* v *John Fairfax & Sons Ltd* (1980) 32 A.L.R. 485; *Attorney-General* v *Jonathon Cape Ltd* [1975] 3 W.L.R. 606.

[155] Case law is sparse indeed.

enterprises.[156] What this means for practical purposes is that the "trade secrets" etc. of governmental businesses will be protected as of course from misuse etc. by its employees, ex-employees and third parties. Here, to obtain trade secrets protection, the governmental body does not have to show that a threatened use or disclosure would be likely to harm the public interest. It has merely to show that the information is confidential and that the employee, etc. received it in confidence.[157] This body of law is of obvious importance to officials engaged in research for government or for statutory authorities, and for the officers etc. of government owned or government conducted commercial enterprises. Equally, as will be noted below, the protection of trade secret-type information can often be achieved most effectively through express contractual stipulation in the employment contracts of officers and employees.

The one matter of difficulty with this "exemption" lies in determining when the "public injury" rule ceases to apply, and the "commercial exemption" begins to apply, to a governmental activity. This difficulty is most pronounced in the case of statutory authorities operating in commercial arenas and this because their functions and purposes tend to be a composite of the governmental and the commercial. The assumption made in some English authority is that if the predominant character of an authority's activities is business or commercial, it should for all purposes connected with secrecy, be treated as if a non-governmental body.[158] It is most unlikely that a like view will be taken in Australia. Such authority as we have suggests that the form of secrecy protection to be given a statutory authority in respect of its information will in all probability be determined by the nature of the information in question: is it "governmental" or is it "commercial"? Again, *Freedom of Information* legislation, to the extent that it applies to statutory authorities, reflects this suggestion.

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[156] See *Attorney-General (U.K.)* v. *Heinemann Publishers Pty Ltd* (1987) 10 N.S.W.L.R. 86, at 100-101.

[157] See generally R. Dean, *The Law of Trade Secrets*, Law Book Co., Sydney (1990).

[158] E.g. *British Steel Corp.* v. *Granada Television* [1980] 3 W.L.R. 774.

(d) *Access by Officials to Official Information.*

The matter of concern here is not with public access to official information. It is with such right as the individual official has to information in the hands of government. By way of general background it should be noted first, that both common law and statutory duties of secrecy are premissed upon the proposition that disclosure of official information to one's fellow officials can itself be a civil or criminal wrong; and secondly, that where information is subject to a duty of secrecy it can, as a rule, only be disclosed to others to the extent authorised (i) by the person or body to whom the duty of secrecy is owed; or (ii) by law (usually statute).

For practical purposes access can be viewed from two rather distinct perspectives: the first is that of the person who has lawful authority to disseminate or to authorise the dissemination of official information to other officials and this irrespective of whether those others can assert any right to that information; the second is that of the official seeking access in which case such right as that person possesses is of importance. Both perspectives bear directly upon information management by government. And both can be affected by secrecy obligations — the former because secrecy (where it applies) begins at the boundaries of lawful authority to disclose; the latter because absent a right of access, a secrecy obligation may itself preclude the giving of access. Little purpose would, however, be served by considering these two perspectives separately for present purposes. Rather the important distinction necessary to be drawn is between access to third party information and access to governmental information. The obvious reason for this is that in the former, but not the latter case, the third party will ordinarily have a legitimate interest to be considered in the matter.

1. Third Party Information.

As has been seen, such information commonly is subject to a duty of secrecy owed to the third party and the scope of that duty itself will ordain the permissible extent to which the information can be disseminated within and between agencies of government. This rather simple proposition is not a particularly illuminating one without at least the following elaboration.

(i) A member of the public who deals with a governmental agency for a particular purpose and who provides information when so doing, must accept that the agency itself will have in place practices and procedures both for the handling of information and, where relevant, for the proper provision of the service etc. it is expected to provide to that person. To that extent the member of the public will be taken as having consented to such dissemination of his or her information as is required by those practices and procedures. This "implied consent" is obviously necessary or else secrecy obligations to the public would thwart the effective provision of governmental services. Judicial recognition of this need is to be found in a case involving the A.C.T. Health Authority:[159]

> ..."when a patient consults the Authority he is to be taken as accepting impliedly the administrative procedures which are adopted by that Authority. If, for example, the record keeping system is one where the records in relation to patients are kept not by the individual doctor consulted by the patient but by a central record agency or office or registry, it seems to me that the patient impliedly accepts the possibility that members of the staff of that agency, registry or office would see, at least in passing, medical records relating to the patient, and this is to be implied unless the patient expressly requests that his records should be dealt with in another way."

The fact that the law here accepts an "implied consent" to information handling, does raise an integrity issue for governmental agencies. It casts upon agencies themselves the onus of having in place information handling procedures which are sensitive to the need to respect and to protect the privacy and commercial interests of those dealing with government. The Victorian Legal and Constitutional Committee has recently commented upon this matter in its *Report on Privacy and*

[159] *Slater* v. *Bisset* (1986) 69 A.C.T.R. 25, at 28.

Breach of Confidence[160] and has added its weight to the growing support in this country for information privacy/data protection legislation modelled on the Commonwealth *Privacy Act 1988*[161], the *Information Privacy Principles* of which impose obligations on "record-keepers" in respect of the storage, security, use and disclosure of "personal information."

(ii) Equally, as noted earlier, though the agency and its officers who receive and handle "client information" are ordinarily subject to a duty of secrecy to the client, the permissible uses they can make of that information by way of its further dissemination or otherwise is limited first, in the case of the agency, by the extent to which such further use is authorised either by the third party or by law (usually legislation); and secondly, in the case of the individual official, by such authority as he or she possesses by virtue of office ("individual authority")[162] or by virtue of the consent of a superior officer, to use that information in a way that is lawfully open to the agency itself. What requires emphasis is that it is <u>not</u> open to a minister or superior officer unilaterally to condone a further use not authorised by the third party or by law.

(iii) Insofar as an individual official within an agency is concerned, that official's entitlement to have access to client information will turn upon the duties performed by that official and in particular upon whether, consistent with the agency's secrecy obligation, they are such as require the official to have access to that information for the purpose of discharging those duties. This, as will be seen, is referred to in the case law as "the need to know" principle. The matter to be noted here is that, for reasons given above, a superior officer does not have an unconstrained right to authorise (for whatever purpose) an official's access to client

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[160] 40th Report, 1990.

[161] Ibid., p. 46 ff; see also *Cabinet Administrative Instruction: No.1 of 1989* (S.A.).

[162] This concept is considered in the preceding Section of this Report.

information in the agency's hands. That access will only be permissible where the official's duties relate to the performance of a function in which the information can properly be used and, furthermore, is necessary for the official's discharge of his or her duties.

2. Governmental Information.

In the usual case the access/dissemination question here is not complicated by duties owed to third parties. In a general way it can be said that, statutory requirement apart, it is for government itself in its own procedures etc. to ordain what is permissible access/dissemination within and between agencies. Nonetheless those procedures themselves will be affected by, or else will need to accommodate, a number of established principles of law.

(i) Perhaps most obviously, the function of a particular agency, the manner of allocation of offices within it, and the nature of the duties and responsibilities assigned to those various offices will themselves contrive who has access to particular information and the extent of that access. Considered from the standpoint of the individual official and subject to limitations imposed by, or authorisations properly given by, superior officers, the scope of any individual's right of access to governmental information is set by the need to know principle. This has been expressed authoritatively in the following terms:

> "No official has any right to acquire any part of [an agency's] stock of information, whether or not confidential, save in so far as it is needed by him in order that he should be able to do his job. In a word, he has to have a "need to know"."[163]

The principle is of obvious importance where what is in issue is access to, or dissemination of, sensitive information – and this is the invariable context in which its

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[163] *R.* v *Birmingham City DistrictCouncil, Ex p. O.* [1983] 2 W.L.R. 189, at 199.

application has been considered judicially. But this context apart, it is a principle which today should not be pushed too far – at least as a justification for limiting the dissemination of non-sensitive information amongst officials. A rewarding working environment for officials and an enhanced commitment to an agency, can result from an official's inclusion in, rather than exclusion from, the information and affairs of an agency. At this point though, one moves away from what an official has a right to know into the realm of what he or she can or should be told — a matter which bears more directly on policies and practices relating to information dissemination within agencies.

(ii) The "need to know" principle itself knows one important exception. It relates to ministers (at least in their departments)[164] to the C.E.O's of agencies, to members of statutory authorities and to directors of State-owned companies. In their respective cases they do not have to demonstrate any particular "need to know" to justify access to governmental information in their departments' etc's. hands. Their respective positions in the departments, etc. are such that they are prima facie entitled to that access and can only properly be denied it in the very exceptional case where there are reasonable grounds for apprehending that access is being sought in a particular instance so as to further an improper purpose contrary to the minister's, etc's. duty of office.[165] The one problematic case is that of the minister in relation to statutory bodies or offices for which he or she bears some responsibility by virtue of portfolio arrangements, but which are not subject to complete ministerial control and direction. Here, conventional constitutional wisdom would deny a minister an entitlement to access to any and all information in the hands of such a body. But it likewise leaves shrouded in mystery the manner in which even a "need to know" principle should be applied in the minister-statutory board/office relationship. As will be seen in a later Report, this opacity cannot

[164] As to their portfolio generally see below.

[165] See e.g. *Molomby* v *Whitehead* (1985) 63 A.L.R. 282 for the primary proposition; see e.g. *Bennetts* v *Board of Fire Commissioners of N.S.W.* (1967) 87 W.N. (N.S.W.) Pt. 1. 307 for the narrow exception.

be circumvented by a minister through the practical expedient of appointing a departmental official to a statutory board for the purpose of creating a conduit to that board's information. That departmental official, no less than any other board member, is bound first and foremost by his or her obligation to the board in respect of the use etc. made of board information. Perhaps the most that can presently be said — and it is not illuminating — is that a minister's need to know extends (a) to those matters in relation to which he or she could properly be called upon to answer in Parliament on ministerial responsibility grounds — and these are by no means obvious or settled; and (b) to matters relevant to the exercise of such statutory powers of direction etc. that the minister has in relation to the statutory board/officer.

(iii) Such duty of secrecy as an official owes is owed to the authority under which the official holds office. This as a rule will be the Crown, or where relevant, an independent statutory authority or company. The reason this needs emphasis is that, statutory modification apart, it is the body to whom the secrecy obligation is owed which alone can relax or release it in relation to particular information or classes of information in the hands of an official. What this means for practical purposes is that administrative arrangements must be in place which can allow for such relaxation or release to occur. Public Service regulations, as noted earlier, commonly provide for this in a way which requires the assent of a minister or chief executive officer to disclosure of information otherwise than in the course of official duty. It is at this point, however, that secrecy principles and administrative practice become problematic. First, given the very widely cast terms of duties of secrecy imposed by or under most public service/public sector management Acts, compliance with these authorisation procedures, strictly, is necessary for the use or disclosure of a large body of innocuous information, if this occurs outside the course of official duties. Secondly, it is highly questionable whether the procedures currently prescribed under such legislation are appropriate to the modern circumstances of public administration. Authorisation procedures are, it is suggested, appropriate matters for significant, if regulated, delegation. For this reason the disclosure rule proposed in this Report allows disclosure with the permission of "an officer who is reasonably believed to have authority to give that permission".

(e) *Employment Obligations.*

Of direct interest here are those public officers or employees whose engagement is based on a contract of service (i.e. public servants and public employees, and the officers and employees of statutory authorities and State-owned corporations).

Under general employment law, the common law secrecy obligation of an employee during the currency of the employment merges, for practical purposes, with the more general fiduciary type duties that an employee owes the employer. In the case of a private sector employee these more general duties can be described, compendiously, as an -

> implied contractual duty to serve the employer with good faith and fidelity during the currency of the employment.

In one of its many and varied applications this duty of fidelity encompasses the unauthorised use or disclosure of confidential information acquired in the course of employment. But it can also extend to the use or disclosure of information which is not confidential if that use is inimical to the interests of the employer or is "destructive of the necessary confidence between employer and employee".[166] In other words the duty of fidelity protects against (a) misuse of confidential information; and (b) misuse of non-confidential information which is incompatible with a faithful service of the employer's interests. There are difficulties in translating particularly the second limb of this to the public sector. Much of our learning on fidelity originates in the private sector and its focus is the protection of the private and commercial interests of private sector employers. Case law is slight on its use to protectg the "public interest". Later Reports will consider other possible applications of fidelity to public sector

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166 *Blyth Chemicals Ltd* v *Bushnell* (1933) 49 C.L.R. 66, at 81 per Dixon, McTiernan J.J.

employees. Here, for the purposes of use or disclosure of official information, only the following requires note.

(i) To the extent that public sector agencies or State-owned companies engage in "non-governmental" or commercial activity, the private law duty of fidelity will, in all probability, be applied with full force to those employees involved in that activity,[167] and this not only to protect the confidential information of such bodies but also to safeguard their legitimate interests from prejudice occasioned by an employee's actions involving information misuse which are inconsistent with loyal service by that employee.

(ii) While for the purposes of information abuse there is a significant area of overlap between secrecy, and loyalty and fidelity, the latter is only likely to have a significant role to play in the public sector in two classes of case of present relevance: the first involves improper "public comment" by an employee (which may or may not involve use or disclosure of official information); the second is misuse of official information without disclosure. The first of these is considered in the separate *Report on Compromising Relationships and Other Activities*; the second, in a subsequent Section of this Report on "Misuse of Official Information". Where disclosure is in issue, the duty of secrecy would seem to provide such level of protection to the interests both of the public and of government as the common law is likely to allow. Fidelity adds little if anything in disclosure cases to the already generous protection the common law gives to third party information. And in relation to governmental information, the special "injury" test (which applies to the public sector alone) is itself able, in its balancing process, to give appropriate weight to the need to maintain loyal and faithful service by public sector officers and employees. The test is capable, for

[167] See generally R. Dean, *The Law of Trade Secrets*, 181 ff.

example, of preventing disclosures which are prejudicial to the ordinary business of government[168] or to efficiency and morale.[169]

(iii) In all jurisdictions other than New South Wales, the Northern Territory, South Australia and, possibly, Queensland, the employment obligations of persons subject to public service/public sector management Acts have been enlarged significantly in relation to the unauthorised disclosure of official information.[170] For this reason the common law, whether considered from the standpoint of confidentiality or of loyalty and fidelity, has no operative role to play as a source of employment obligation regulating employee disclosures in these jurisdictions.[171] Those statutory enlargements are considered in a later Section of this Report.

(f) *Post-employment Obligations.*

As the subject of post-employment secrecy is considered separately and in detail in the final Section of this Report, the common law's role in it will only be outlined briefly at this point.

It is in the post-employment context, even in the public sector, that the common law's duty of secrecy comes into its own. Its dual pronged secrecy obligations — the one protecting governmental information, the other, third party information — subsist after the termination of public office holding or employment and for so long as the ex-officer or ex-employee has in his or her hands confidential information that the law will protect. What, however, needs to be emphasised is that governmental information which the common law would protect during office-holding or employment will not, as of course, be protected from use or disclosure after

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168 See e.g. the illustrations given by Mason J. in *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485, at 495.

169 See e.g. *Attorney-General* v *Guardian Newspapers Ltd.* (No. 2) [1988] 3 All E.R.545; *British Steel Corp.* v *Granada Television* [1980] 3 W.L.R. 774, at 853.

170 See e.g. *Public Service Regulations*, reg.35 (C'wealth).

171 Misuse without disclosure is another matter as will be seen in Section 4 of this Report.

termination of employment. The principal reason for this is that in the latter case interests different to those relevant during office holding, have now to be taken into account. And not the least of these is the public interest in promoting the effective utilisation of individual skill and experience in our society.

If the principles upon which the common law works can be stated without undue difficulty, their application can give rise to intractable problems and this because of the need to make almost arbitrary distinctions between the information that should be accorded enduring protection and that which should be free for use and disclosure by an ex-officer or ex-employee. Attempts to circumvent this difficulty through the use of contracts which purport to identify and isolate "protectable" information are not likely to be successful if private sector experience provides any guide in this.

Because of uncertainties in the application both of the common law and of contract, it will be suggested that to the extent that the public interest justifies the sterilization of official information in the hands of ex-officers and ex-employees, this should be achieved at least in areas of predictable sensitivity, through statutorily backed administrative procedures which allow appropriate and sensitive balances to be struck between the governmental, individual and other interests raised in each particular case or class of classes.

Finally, and because it tends to be overlooked, the common law obligation extends to all public officials. Ministers, no less than clerks, fall within its net.[172]

(g) *The "Public Interest" Exception to Secrecy*

This subject is considered in detail in the Section of this Report dealing with "Whistleblowing". Comment here will be brief.

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[172] *Attorney-General* v *Jonathan Cape Ltd* [1976] Q.B. 752.

It has been observed on a number of occasions that the "public interest" is used in two quite different ways in the common law depending upon the nature of the particular official information in issue.

(i) Where the information is "governmental information", the injury to the public interest test determines whether protection against unauthorised use or disclosure will be given to that information. In other words the public interest provides the justification for the protection given by the common law.

(ii) Where the information is "third party" information in respect of which a governmental authority or public official owes a duty of secrecy to a member of the public, the "public interest" can provide an exception to that duty thus allowing at least some uses or disclosure not authorised by the information provider. Here, unlike in (i) the public interest provides justification for overriding such duty of secrecy as otherwise is owed.

The second of these usages requires present explanation . Though the scope of the public interest exception (or defence as it is often put) has not been authoritatively settled in Australia, it is accepted to be a narrow one which can justify disclosure –

(a) of information relating to serious wrongdoing which it is in the public interest to disclose; and

(b) of information the disclosure of which will avert apprehended harm to the public or to members thereof.[173]

Thus, for the exception itself to be brought into play, the information to be disclosed must itself possess a very distinctive character. Commonly that distinctive character is summed up in the description "iniquity". Importantly the exception does not justify the disclosure of

[173] See *Castrol Australia Pty Ltd* v. *Emtech Associates Pty Ltd* (1981) 33 A.L.R. 31; *Allied Mills Industries Pty Ltd* v. *T.P.C.* (1981) 34 A.L.R. 105; *Corrs Pavey Whiting & Byrne* v. *Collector of Customs (Vic.)* (1987) 74 A.L.R. 428, per Gummow J; *Attorney-General (U.K.)* v. *Heinemann Publishers Australia Pty Ltd* (1987) 8 N.S.W.L.R. 341; (1987) 10 N.S.W.L.R. 86 per Kirby P; *Smith Kline & French Laboratories (Aust.) Ltd.* v. *Secretary to Dept. of Community Service and Health* (1990) 95 A.L.R.87.

any confidential information simply because it is thought that it would be of interest to, or beneficial to, the public.

Greater controversy centres upon what the exception actually justifies the confidant doing with the information. An emerging theme in the case law is that, if disclosure is justified at all, it must be to a proper authority having an interest in receiving the information.[174] This means, for practical purposes, that it is not necessarily permissible to make the disclosure to the media. The disclosure may, in the circumstances, only be justifiable if made to the police, a regulatory agency, etc. This "proper authority" limitation is of importance in the public sector if governments are inclined to institutionalise whistleblowing procedures.

If the exception allows, in the main, a limited disclosure of wrongdoing, it most likely harmonizes in its effect with what the "public interest" would justify in relation to governmental information ((i) above). Even where governmental information relates to or involves wrongdoing, that, of itself, would not necessarily justify a complete denial of secrecy protection to that information.[175]. Its publication may still be likely to harm the public interest. But if analogy is sought from the public interest exception ((ii) above), it is open to our courts to say that a limited form of disclosure, i.e. to a proper authority, is justifiable nonetheless. This again requires emphasis because, if reasonable and workable procedures for reporting wrongdoing are established in governmental agencies, it may well be the case that only in very exceptional circumstances could an official use the "public interest" or "harm to the public interest" as legally acceptable justifications for the public disclosure of governmental wrongdoing.

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[174] *Francome* v. *Mirror Group Newspapers* [1984] 1 W.L.R. 89; *Corrs Pavey Whiting & Byrne* v *Collector of Customs (Vic)* (1987) 74 A.L.R.428.

[175] Cf. the views of Street C.J. in *Attorney-General (U.K.)* v. *Heinemann Publishers Australia Pty Ltd* supra

(h) *The Common Law and Contract.*

The common law's secrecy obligation arises independently of contract. If, however, the respective parties are in a contractual relationship that obligation will ordinarily take effect as an implied contractual term — save where the contract itself makes express provision for secrecy. Ministers, the members of statutory boards (ordinarily) and non-executive directors of companies (variably) do not hold office on the basis of a contract let alone of a contract of employment. But these apart, public servants and employees, and the officer's and employees of statutory bodies and State-owned companies characteristically are parties to employment contracts with their respective employers. For some but by no means all of these the general framework of their contract will be contrived by the legislation under which office or employment is held — much the most significant in this being public service/public sector management Acts — and the contract itself ordinarily, will embody as contractual terms such rights or obligations as are imposed on officers or employees by or under such legislation. "Ordinarily" is here emphasised because it is an emerging phenomenon in the public service legislation of some jurisdictions to allow at least some range of public officials (usually S.E.S. officers) to negotiate contractual terms with their employer which are inconsistent with those prescribed by legislation.[176] But for the most part in most jurisdictions, much the greater number of public sector employees are engaged under legislative schemes which impose or authorise the imposition of secrecy obligations of such character as leaves to the common law little effective role as a source of implied contractual obligation — at least in relation to employee disclosure of information acquired by virtue of employment.

The common law, and for that matter the law of contract, are nonetheless not without significance in the employment context.

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[176] See e.g. *Public Service Act*, 1978, s.30(4) W.A.; *Government Management and Employment Act*, 1985, s.50(4) (S.A.).

(i) In the majority of jurisdictions[177] the common law alone regulates the misuse of official information not involving disclosure, for example, use for the purposes of insider trading [178]

(ii) In New South Wales and the Northern Territory[179] statute does not impose secrecy regimes directly on public sector employees generally, this matter being left to common law and contractual regulation.

(iii) The common law and contract govern the secrecy and fidelity obligations of employees who are not engaged under legislation (e.g. employees of State-owned companies) or whose "engaging" legislation does not make provision direct or indirect for these matters.

As a prelude to considering the possible use to be made of express contractual provision in the secrecy arena, the distinctive positions occupied by New South Wales and the Northern Territory require individual mention.

New South Wales.

Public sector employment in this State is governed for the most part by the *Public Sector Management Act 1988* (as amended). Neither the Act nor the Regulations made under it impose express secrecy obligations. The employment scheme upon which the Act is premissed (and whether in departments or in declared authorities) is essentially contractual, a premise made quite explicit in relation to S.E.S. officers by s.42G of the Act. For these officers a *Code of Conduct* ,which is incorporated into the s.42G contract, is the source of their secrecy obligations. For other officers and employees engaged under or regulated by the Act, it would seem that their general employment obligation of secrecy remains for the moment a matter of implied contract.

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[177] But cf. Public Service Regulations, reg. 8A(h) (C'wealth).

[178] "Misuse" is considered in a later Section.

[179] The Territory's *Criminal Code* offence as will be seen does not itself create an official secrecy regime.

For present purposes the relevant contractual provisions of the S.E.S. *Code* stipulate:

5.1 Other than as required by law (as exemplified by the *Freedom of Information Act*), in the course of duty, when called to give evidence in court or when proper authority has been given, an executive should not disclose official information or documents acquired in the course of his or her employment.

5.2 Executives should not misuse information gained in their official capacity. Section 8(1) of the Independent Commission Against Corruption Act includes in the definition of corrupt conduct "any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person". Misuse includes:

(i) speculation in shares on the basis of confidential information about the affairs of a business or of proposed Government actions:

(ii) seeking to take advantage for personal reasons of another person on the basis of information about that person held in official records:

(iii) gossiping on the basis of personal or other information held in official records.

The first, and most obvious comment to be made of this is that cl.5.1 is far more comprehensive in its information coverage than the common law would allow under the ordinary confidentiality rule (in the case of third party information), or under the "injury" test in the case of governmental information. Though not necessarily objectionable as a contractual obligation simply for this reason,[180] it will be suggested below when statutory provisions of like ambit are considered:

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[180] An argument can be made, paralleling that used in the private sector to strike down secrecy agreements which are in restraint of trade, that a provision of such width may be void or grounds of public policy given that much official information caught by the provision may be freely and publicly available.

(i) that a provision of such width invites systematic violation by even the most scrupulous and conscientious official — one should note that the provision in terms is capable of catching publicly available and notorious information;[181]

(ii) that a court would not, as Australian law now stands, restrain an employee from making a disclosure which violates cl.5.1 unless it could be shown that that violation would have constituted a breach of the common law obligation in either of its manifestations; and

(iii) that it sits quite uneasily against emerging constitutional principle which uses the public interest rather than the mere official status of information to test its need for secrecy protection.

Secondly, cl.5.1 presupposes some continuing application of the common law at least to the extent of giving content to particular formulae used, for example, the disclosures that are justified "in the course of duty", and the means by which "proper authority" can be given or had.

Thirdly, cl.5.2 is subject to a like objection to cl.5.1 in its information coverage, unless the term "misuse" can be said by implication to refer only to uses which are legally objectionable.

Finally, both clauses are not cast in absolute terms, each using the more exhortatory "should not" rather than the mandatory "must not" which appears elsewhere in the *Code*.[182] This may suggest some corridor of discretion, some latitude, in their applications — a corridor which emphasises more that a purposive rather than a technical interpretation should be given to them. But even if this be so it illustrates the latent difficulty in giving direct legal effect to Codes which have a significant admonitory or guiding function. It is instructive here to note by way of contrast the rather different legal effect statute gives Queensland's public service

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[181] Cf. *Triplex Safety Glass Ltd* v *Scorah* [1938] Ch. 211.

[182] E.g. cl.6.1.

Code of Conduct: only a "wilful failure" to comply with that *Code*'s provision exposes a public servant to possible sanctions.

The Northern Territory.

Though one of the six Australian jurisdictions to make violation of official secrecy a criminal offence,[183] that offence only applies to the "unlawful communication of confidential information obtained by virtue of office."[184] Neither the *Criminal Code*, nor the *Public Service Act, 1976*, its *Regulations* or *Bye-Laws* provide any statutory definition of the component parts of this formula. Importantly the *Act* and *Regulations* do not make any express provision for official secrecy. Save where individual statutes impose particular secrecy obligations for their own purposes, the matter has been left to the common law and to regulation through the contract of employment. As to the latter the Public Service Commissioner, by circular, has taken the view that "all information handled by employees in their normal day to day activities is confidential."[185] While this may well be a prudential attitude to take in providing guidance to public servants given the effect of the criminal law in the Territory, it cannot and, at law, would not be taken as indicating what in fact is confidential information for the purposes either of the criminal law or of employment law in the Territory — save where, as noted below, the Commissioner's view has contractual effect in relation to a particular employee.

Additional to the above circular, General Order Section 30H,[186] in the context of public comment by public servants, enjoins employees to protect the confidentiality of "restricted information", examples of which are given in the Order. The legal status of the General Order vis-a-vis individual employees is by no means certain. Furthermore, the Public Service Commissioner has prepared a pro forma which it is suggested should be signed by new

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[183] Criminal Code, s.76.

[184] This is a precis of the offence.

[185] Circular 1983/3, "Confidentiality of Information and the Northern Terriutory Criminal Code."

[186] "Public Comment by Public Servants".

employees and which contains an acknowledgment that the employee " understands my obligation and responsibilities in relation to information that may come to my attention in the normal course of my employment in the public service."[187] This pro forma, where signed by new employees, would in all probability give contractual effect to the view of the Public Service Commissioner on confidentiality noted above.

But whether or not the effect of Circulars and General Orders is, for employment purposes, to make all information handled by employees confidential, their use or disclosure of that information will only be improper where that use or disclosure is in breach of the employment obligation they have in relation to that information. It is at this crucial point that the formal arrangements made in the Territory's secrecy scheme collapse into silence. The employee might be obliged to acknowledge his or her obligation in relation to information (the pro forma) but nowhere, it seems, does Territorial law formally outline what that obligation is. Given this silence, it would seem to be the case that the common law (in both of its manifestations) (1) provides, as an implied contractual duty, the actual secrecy obligation owed by a public servant — notwithstanding that the "injury" test in particular is clearly more favourable to information disclosure than the Circulars of the Public Service Commissioner in their temper would wish to allow; and (2) sets the limits of lawful use in the usual case[188] for the purposes of the Criminal Code offence.

Express Contractual Provisions.

The explicit use of contracts as the basis for public sector employment is a growing phenomenon in Australian jurisdictions. The question that needs consideration in the light of this is the extent to which it is appropriate or desirable for those contracts to address directly the in formation handling obligations of the employee-contractor. The two preliminary points to be made are (i) that to the extent that these obligations are independently prescribed by or under

[187] Memorandum 1989/6, "Confidentiality of Information and the Northern Territory Criminal Code.

[188] In some instances specific legislation may impose its own explicit secrecy obligation on public servants administering that Act.

legislation it is not open, by contract, to dilute, vary or extinguish those obligations save where this is expressly permitted by legislation — as it is in some circumstances in some jurisdictions which have statutory secrecy regimes;[189] and (ii) that, unlike statutory obligations, contractual ones are subject to ordinary common law principles governing the validity, interpretation etc. of contractual provisions — a phenomenon which can result in their being found to be ineffective in circumstances in which a like statutory obligation could not be so found.

The one distinctive and for present purposes discrete class of case where express contractual provision can be both necessary and desirable involves the employees of State-owned companies and of governmental agencies engaged in research or commercial activity. To the extent that the employees of such bodies are or are likely to have access to identifiable confidential information of the company or agency (and particularly to "trade secrets"), their employment contracts should address employment and post-employment use of such information in a manner similar to that now found in private sector employment.[190] Without greatly enlarging upon this matter here one should indicate that express contractual provision should be made in relation (i) to the general secrecy obligation of the employee; (ii) to the management and use of identifiable or particularised confidential information by employees; (iii) to the ownership of inventions made during employment; (iv) to spare-time private activities which are inconsistent with employment functions; and (v) to the employment restrictions which are to apply (if any) on termination of employment (i.e. restraint of trade covenants). The one additional matter that should be emphasised for the officers, employees, ex-officers and ex-employees of State-owned companies is that in <u>addition</u> to such obligation as they may owe to the company or former company at common law or under contract, they are in any event bound by the provisions of *The Corporation Act 1989* s.232(5). More in the nature of a fidelity than a secrecy provision,[191] it requires that an officer, etc

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[189] See e.g. *Public Service Act, 1978*, s.30(4) (W.A.), *Government Management and Employment Act, 1985*, s.50(4)(d), (S.A.).

[190] On which see generally, R. Dean, *The Law of Trade Secrets.*

[191] It applies to any information whether or not confidential provided its use is for the purposes designated.

"shall not make improper use of information acquired by virtue of his position ... to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation."

Beyond the above classes of employees the issue of express contract becomes more vexed given the other options available to government to regulate the handling of official information. The particular virtues claimed for express contractual provisions aimed at securing loyalty or at protecting confidential information are —

(i) that they have a <u>precautionary function</u> in that they bring home to a person that he or she has obligations in this matter;

(ii) that they have a <u>discriminating function</u> in that they can particularise the type of information or activity which is governed by the contractual duty; and

(iii) that they have a <u>regulatory function</u> in that they can differentiate between what are or are not permissible activities or uses of information both during and after the termination of, the employment relationship.

The question that needs to be considered is how effective and necessary these functions might be in the public sector bearing in mind (a) that unlike in the private sector, other devices are open through which to impose secrecy and loyalty obligations – e.g. regulations, statutorily sanctioned Codes, etc; and (b) that the virtues claimed for express contractual obligations are very much the product of their use in the private sector to protect the economic interests of commercial enterprises — and a large body of law, practice and precedent exists in that arena which is not the case in the public sector.

(1) <u>The "precautionary function"</u>. It is open to serious question whether an employee will be aware of, and appreciate the significance of, particular employment obligations simply because they are formally expressed in a contract of service. The manner in which a contract is executed and the explanation given of the contract may produce the effect desired. But there is obviously a variety of ways in which it can be brought home to public sector employees (a) that certain standards of conduct are to be expected of them and (b)

that these standards are binding on them. The execution of individual contracts may be entirely appropriate for some range of public sector employees.[192] But it is doubtful if such is the case — if only for feasibility reasons — for the generality of employees.

In considering the means to be adopted the two matters of practical concern are first, how best to make standards binding on employees; and secondly, how best to ensure employee appreciation of those standards and their demands.

(a) "Binding Standards". As noted above the private sector has only contract available to it to achieve this purpose. State owned companies apart, such is not the case in the public sector. Subordinate legislation, or Orders in Council and Administrative Instructions, etc. having statutory backing provide clear alternatives. The attraction in giving a statutory foundation to obligations is that they are not then open to challenge (as are contractual provisions) on the basis of contractual uncertainty, public policy (an important consideration with restraint of trade clauses), etc. Equally, if the obligations are to be imposed uniformly on a wide range of employees there is a like attraction in their being formulated in a single document which itself is given binding force, for example, a *Code of Conduct* or General Orders. It is only if obligations are to be tailor made for particular employees or classes of employees that a contractual rather than a legislative basis for obligations seems appropriate.

(b) "Employee appreciation". The concern here is with ensuring employee awareness of – and continuing sensitivity to – their obligations. Such obligations should be brought home to an employee on entry into service and their demands should be re-emphasized periodically. The real issue in this is one of employment and management practices and not of formal execution of contracts. An employee bound by a statutorily sanctioned Code, for example, could just as easily be required to subscribe a copy of that Code as be asked formally to subscribe a

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192 Cf. the N.S.W. Senior Executive Service.

contract embodying a like Code. In Queensland, for example, the Public Service *Code of Conduct* has a legislative basis and its violation has possible disciplinary consequences; in N.S.W., for the Senior Executive Service, the Executives Code has contractual force. And while it has consequential employment effects through contract law, its disciplinary force under the *Public Sector Management Act* is indirect only – i.e. a breach of the Code may constitute conduct of a type falling within s.66 of that Act.

(2) The "discriminating function". It is well accepted in the private sector that secrecy clauses which do not particularize the information, or the classes thereof, that are to be kept confidential, but which merely refer to "confidential information" are of little more than hortatory value. Such provisions may alert employees to their secrecy obligation but of themselves they do not assist in the identification of the subject matter of that obligation. Furthermore, courts will not enforce such general provisions against employees (but more particularly against ex-employees) if the employer cannot in any case of alleged breach, prove that the information misused is in fact confidential. Equally the courts may well strike down contractual provisions which purport to embrace "all information" acquired during the employment and this for reasons of public policy.[193] For such reasons, secrecy agreements commonly particularise the information to be kept confidential both during the employment and on its termination. Particularisation is, however, an option not always available. Where access is given to a discrete body of information it can work well enough. But where the information itself is not constant, or is not of a genus which is intrinsically confidential, particularisation loses its utility.

When one turns to the public sector the "discriminating function" of secrecy agreements seems likely to be of marginal value save in those obvious classes of case which are illustrated in the exemptions to *Freedom of Information* legislation. For many employees, effective particularisation often is not feasible option. It is noteworthy, for

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[193] See e.g. *Triplex Safety Glass Ltd* v *Scorah* [1938] Ch.211.

example, that Queensland's *Code of Conduct* refers only to "information of a confidential or privileged nature"[194]. The New South Wales *Executive Code* for its part uses the more problematic formula "official information" [195]

The difficulty in particularising in the public sector and the resultant need to resort to broad generic formulae makes the use of statutory based obligations more attractive — and this because the more general the formula used the more likely it is to encounter difficulties at common law on public policy grounds if it has only contractual force.

(3) The "regulatory function".

While here the private sector experience may have important lessons for the public sector, they are not ones which necessitate resort to the contract option. Private sector contracts commonly address (i) the particular steps that are to be taken to maintain the confidentiality of specified information including handling procedures that are to be adopted in relation to that information (cf. the procedures followed in some jurisdictions in relation to the handling of "Cabinet Information"); (ii) spare-time employment which would be prejudicial to the employer's interests — a matter usually regulated by public service/public sector management legislation in any event; (iii) the consent procedures to be followed if particular uses, or, alternatively, uses not previously authorised, are to be made — again a matter addressed in public service/public sector management legislation in most jurisdictions; and, importantly, (iv) post-employment obligations. The last of these is considered in detail in the last Section of this Report. It will there be suggested that the practical difficulties involved in translating the private sector's restraint of trade doctrine to the public sector, and uncertainties as to the manner in which the "injury" test will be applied in the post-employment context to governmental information both suggest that legislatively backed obligations and procedures rather than contractual ones are likely to be

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[194] Para 4.2.

[195] Paras 5.1,5.2.

able better to address such need as there may be to protect official information from post-employment misuse.

Overall, there does not seem to be any particular advantage to be derived from express contract, at least in the secrecy/fidelity area, which cannot be realised more effectively by other means. Governments, for their own reasons, may wish to resort to express contractual arrangements in at least a range of public sector employments. If such is the case, there may be reason for intruding (through the use of Codes or otherwise) secrecy provisions etc. into those contractual arrangements. But this will ordinarily relate more to how employment obligations are to be brought home to the employees concerned rather than to any legal necessity for so doing.

(i) *Secrecy and third parties.*

An account of the common law and of its role in interest protection would be incomplete without reference to its impact on a third party who, knowingly or unknowingly, receives confidential information from a person who commits a breach of confidence in communicating that information to that third party. This body of the law has two quite practical spheres of operation in the public sector: (1) where the third party threatens to, or proceeds to, publish the information; and (2) where an ex-officer takes employment with a third party. Save for s.79 of the *Crimes Act, 1914* (C'wealth), the law here is not complicated by a criminal law overlay.

The common law rule put simply is that from the time that the third party knows or has reason to know that protected information has been supplied to it in breach of confidence, it is subject to the *same duties and liabilities* in respect of that information as is the person who wrongfully disclosed the information. Subject only to narrow (and uncertain) change of position defences, the third party can thus be restrained from using or publishing the information; can be made to return any document containing it; can be held liable in damages for any loss that use by the third party occasions; can be held accountable for any gain made from the inform ation.[196]

For the purposes of the public sector what this means in practice is that (i) in relation to confidential private, personal or commercial information supplied to government, it will be protected as of course from use by any third party who receives it in breach of confidence; and (ii) in relation to governmental information, it will be protected from use by any third party if, but only if, the "public injury" test is satisfied. The common law rule, in other words, is capable of preventing publication of information supplied to the media, and of requiring the media to surrender any gain made from its misuse.[197] Equally because the third party's obligations arise from the time it knows or has reason to know that it is acquiring information in breach of confidence, governmental agencies are provided with a limited practical means (by the giving of notice) for throwing onto a third party who employs an ex-official, some obligation to ensure that it neither receives protected official information, nor has it used on its behalf.

Finally, it is important to note that if a third party knows the identity of an officer who supplies it information in breach of confidence, that third party can be compelled to reveal to the government the name of that officer.[198] It is often assumed incorrectly that governments have no power by such means to seek to identify an officer who "leaks".

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[196] In the latter two cases liability for loss or for profit runs from the time at which the third party knows or has reason to know that the information has been wrongfully obtained.

[197] *Attorney-General* v. *Guardian Newspapers Ltd (No.2)* [1983] 3 All E.R. 545.

[198] *British Steel Corp.* v. *Granada Television Ltd* [1980] 3 W.L.R. 744.

II.

OPEN GOVERNMENT, FREEDOM OF INFORMATION AND OFFICIAL SECRECY.

The two dominant strands in contemporary law regulating official information place quite different values upon open government and its realization. As noted in the "Historical Outline" in Section I of this Report the *first*, and older strand, is embodied for the most part in Public Service legislation and in the general criminal law offences to be found in the majority of Australian jurisdictions. It originated in regulations made under colonial Victorian Public Service Acts. It imposed duties of secrecy on public servants save where disclosure of governmental information was made (i) in the ordinary course of official duties; or (ii) with the express authorisation of a minister or chief executive officer. Its objects seem to have been several: (a) to contrive a loyal, neutral and obedient public service; and (b) to regulate when and how officials could make information available to the public.[199] While it did not, as such, preclude the release of a significant level of governmental information to the public, it left the determination of what that level was to be in the hands of ministers and C.E.Os. It was, in other words, premissed upon discretionary release of information coupled with coerced official secrecy. Insofar as the public was concerned its hallmark was governmental paternalism.

The *second* strand, reflected initially in the common law, is more modern and liberal-democratic in character. Concerned at once to protect the legitimate interests both of those who deal with government and of governments themselves, and to safeguard basic constitutional and democratic values in our society, it has made the "public interest" its touchstone. As seen in the preceding part of this Section, that concept founds the varying balances struck between secrecy and openness in widely diverse governmental contexts. Importantly the common law did *not* address the question of public rights of access to

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199 See *F.C. of T. v. Swiss Aluminium Australia Ltd* (1986) 66 A.L.R. 159, at 163.

official information, save in the very distinctive case of access for the purposes of legal proceedings.[200] Rather, its primary concern has been with the extent to which it would protect official information from use or public disclosure. It has been *Freedom of Information* (F.O.I.) legislation which has added access rights to this second strand of our law.

Before considering such effects of that legislation as are relevant to this Report two brief, introductory comments should be made: the one about the F.O.I.-common law relationship; the other about F.O.I. and official secrecy.

F.O.I. and the common law. Though, as noted above, both bodies of law have somewhat different functions, the substantive similarities between them are marked. They are generally in accord both in the public interest considerations which enliven each of them, and in the types of information each is apt to protect from disclosure. Together they exemplify what should be taken to be the emerging constitutional norm for Australia governing how official information should be managed by government for the public it serves.

F.O.I. and official secrecy. When considered from the standpoint of the citizen, F.O.I. legislation encroaches markedly upon the old order of official secrecy: public right, not governmental discretion, is its hallmark. But as will be seen, when considered from the standpoint of the individual official, F.O.I. legislation as such does little to undermine even the most illiberal official secrecy regimes. While the legislation has a vital role in regulating the citizen-State relationship, it leaves it very much to government to determine how, in discharging its obligations in that relationship, it will manage its own officials in their individual handling of official information.

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200 The arena important to the law of "public interest privilege."

F.O.I. LEGISLATION

The following does not review F.O.I. legislation generally. Its focus is upon such light as this legislation throws upon the standards of conduct that can now properly be expected of public officers and employees. The Commonwealth, New South Wales, Victoria and the Australian Capital Territory have Acts in place. South Australia, for the moment, has expressed its commitment through the arcane device of a Cabinet Instruction laying down F.O.I. procedures.[201] Almost all remaining jurisdictions (including South Australia) have legislative proposals in train. For present purposes the existing Acts and Ordinance are sufficiently similar as to allow them to be treated synoptically in what follows.

The general objects of the legislation are to enlarge and enhance community access to governmental information both by requiring publication of information about the operations of governmental agencies and by giving public rights of access to documentary information save where such information is excepted or exempted from disclosure on essentially public interest grounds.[202] The legislation, however, does not leave it to officialdom generally to effectuate these objects. Save for information required to be made publicly available by agencies, determinations as to whether or not access is to be given to a particular document on request are to be made by a minister or principal officer of an agency or by a person authorized so to do by the minister and/or principal officer.[203] Importantly, all Acts exempt such a minister, principal officer or authorized officer both from civil liability for defamation and breach of confidence and from criminal liability, in making a determination in good faith to give access to a

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[201] *Cabinet Administrative Instruction No.2* of 1989 ("Access to Personal Records Instruction"). The legal effect of this Instruction vis-a-vis the public is probably nil.

[202] S.3, (C'w); s.5, (N.S.W.); s.3 (Vic.); s.3, (A.C.T.).

[203] S.23 (C'w); s.18 (N.S.W.) s.26 (Vic.); s.22 (A.C.T.) (there are some variations between these sections).

document pursuant to the legislation.[204] For present purposes these liability exemptions are of primary importance. Several comments should be made on them.

First, notwithstanding the legislative exhortation to ministers and agencies to publish or give access to documents otherwise than as required by F.O.I. where they can properly do so,[205] the exemptions limit the liability protection given to those cases where access is provided "because it was *required* by the [F.O.I.] Act or in the bona fide belief that it was required so to be given".[206] While this limitation in the liability protection is not of great importance to ministers and senior officers because of the level of "individual authority"[207] they commonly enjoy by virtue of office to release or authorise the release of at least "governmental information"[208], it is of particular significance to other officers whether or not authorised to make determinations under F.O.I. Acts. The reasons for this are (i) that apart from such authority (if any) as they may have to make F.O.I. determinations, the "individual authority" they will ordinarily possess to disclose official information, will be circumscribed; and (ii) that they remain subject to such official secrecy regime as the law of their jurisdiction imposes, whether through public service/public sector management legislation, employment regulation or the common law. The combined effect of these reasons is that, in the absence of administrative guidelines prescribing what can lawfully[209] be released, such officers act on the legislative invitation to make releases beyond the F.O.I. Act at their peril. Simply by way of illustration of the point being made, the S.E.S. *Code of Conduct* in New South Wales in terms prohibits disclosure of official

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[204] Ss. 91,92 (C'W); Ss.62,63 (Vic.); Ss.64-66 (N.S.W.); Ss. 77,78 (A.C.T.).

[205] S.14 (C'w); S.16(2) (Vic.); S.13 (A.C.T.); cf. S.5(4) (N.S.W.).

[206] *News Corporation Ltd* v. *N.C.S.C.* (1984) 52 A.L.R. 277, at 279 per Bowen C.J. and Fisher J; emphasis added.

[207] This concept is considered in part IIB of Section 1 of this Report.

[208] But not necessarily "third party information":

[209] Where government itself is bound by a secrecy obligation to a third party – a topic considered in the previous section of this Report – it cannot authorise the release of information caught by that duty otherwise than under the F.O.I. Act, unless it has lawful authority so to do.

information unless disclosure is "required by law (as exemplified by the *Freedom of Information Act*) [or is] in the course of duty."[210]

Secondly, given the form in which the liability protection has been cast, the scheme of F.O.I. legislation, formally, is compatible with the most severe regimes of public service secrecy that obtain in Australia, as for example in the Commonwealth and Victoria — a state of affairs acknowledged by the Gibbs Committee in its *Review of Commonwealth Criminal Law*.[211] The reason for this is that secrecy regimes, as will be seen, are concerned characteristically with how, when and by whom official information is released rather than with what information is released. "Formally", nonetheless, has been emphasised above because in their substance and objects F.O.I. and the usual secrecy regime are in sharp conflict. Again by way of illustration of the unhappy relationship of these two, the technical possibility exists in the Commonwealth and the A.C.T. for an official to be guilty of both a disciplinary and a criminal offence if he or she makes an unauthorised disclosure of information which an agency is obliged to and has made publicly available under F.O.I. legislation.

The net effect of super-imposing F.O.I. legislation upon the older official secrecy regimes is to substitute a qualified form of mandatory disclosure for a system of discretionary disclosure — but a mandatory disclosure which can only be made by a designated class of officials. There, doubtless, are very good reasons of prudence, efficiency and of order in the conduct of public business, that such determinations as are required to be made under F.O.I. legislation should be made by officials who have had this responsibility assigned to them. What is indefensible are the continuing criminal etc. disabilities imposed on officials in respect of those categories of official information which clearly fall outside the exempt document area. If officers, *as members of the public*, are entitled to access to that information and, as members of the public, to deal with it without restriction, it seems highly anomalous that, *as officials*,

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210 Cl.5.1; emphasis added.

211 See *Discussion Paper No.20*: "Disclosure of Official Information", (Dec. 1988) paras 3.25, 3.26.

they may not lawfully be permitted to disclose that information to the public. It is noteworthy in this regard that in Queensland (which is not as yet an F.O.I. State) the public service *Code of Conduct* expressly provides that :

> "Officers are not prohibited from disclosing official information which would normally be given to any member of the public seeking that information."[212]

THE EXEMPTIONS AND OFFICIAL SECRECY

The exemptions, for the most part, are a statutory adumbration of the classes of information of which the common law, on a variety of public interest grounds, would prevent either publication or, in some instances, disclosure in legal proceedings. And F.O.I. legislation, in a sense, directly acknowledges this in those Objects Sections which link the exceptions and exemptions to what is necessary "for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies."[213]

Cumulatively the exceptions and exemptions isolate circumstances and matters which actually or incipiently raise such public interest concerns as necessitate, or else warrant consideration being given to, the maintenance of secrecy. As governments are constitutionally required to act in the public interest, the exemptions and exceptions can properly be said to provide the appropriate spheres (i) within which government has the initial responsibility (subject to appeal rights) to determine in any particular matter how the public interest is best served; and (ii) in relation to which officialdom generally (other than those authorised[214] so to do) should be precluded from unilaterally usurping that governmental responsibility. To put the matter directly, *the subject areas of the exemptions and exceptions provide prima facie the proper general province of official secrecy.* Those

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[212] Para 4.2.

[213] S.3 (C;'w); S.3 (Vic); S.3 (A.C.T.); but cf. S.5(2)(b) (N.S.W.).

[214] Whether under F.O.I. legislation or as a matter of "individual authority of office".

are the areas in which the public can legitimately be asked to trust in governments to discharge the constitutional responsibility imposed on them. Those are the areas in which governments in turn are entitled to trust in their officials to in no way impede or thwart the discharge of that responsibility.

The view advanced in the preceding paragraph would seem to presuppose that a particular jurisdiction has F.O.I. legislation in place and that in the absence of such legislation the proper scope to be afforded "official secrecy" remains an open question. But if, as suggested, the exceptions and exemptions are properly to be seen as an elaboration of basic common law and constitutional principle, their subject area has a like significance in non-F.O.I. jurisdictions as in F.O.I. jurisdictions: it is the area in which officials (save those lawfully authorised to publicly disclose official information) can properly be expected and required to keep official information "confidential or privileged" — to use the formula of Queensland's *Code of Conduct*.

While it is not intended here to discuss the exemptions in any detail, three matters do, however, warrant particular note. The first concerns the relationship of F.O.I. legislation to the secrecy provisions of other Acts; the second, exemptions affecting information supplied to government by third parties ("third party information"); the third, exemptions relating to "governmental information".

(i) Secrecy provisions of other Acts

The F.O.I. legislation of the Commonwealth, Victoria and the A.C.T. (s.38 in each instance) provide:

> "A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications."

Somewhat different in its terms — and effect — is the N.S.W. provision[215]:

> "A document is an exempt document if it contains matter the disclosure of which which constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions."

Given the diversity in character and content of statutory secrecy provisions, these F.O.I. exemptions are of importance and in a number of respects. The ambit of Commonwealth, Victorian and A.C.T. exemption is distinctly more narrow than that of the N.S.W. It does not apply to an enactment which does no more than –

(i) prohibit the disclosure of information identified by reference to the capacity of the person who has received or is in possession of the information; or

(ii) "prohibit the disclosure of information identified only as information obtained in pursuance of the enactment in which the prohibition is found."[216]

The relevant enactment itself must refer to the information to be protected and that reference must be sufficiently specific. A section, for example, which prohibits "the disclosure of information obtained officially"[217] is insufficient for this purpose. As has been observed by the Federal Court[218]:

> "s.38 requires that there be a more direct and explicit reference to the *nature of the information* itself. Information is the commodity being dealt with in the Act, not the discipline or integrity of officers."

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[215] Sched.1, s.12(1).

[216] See *Harrigan* v. *Department of Health* (1987) 72 A.L.R. 293, at 294-295; see also *News Corporation Ltd* v. *N.C.S.C.* (1984) 52 A.L.R. 277; *Kavvadias* v. *Commonwealth Ombudsman* (1984) 52 A.L.R. 728; *F.C. of T.* v. *Swiss Aluminium Australia Ltd* (1986) 66 A.L.R. 159.

[217] (Cf. Reg.35 *Public Service Regulations*, (C'w)).

[218] *Kavvadias case*, supra at 733, emphasis added.

While some number of the myriad of statutes which impose secrecy prohibitions have been found to fall within the s.38 exemption, one must observe that this can be for adventitious reasons which have more to do with styles of legislative drafting and with whether the enactment pre-dates or post-dates the F.O.I. Act.

An important consequence flowing from the limited scope of s.38 is that, for purposes other than F.O.I., disclosure of information *not* exempted by the section but protected by another enactment, will constitute an offence against that other enactment if the disclosure is made by an officer not authorised to make it under the F.O.I. Act. While there may well be justification for this apparently anomalous result in some instances, it must equally be acknowledged that it can follow from a marked lack of harmony between the policy of F.O.I. legislation and that of some individual enactments prohibiting information disclosure.

The N.S.W. exemption is more problematic — although made the less so in practice (i) by the more sparing use which seems to be made of secrecy provisions in enactments; and (ii) by the usual bias in those provisions in favour of protecting primarily information supplied by the public to the governmental agency in question. The exemption does, nonetheless, remove from the scope of the F.O.I. Act, documents of some number of agencies or governmental programmes and this because of the secrecy provision in their Act creating the agency or programme.[219]

(ii) Information supplied to government ("Third Party Information")

A distinctive feature of the common law of confidentiality, as has been seen, is its differential treatment of confidential information supplied by third parties to government on the one hand, and governmental information on the other. This difference — reflected in the distinct rules applied to each species of information — evidences the strong public interest there is in protecting the private, personal and commercial interests of those who

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219 See e.g. *Tourism Commission Act*, 1984, s.25; *Land Tax Management Act*, 1956 s.6; *Health Administration Act*, 1982, s.22.

deal with government. When one turns to the F.O.I. exemptions not only is the same duality apparent, the same public interest noted is conspicuous in the personal privacy, trade secrets and business affairs, and breach of confidence exemptions.[220] The potential overlap between the first two of these and breach of confidence is, perhaps, significantly greater than is generally appreciated. Victoria apart, breach of confidence covers, potentially, all identifying personal information and all confidential commercial information which is acquired by government with legislative authority, or, absent legislative authority, which is supplied and received for a particular purpose — save, in either case, where the relevant legislation or purpose admits of general publication of that information.

For present purposes the comment to be made of these exemptions generally is that, when coupled with the common law's treatment of third party information in the hands of government, they suggest that those dealing with government — and beyond such persons the public generally — are entitled to expect that scrupulous standards will be adhered to in the handling of private, personal and commercial information supplied to governments. Official secrecy regimes, whatever their form, should reflect this.

(iii) Exemptions relating to "governmental information"

Reference has been made to some number of these at various points in this Report. It is not intended here to discuss the "government information" exemptions specifically. Rather these exemptions, much more so than those dealing with third party information, throw up a central dilemma in the appropriate reconciliation to be affected between the policy of F.O.I. (and of the common law) on the one hand and official secrecy regimes as they apply to the individual official on the other. It is this dilemma which will be outlined here.

The view has earlier been put that F.O.I. exceptions and exemptions provide, prima facie, the proper general province of official secrecy. The application of this to third party

[220] Ss.41,43,45 (C'w); Sched. I, Ss. 6,7,13 (N.S.W.); Ss. 33,34,35 (Vic.); Ss.41,43,45 (A.C.T.).

information is not beset with any particular difficulties, both because such information is, for the most part, self-identifying and discrete in character, and because it is in any event given generous protection both at common law and under F.O.I. legislation. By way of contrast, with governmental information, the view proposed is not free from difficulty.

The exemptions of present relevance — cabinet documents, internal working documents, documents affecting law enforcement, and the like — specify some number of species of government document which, because of their intrinsic nature or because of the effect their disclosure would have, warrant being granted exempt status. In their application the exemptions require, strictly, two determinations to be made: first, whether or not a document falls within an exemption; and secondly, if it does, how the exemption should be applied to it. Within the framework of the legislation, both determinations are such as require the respective decisions to be made by a person so authorised under the Act. Given government's responsibility in the matter, it is manifestly the case that the second of these determinations is one to be made for government by officials it designates for the purpose. It is the first of the determinations which is of present concern, not for reasons relating to the proper and efficient administration of F.O.I. legislation, but for the significance it has beyond F.O.I. in delineating the province that should be given official secrecy regimes.

The issue can be put briefly. For the purpose of allowing access under F.O.I. legislation, it is appropriate for administrative and other reasons that an authorised officer makes the determination as to whether the document requested falls within an exemption. But where the question is not one of F.O.I. access at all, but is when and to what extent an individual official not authorised under F.O.I. legislation should be lawfully allowed to *disclose* official information, the vital matter for the domain to be given official secrecy is whether that official should be allowed some level of discretion in determining whether the relevant information is, or is likely to be, of a type which could attract an F.O.I. exemption if contained in a document, or whether it is information to which public access would be given. The answer given will, in the last analysis, contrive the scope to be given to official secrecy regimes. The two extreme positions put crudely, are:

(i) because of the risk of the individual official disclosing information of a type which would be prima facie exempt under F.O.I., the official should be precluded (unless otherwise authorised in the course of duty, etc.) from disclosing even information which falls outside F.O.I. exemptions notwithstanding that the public has a right of access to it and that the common law would not protect it from disclosure under the "injury" test; or

(ii) because the public has a right of access to information falling outside the exemptions and because its "unauthorised" disclosure would not be protected by the common law, the individual official should be permitted to disclose governmental information save where it can reasonably be said that the information in question is of a type which, if contained in a document, would be likely to fall within an exemption.

The first alternative sharply separates F.O.I. and official secrecy. It denies the individual official any personal responsibility in effectuating the public purposes evidenced in F.O.I. legislation, the common law, and, for that matter, the constitutional responsibility of government itself. It leaves to government alone responsibility for how official information is to be managed. And it subjects information to official secrecy irrespective of whether there is a possible public interest in maintaining its secrecy. This approach is the one which currently obtains in all present F.O.I. jurisdictions and it allows for the concurrent operation both of F.O.I. and of highly illiberal official secrecy regimes.

The second alternative seeks to reconcile and balance the purposes and provinces of F.O.I. and the common law, and of official secrecy. It accentuates the personal responsibility of the individual official both in information management and in furthering the constitutional responsibility of government to act in the public interest. It accords with the democratic values informing both F.O.I. legislation and the common law. And it minimises the possibility (open under the first alternative) of the official being vulnerable to disciplinary action, criminal prosecution, etc. for disclosing information, not exempt under F.O.I., and which is or may already be publicly available. The only Australian jurisdiction to proceed any distance down this path — and it is not as yet fully an F.O.I. jurisdiction — is South Australia.[221] Its *Government Management and Employment Regulations 1986* authorise the disclosure of information obtained in office if (inter alia)

> "the disclosure ... is of such a nature and made in such circumstances as to create no reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies."[222]

While justification can be mounted for either approach, and while each carries its own difficulties in practical implementation, the choice between the two goes to the very core of the principles which inform both public service by officials, and the nature of office holding itself in this country. The one approach requires loyalty and subservience to government, but diminishes the capacity of officials to serve, assist and inform the public. The other accentuates individual responsibility and public service, but diminishes the level of subservience of officials to government (though not necessarily their accountability). The principal vice in the former approach is that in making "lack of authority" rather than "the nature of the information" the basis for secrecy, it is inevitably over-inclusive in its information coverage and in consequence invites systemic non-compliance — a prevalent phenomenon today. The principal vice in the latter approach lies in such doubts as there may be as to the capacity of individual officials both to recognise when, and to determine properly if, a particular piece of information is of an exempt (or non-disclosable) character.

Of the two approaches, the latter — the "individual responsibility" – approach is the one espoused, and acted on in the recommendations made, in this Report. The reasons

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221 Its F.O.I. provisions are, for the moment, contained in *Cabinet Administrative Instruction No.2* of 1989.

222 Reg. 21(1)(c). There are two limitations to this which are not of present relevance.

for this inhere not only in the more ready reconciliation of that approach with the constitutional obligation of government but also, and negatively, in what seem to be ineradicable vices in "lack of authority" based regimes. Furthermore, for the purposes of the standards of conduct properly to be expected of officials — the principal concern of this Report — the "individual responsibility" approach, unlike its rival, at least calls for officials to understand and to be responsive to the values and interests which inform the secrecy regime with which their compliance is required.

Finally, and to dispel possible misunderstanding, what is being proposed here is not that the individual official should have the responsibility to determine whether "exempt information" should nonetheless be disclosed. Rather it is that that official should have responsibility to determine whether it could reasonably be said that information possibly is exempt information. If it could not, that official should be able to disclose it. If it could, its disclosure should only be made (if at all) by an official properly authorised by government to make that determination.

III

STATUTE AND OFFICIAL SECRECY

The following Section considers those obligations of secrecy which bind officials, not because of the common law, but because of statute. These may result from direct statutory provision; may be the product of subordinate legislation; or, though contained in Orders, Codes, etc., may derive their binding character from legislative fiat. The Section is divided into two Parts. The first analyses those statutory regimes which are general in character. These, for the most part, are the creatures of public service/public sector management Acts. The second refers briefly to the plethora of specific Acts, now running into many hundreds throughout Australia, which impose specific secrecy obligations for their own purposes. In both Parts discussion will be limited to obligations which regulate the disclosure of official information. Such statutory limitations as are placed on the mere use of information are considered in the Part following.

1.

STATUTORY GENERAL REGIMES

These can and do vary widely across the country. For this reason they will be considered on a jurisdiction by jurisdiction basis. Because a slender majority still adhere to a model which originated in the early legislation of colonial Victoria, brief initial reference will be made to that legislative history.

The Colonial Victorian Model

The first colony to place its public service on a statutory footing in 1862,[223] Victoria, in its *Civil Service Regulations 1867*, inaugurated a regulatory scheme for public servants designed (a) to cast a blanket of secrecy over governmental information and over

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[223] This initial attempt proved to be a costly failure: see P.D. Finn, *Law and Government in Colonial Australia*, 102 ff, Oxford University Press, Melburne, (1987)..

the operations of government save to the extent that disclosure of these was required in the ordinary course of official duty; (b) to preclude comment direct or indirect on the public service or its business, and particularly comment to the press; but (c) to relax (a) and (b) by a system of express discretionary authorisation controlled by a responsible minister.[224] Public servants were, furthermore, denied the right "to take any part in political affairs".[225]

With the reform of the public service in 1883, new regulations were adopted by the recently created Public Service Board. These built upon the scheme of the 1867 *Regulations* and provided the pattern in official secrecy which for many years was to be followed throughout Australia. Their influence is still to be found in a majority of jurisdictions. Regulation 33 provided:

> "Except in the course of official duty, no information concerning public business shall be given, directly or indirectly, by any officer without the express direction or permission of the responsible Minister";[226]

Regulation 34, that:

> "No officer shall make any communication, directly or indirectly, to any person not officially entitled thereto upon any matter affecting the department in which he serves, or the business or the officers thereof, or relating to the Public Service, or his own official position or acts, or upon any political subject or question whatsoever, without the express permission or authority of the responsible Minister."

For the individual official the environment, in form at least, was one ruled by the iron hand of superior authority. Official secrecy was to be the prescribed — and coerced — norm.

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224 Regs. 20,21.

225 Reg.23.

226 This was a recasting of reg.21 of the 1867 regulations.

These *Regulations* represent the epitome of the second phase of the law governing official information referred to in the "Historical Outline" of Section I of this Report — the phase of *governmental authoritarianism.* In their burden and temper they are far removed from a system of democratic government and constitutional principle which place positive value upon open government and upon the public accountability of government. Little purpose would be served in subjecting the above quoted regulations to detailed criticism. Their vices remain evident in some number of the contemporary statutory schemes considered below.

Before considering those schemes individually one matter of considerable importance should be noted and this relates to four of our six jurisdictions which have seen fit to make breach of official secrecy a criminal offence. *While the public service/public sector management Act schemes of the Commonwealth, Western Australia, Tasmania and the A.C.T. are concerned first and foremost with imposing "employment" obligations of secrecy, the criminal law of those jurisdictions makes breach of these employment obligations a criminal, not merely a disciplinary, matter.*

(A) The Commonwealth and the A.C.T.

An obvious progeny of the colonial Victorian scheme, the *Public Service Regulations*, Reg.35 provides:

> "Except in the course of official duty, no information concerning public business or any matter of which an officer or employee has knowledge officially shall be given directly or indirectly, nor shall the contents of official papers be disclosed, by an officer or employee without the express authority of the Secretary."

As it stands this regulation is unacceptably broad in its coverage; is ambiguous in its terms; sits ill beside the policies of F.O.I. legislation and of the common law; and is in urgent need of reformation.

(i) Though in essence an official secrecy provision, it does not seek in any way to identify types of information which, on public interest grounds, could even feasibly be said to warrant secrecy protection. It simply casts a blanket over all information concerning public business or any matter of which knowledge is had officially. It matters not that that information is already available, or required by F.O.I. legislation to be made available, to the public;[227] that its disclosure would be publicly beneficial and that its disclosure would otherwise be unobjectionable; or that its revelation would enhance rather than impede the prosecution of public business or the purposes of the Government. And unless assisting the public falls "within the course of" a particular official's "official duty", it matters not that the disclosure provides such assistance.

(ii) There are ambiguities in the terms of the Regulation itself. These in some measure are the products of the archaic language in which it is cast. Does "of which an officer ... has knowledge officially" refer both to "public business" and to "any matter" or only to the latter? Does "has knowledge officially" mean knowledge obtained because a person is an official irrespective of to what the information relates, or does it mean knowledge which an official has or has access to because of the particular office held? Howsoever these ambiguities are resolved, the Regulation's ambit still remains very wide indeed. For example an officer, officially informed of the sitting days of Parliament, who informs a fellow officer of those sitting days, is technically in breach of the Regulation unless the officer is acting in the course of official duty.

(iii) Reg.35 is breached daily if not hourly by public servants today. The form of secrecy it demands is, to use the words of the Chief Justice of the High Court of Australia, "unacceptable in our democratic society".[228] It produces the highly

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[227] Cf. *R.* v *Crisp and Homewood* (1919) 83 J.P. 121.

[228] *Commonwealth* v. *John Fairfax & Sons Ltd* (1980) 32 A.L.R. 485, at 493.

anomalous result that an officer cannot disclose to the public information which, as a member of the public, the officer has a right to have made publicly available.[229] It is scarcely compatible with the duties imposed on public servants by the same *Regulations* Reg.8A(e) and (f) — the "courtesy" and "reasonable assistance to the public" requirements. But what makes it particularly offensive is its interaction with sections 70 and 79 of the *Crimes Act,* 1914. The *Crimes Act* in effect criminalises breaches of Reg.35.

(iv) The first qualification to Reg.35 — "in the course of official duty" — highlights the importance that an officer's "individual authority" has in justifying disclosures of official information. That authority, as noted earlier in this Report,[230] is the authority to make such disclosures as inhere in the nature the function performed by each individual public servant or employee. The possible dilemma for a public servant in this — and it is exaggerated by the coercive character of Reg.35 — is that, in the absence of explicit guidance or instruction as to disclosure of official information in the course of official duty, a public servant is left to determine not only whether his or her function is such as to authorise disclosure, but also the extent of that authority both in terms of the information it would justify disclosing and of the forms of disclosure it would permit. This apart, what is clear is that the effect of the qualification on the Regulation is to indicate that its positive concern is with <u>when</u> information can be given and not, other than by implication, with <u>what</u> information can be given. It would thus, for example, proscribe a private or casual communication no matter how innocuous the information given.

(v) The Regulation is manifestly unsuited to the modern circumstances of the Commonwealth and A.C.T. Governments; to the current practice of public administration in the Commonwealth and the A.C.T.; and to the expectations that

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229 *F.O.I. Act* Ss.8, 9.

230 Section 2, IIB.

the respective Australian and A.C.T. communities are entitled to have of their government and its officials. While there is an unquestionable need for some level of official secrecy in both jurisdictions, Reg.35 is not directed to that need.

(B) Victoria

The public service secrecy provisions in this State are unusual and reflect its own, distinctive constitutional history. As noted previously, Victorian Public Service legislation from the first imposed wide ranging prohibitions on the disclosure of official information. These have been relaxed only slightly as will be seen.

The Constitution, 1975, s.95.

In 1916 as part of a scheme to abolish the separate representation of public servants and railway officers in both Houses of Parliament, it amended its *Constitution* in terms which now provide[231]:

> "A person employed in any capacity (whether permanently or temporarily) in the service of the State of Victoria shall not –
>
> (b) use except in or for the discharge of his official duties any information gained by or conveyed to him through his connexion with the public service."

The original version of this provision acknowledged its object to be so "that all officers may be enabled to render loyal and efficient service to the State." Equally in its original form it was limited to persons employed "in the Public Service" — a formula now abandoned in favour of the wider "in the service of the State." If, as seems likely (and the Parliamentary Debates support the view), disclosure of information constitutes "use" for the purposes of the provision, this section in form is one of the most draconian of any to be

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[231] The quotation given is from the current *Constitution Act ,1975* s.95. The provision itself seems to have been borrowed from the regulations made under the *Commonwealth Public Service Act, 1902* (reg.41).

found in legislation applying to public servants in Australia. It is noteworthy in passing that the possible "use" which most engaged speakers in the parliamentary passage of the original amendment was use in the course of political activity or for political purposes.

Insofar as it proscribes disclosure, it does not even admit expressly of authorisation by a minister — a possibility at least allowed under the State's *Public Service Regulations*[232] - although constitutional convention would doubtless allow for such authorisation. Nonetheless the section imposes an impossible obligation on officials. Its vices mirror those of the Commonwealth's Reg.35.

Public Service Regulations.

Regulation 16.5(7) of the *Public Service Regulations 1985* provides:

> "No officer shall make any communication, directly or indirectly, to any person (whether an officer of the public service or otherwise) not officially entitled thereto, upon any matter affecting the administrative unit in which such officer serves, or the business or the officers thereof, or relating to the public service, or the official position or acts of such without the express permission or authority of the Minister or the chief administrator."

This provision is a slight relaxation of what was required of public servants in Reg.21 of the *Civil Service Regulations 1867* and Reg.34 of the *Public Service Regulations 1884*.

(i) The regulation, unlike the *Constitution Act,* s.95, touches communication only. In one of its dimensions it attacks public and other comment by officers — the subject of a later Report. In another it regulates the disclosure of information acquired in office. In this, which is of present concern, the Regulation is distinctly problematic for it turns not on the right or authority of an officer to disclose information but rather upon the "official entitlement" of the recipient to receive that communication.

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232 See Reg.16.5(7).

It raises the daunting question of what entitlement do members of the public and others have to information in the hands of officials? By making the matter turn on that entitlement (and one can only speculate what is added to that entitlement by "official") and not on such duty or authority the officer possesses by virtue of office, it would seem to place officials in a quite invidious position, for to comply with the regulation they must be certain of the recipient's "official entitlement."

(ii) The provision is even more drastic in its limiting effect than Reg.35 of the Commonwealth's *Public Service Regulations*. One can only speculate what purpose it is designed to serve today. Where, for example, a governmental agency makes information of its activities etc. available to the public under F.O.I. legislation, does it by so doing make the public "officially entitled" to that information? This provision, as noted earlier, was part of a composite of regulations in early colonial legislation designed both to enforce strict secrecy and to control information release tightly. In its current form it is an anachronism. Its breach is an offence under the disciplinary provisions of the *Public Service Act, 1974*.[233] It requires reformation. Many of the general objections that can be made to Reg.35 are appropriate to this provision also.

"Cabinet Information"

Quite distinct from the above are the *Public Service (Unauthorised Disclosure) Regulations 1987*. They protect "Cabinet information" (which is defined in a non-exhaustive way). Regulation 4 prohibits disclosure, communication, recording or copying of such information "unless that person acted with the direct or indirect authority of Cabinet or a Minister or a Chief Administrator or for the purpose of giving effect to a decision of Cabinet." Breach of this prohibition is a disciplinary offence. To be noted about these

233 See s.59(1)(a).

Regulations is that they do not purport to apply to a *minister* in respect of cabinet information.

(C) Queensland

In its 1988 reform legislation, Queensland abandoned its reliance upon a Reg. 35 type of secrecy provision in favour of an approach which is novel in the Australian public sector. Neither the *Public Service Management and Employment Act 1988* nor the *Regulations* made under it impose duties relating to the use or disclosure of official information. The Act does, however, render an official liable to disciplinary action for –

> "wilful failure to comply with any provision of a code of conduct approved by the Governor in Council for officers of the public service".[234]

The *Code of Conduct for Officers of the Queensland Public Service* provides in turn (inter alia):

> "Officers are not prohibited from disclosing official information which would normally be given to any member of the public seeking that information. However, official information of a confidential or privileged nature should not be disclosed to unauthorised persons or organisations, except with the approval of the Chief Executive."[235]

This represents, at least on one view, an attempt to contract the secrecy accorded official information. If "confidential or privileged" are to be given their technical legal meanings as applied to official information, the provision may well do no more than protect such information to the same extent that it would be protected by the common law. If, however, the terms are used in a popular and non-technical sense, they would seem to cover all information in the hands of government other than that (a) which is already in the

[234] S.29(1)(f).

[235] Cl. 4.2.

public domain; or (b) which would be made available to the public on request. Though still very broad in its scope, this latter interpretation nonetheless would still give the provision a more narrow compass than the Commonwealth's Reg. 35. Given the possible alternatives, the burden of the provision requires clarification - the more so, because it indirectly gives substance to the "duty to keep secret" requirement of the *Criminal Code's* disclosure of official information offence.[236]

(D) South Australia

This State's official secrecy scheme is at once traditional and novel. Reflecting both the importance that proper information management has to government and to the community, and the trust reposed by government and the community in officials, the "General Principles of Conduct" of the *Government Management and Employment Act, 1985*[237] enjoin employees to be "scrupulous in [their] use of official information." The Act itself through its disciplinary provisions then provides what at first sight appears to be an uncompromising framework for official secrecy. An employee is made liable to disciplinary action who -

> "except as authorised under the regulations, discloses information gained in the employee's official capacity, or comments on any matter affecting the Public Service or the business of the Public Service."[238]

It is in the Regulations[239] that the novelty is to be found. Remarkable not only because, uniquely in Australia, it speaks in the encouraging words of authorisation and not with the stern voice of prohibition, Reg.21(1) provides:

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236 S.84.

237 S.7(b).

238 S.67(h).

239 *Government Management and Employment Regulations 1986.*

"An employee is authorized to disclose information gained in the employee's official capacity, or comment on any matter affecting the Public Service or the business of the Public Service –

(a) if the disclosure or comment is required to be made as part of the employee's official duties;

(b) if the disclosure or comment is made with the permission of the Chief Executive Officer of the administrative unit in which the employee is employed (or in the case of a Chief Executive Officer, the Minister responsible for the administrative unit);

or

(c) if the disclosure or comment –

(i) is of such a nature and made in such circumstances as to create no reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies;

(ii) is not made with a view to securing a pecuniary or other advantage for the employee or any other person;

and

(iii) is not made contrary to any law or lawful instruction or direction."

The new (para (c)) is here engrafted on the old (paras (a) and (b)). Comment needs only be directed to para (c). It clearly represents a fresh and refreshing departure from the approach to official secrecy characteristically taken in Australia. Not only does it at least partially[240] shift the responsibility for maintaining official secrecy to the individual

[240] Cf. para (c)(iii).

employee, it creates an environment more conducive to the practice of open government and this in a State which has not as yet legislatively[241] committed itself to *Freedom of Information*. This said, the para may nonetheless be thought to be deficient in form. While it aims in express terms to protect the interests of Government from prejudice, it does not purport to extend a like protection to third parties whose interests are equally vulnerable where they have supplied private, personal or commercial information to the Government. In practice this deficiency — and deficiency it is — has been offset to some extent by *Cabinet Administrative Instruction No. 1 of 1989* which imposes "Information Privacy Principles" upon the State's public sector, and, more obliquely, by *Cabinet Instruction No.2 of 1989* which, in establishing a Freedom of Information regime for the State, provides in its exemptions some measure of protection to third party information from unwarranted disclosure. Nonetheless the deficiency is there and it is a serious one. The Regulation, in constituting the general scheme of "authorisation", should acknowledge explicitly that the interests of government are not the only ones which employees should be obliged to protect from unjustifiable prejudice.

The language of para (c)(i), while generous in its intent, and while formulated in interest protection terms, is not altogether free from difficulty, the principal reason for this most probably resulting from the conflation of disclosure and comment in a single rule. As a *disclosure* rule, it is arguable that it does not sufficiently protect the full range of legitimate interests of government that could be prejudiced simply by disclosure: does the "in the conduct of its policies" formula cover adequately such matters which have no devious connection with the actual policies of the government for the time being but which nonetheless are important to the proper conduct of governmental operations? Equally, for disclosure purposes, it can be suggested that the rule places inadequate emphasis upon the quality of the information to be disclosed and the possible effects of its disclosure, and this most likely because in form it is more suited to comment than to disclosure. Finally, being

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241 But cf. *Cabinet Administrative Instruction No.2 of 1989.*

a "prejudice" based rule, it of necessity leaves some level of individual responsibility to an official to determine whether or not a proposed disclosure would have the stipulated effect upon which authorisation turns. This, as noted in Part A, is an inevitable consequence of using a prejudice based rule. It is, however, questioned whether the actual responsibility given here may not, in its terms, allow officials to disclose information which, if sought by a member of the public, could only be disclosed by a designated officer acting under the State's *Freedom of Information* regime. The disclosure proposal made in Part A of this Report, while obviously indebted to this regulation, attempts to eliminate or else minimise the significance of, any of the above criticisms.

Finally, it warrants note, that South Australia's criminal law does not make breach of official secrecy a criminal offence.[242]

(E) Tasmania:

The *Tasmanian State Services Act, 1984*, s.54 creates disciplinary offences where an employee –

"(h) without the permission of the Minister administering the Agency in which he is employed, makes any communication or contribution, directly or indirectly, and whether anonymously or otherwise, on any matter affecting the Agency in which he is employed, the position held by him, or his powers, functions, and duties as an employee to any newspaper or publication of a like nature, other than –

(i) in the case of an employee who is a member of a professional health organisation, a journal or publication relating to or relevant to the profession of that employee; or

[242] It should, however, be noted that a wilful misuse of official information could constitute the common law offence of official misconduct.

(ii) in the case of an employee who is a member of an employee organisation, a journal or publication issued by or under the authority of that employee organisation; or

(i) without the permission of the Minister administering the Agency in which he is employed or otherwise than in the ordinary course of his duties, divulges any information gained by him in his employment in the State Service, ..."

Of all of the Australian jurisdictions, the Tasmanian provisions most closely reflect those of the original, colonial Victorian regulations of 1867 and 1884.

(i) To the extent that sub-para (h) can embrace a communication of information acquired in office and not merely of comment — as it clearly can — it provides odd and quite arbitrary exceptions to official secrecy; exceptions which make the nature of the recipient publication or journal and not the nature of the information to be published the basis for lawful communication.

(ii) Sub-para. (i) suffers from some of the same vices and is subject to the same objections as Reg.35 of the Commonwealth. These objections will not be repeated here. While the Regulation does not persist in the formula "of which he has knowledge officially", it does retain the exemption relating to disclosure in "the ordinary course of his duties." As with Reg.35 its burden is with *when* information can be disclosed without indicating other than by inference *what* can be disclosed.

(iii) Importantly, to the extent that an employee under the Act is a "public officer" for the purposes of the *Criminal Code*, these provisions bear directly upon the "duty to keep secret" requirement of the *Code*'s s.110.

(F) <u>Western Australia</u>

As with Tasmania, the early Victorian influence is markedly in evidence in this State's public service official secrecy scheme. And as in Tasmania, violation of that scheme ultimately can carry criminal sanctions under the *Criminal Code*, S.81.[243] The *Public Service Regulations 1988* provide that

> "An officer shall not -
>
> (a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of any Department or organisation; or
>
> (b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service".[244]

Reinforcing the Regulation is *Administrative Instruction 711* which has statutory force by virtue of the *Public Service Act 1978*, s.19.

> "An officer shall not, except in the course of the officer's official duty and with the express permission of the chief executive officer,
>
> (a) give to any person any information relating to the business of the Public Service or other Crown business that has been furnished to the officer or obtained by the officer in the course of his/her official duty as an officer; or
>
> (b) disclose the contents of any official papers or documents that have been supplied to the officer or seen by the officer in the course of his/her official duty as an officer or otherwise; or
>
> (c) disclose the contents of any Advertised Vacancy file that has been supplied to the officer or seen by the officer in the course of his/her official duty as an officer or otherwise."

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243 See e.g. *Cortis* v *R.* [1979] W.A.R. 30.

244 Reg.8.

Little need be said of these given their similarity in essentials to the Commonwealth's Reg.35 (the "use" of Reg.8(b) clearly encompasses "disclosure".) A later Report deals specifically with "public comment".[245] The one matter which does warrant note is the "official duty" exception to the prohibition imposed by *Administrative Instruction 711*. In terms this exception requires not only that the disclosure allowed be in the course of official duty <u>but also</u> that it be made with the express permission of the chief executive officer. The contentious "and" contained in the *Instruction* would appear to ordain this. Unless that "and" can be read in context to mean "or" to produce in effect dual exceptions (as in the Commonwealth and Tasmania), the *Instruction* erects a wall of silence around public servants of dimensions without counterpart in any other Australian jurisdiction. "Individual authority" counts for nothing on this view, the permission of the C.E.O., everything. Notwithstanding that Western Australia is not, as yet, a Freedom of Information jurisdiction, it seems unlikely that so extreme a prohibition is intended — the more so given that Reg. 8(b) is more permissive at least in this. Under it, "course of official duty" alone suffices.

(G) <u>New South Wales and The Northern Territory</u>

As noted in the previous Section of this Report, neither of these jurisdictions has created an express official secrecy regime in or under their public service/public sector management legislation. In both, either the common law or contract is the source of official secrecy, although it needs to be observed that in the Northern Territory, but not in New South Wales, the *Criminal Code* imposes criminal sanctions upon the unlawful communication of confidential information acquired in office or employment.[246]

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245 Where comment does not involve the use of official information as such, quite distinct questions arise from those posed by official secrecy.

246 *Criminal Code*, s.76.

General Observations.

The picture which emerges from the above survey prompts a number of obvious comments.

(i) The early Victorian Civil Service Regulations have cast a very long shadow over later regulations in most Australian jurisdictions. New South Wales, Queensland, South Australia and the Northern Territory no longer are burdened by its legacy. The other jurisdictions still are, though in varying degrees. The Commonwealth's Reg.35 even maintains the archaic language of the 1884 regulations; Tasmania and Western Australia still adhere very much to the substance of those regulations. Victoria's *Constitution Act, 1975*, s.95, if anything, exaggerates the prohibitions of those early regulations.

(ii) It is not a ground of objection to a regulatory scheme that, in its essentials, it is well over 100 years old. It is, however, necessary to ask whether that scheme remains appropriate to contemporary conditions of government; to the expectations governments can reasonably entertain of their officials; and to the expectations the public is entitled to have of governments and officials. Considered from these perspectives not one of the regimes considered is free from objection although the grounds for, and intensity of, objection varies considerably as between jurisdictions.

(iii) Official secrecy has, and will continue to have, a vital role to play in protecting the legitimate interests both of government and of those who supply their information to government. But if an official secrecy regime is to work for, and not against, government's constitutional responsibility, it needs both to be discerning in the information it protects, and to make demands with which official compliance can reasonably be expected. Neither of these characteristics is to be found in the majority of regimes considered above.

(iv) Given what has been said previously in this Report, it would be superfluous to enlarge here again on the marked asymmetry in the underlying policies informing at least the "Victoria" style regimes on the one hand, and the common law and *Freedom of Information* legislation on the other.

(v) With the possible exceptions of Queensland and South Australia the regimes considered do not provide any reasonable or satisfactory basis upon which to formulate the standards of conduct properly to be expected today of public officials in the protection and disclosure of official information.

2.

SPECIFIC STATUTORY REGIMES.

Many hundreds of Acts throughout Australia impose duties of secrecy on designated agencies and officials in respect of designated information acquired in office. Save for the Commonwealth's *Privacy Act 1988* noted separately below, little purpose would be served in attempting to collate and to analyse individually these statutes. While differences in legislative draughting can be considerable, at their core statutory secrecy provisions characteristically —

(a) proscribe communication to another person (this may be to <u>another officer</u>) or, less commonly, making a record;

(b) of designated information (e.g. "about any person");

(c) obtained or acquired in specified circumstances (e.g. in performance of statutory functions);

(d) unless the communication etc. is in the discharge of official duties; or,

(e) unless the communication is one specifically authorised (or required) to be made under the legislation (often by a designated officer).

A number of general comments should be made about the elements of legislative provisions of this type.

(a) *Communication*

While communication of information is invariably proscribed, personal use of the information generally is not. To be noted is that the communication can be offensive even when made to another official unless that communication is saved by elements (d) or (e).

(b) and (c) *The Protected Information*

The information protected by the statutory duty may be only a portion of, or a particular type of, information acquired by the official in office. It may relate, for example, only to "information about another person".[247] Such limitations require emphasis for two reasons. First, in F.O.I. jurisdictions (excepting New South Wales), the precise wording of the secrecy provision's information coverage is vital in determining whether documentary information subject to such a provision is exempt for the purposes of F.O.I..[248] Secondly, whatever the information coverage of the specific provision, for the official to whom it applies that provision will simply be one and, ordinarily, only a cumulative source of his or her secrecy obligations even in relation to the information covered by the provision.[249] What also should be observed of the information coverage of many secrecy provisions is that they are apt to catch the very types of information which

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[247] E.g. *Ombudsman Act 1976*, s.35(2) (C'wealth).

[248] See the previous Section of this Report, "The Exemptions and Official Secrecy."

[249] Public service/public sector management Act secrecy provisions, employment regulation contract or the common law will continue to bind that official in the usual case quite apart from the specific secrecy provision.

both the common law and F.O.I. legislation would usually protect, particularly personal and commercial information.

(d) *Official Duties*

This requires no specific comment other than the observation that here, as elsewhere, it can raise for an official the issue of what is his or her individual authority to make a disclosure in the course of official duty.

(e) *Authorised Disclosure*

This basis for disclosure etc. of otherwise protected information complements the "official duties" basis. Ordinarily it relates to the disclosure to other agencies of government of personal or commercial information supplied to government by third parties and as such requires the mandate of statute before a superior officer lawfully could make or could authorise, any disclosure which goes beyond that necessary to effectuate the purpose of the legislation under which the information is supplied.

The Privacy Act, 1988 (and *Cabinet Administrative Instruction: No.1 of 1989* (S.A.)).

The scheme of this Act has the dual purposes of providing protection to persons who supply "personal information"[250] to government, and of delineating the responsibilities of *"agencies"*[251] of government which are "collectors"[252] or "record-keepers"[253] of such information. If the legislation's immediate focus is on agencies, and not upon officials as such, it nonetheless implicates officials generally in the responsibilities it imposes (i) by obliging an agency (and hence de facto, its own officers) not to "do an act

[250] *Privacy Act, 1988*, s.6(1).

[251] Ibid.

[252] Ibid., s.9.

[253] Ibid., s.10.

... that breaches an Information Privacy Principle" prescribed in the Act;[254] and (ii) by making acts done by agency officials in the course of official duties, acts of the agency to which those officials belong.[255]

While the collection procedures prescribed in the Principles are of marked importance in prescribing (a) the purposes for which personal information should only be obtained; and (b) the manner in which it is in fact obtained[256] — both matters having like importance in the common law — the Principles of immediate significance are those imposed on record-keepers in respect of their use and disclosure of personal information. Principles 9, 10 and 11, for practical purposes, mirror closely the legal obligation which the common law already imposes on government and its officers in the use, etc. that properly can be made of third party information supplied to government. With the Act itself concerned to protect against information abuses which would reveal or make reasonably ascertainable the identity of the person to whom the information relates,[257] (the same concern as the common law's), the above principles (i) regulate ordinary use and disclosure in the ways envisaged by the common law, i.e. it must be for the purposes for which the information was obtained; with the consent of the person concerned; or as authorised or required by law; but (ii) admit of an exceptional use or disclosure on grounds which closely approximate with those now allowed by the common law's "just cause or excuse" exception.[258] As if to accentuate the relationship to the common law, the Act, far from abrogating the common law of confidentiality, reaffirm's and in one respect enlarges[259] its application to personal information supplied to government.[260]

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[254] Ibid., s.16.

[255] Ibid., s.8(1)(a).

[256] Principles 1 and 2.

[257] See the definition of "personal information" in s.6 (1).

[258] That exception is considered in detail later in Section 4 of this Report.

[259] s.92.

The legislation, doubtless, is of fundamental importance in the Commonwealth, to the privacy protection the citizen can expect from government and its agencies. Nonetheless, for the purposes of this Report, its provisions do not warrant detailed exposition. Considered from the standpoint of the individual official — the concern of this Report — the Act prescribes the agency environment, and provides the legal framework, within which the official's duties of office in relation to personal information are to be laid down. With the individual officer having no possible greater claim to use or disclose personal information than the Act allows to an agency itself, the Information Privacy Principles themselves (especially Principles 9-11) mark out and give substance to the standards of conduct to be expected of officials within the sphere of use or disclosure allowed to them by their duties of office. For this reason those Principles should be taken as providing the practical substance for what should be regarded as proper uses or disclosures by Commonwealth officers for the purposes of the general conduct rules proposed in this Report.

The close affinity of the Act's Principles 9-11 with the common law has been emphasised here for a particular reason. While those Principles, as noted, should inform in the Commonwealth and the A.C.T. how the conduct rule proposed in Part A should apply to "personal information", they equally and because of the common law connection, should be taken as having a similar role in all other jurisdictions. In other words, they should be drawn upon when formulating guidelines for officials governing disclosure of personal information.

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[260] s.89 ff.

IV.

MISUSE OF OFFICIAL INFORMATION

Such has been the governmental preoccupation — if not obsession — with official secrecy in our legislative history that relatively little attention has been given to the often more pernicious phenomenon of personal misuse of official information. In this there is a wide divergence between our public sector on the one hand, and the private sector on the other. As to the latter, Corporations legislation for some time now has drawn no operative distinction between use or disclosure as species of possible information abuse by corporate officers or employees. Likewise the common law draws no such distinction: its secrecy obligations protect against both unauthorised use and unauthorised disclosure. What this difference in emphasis between the two sector's suggests — and it is a sobering suggestion — is that while governments through official sec recy regimes have been vigilant to protect their own interests, they have not shown a like concern to set the standards of conduct which should be expectged of their public officials as such. Information misuse, commonly, has no immediate affects on governments' interests though it can over time, if revealed or suspected, have debilitating impact on public confidence in government.

A majority of Australian jurisdictions have made some express provision for information misuse by officials (usually public servants) in statute, regulations and codes of conduct. Of varying degrees of specificity and varying in compass, these will be noted individually as aprelude to the discussion which follows.

1. Commonwealth and A.C.T.

"An officer shall ... not take, or seek to take, improper advantage, in the interests, pecuniary or otherwise, of the officer, any person or any group, of any official information acquired, or any document to which he or she has access, as a consequence of his or her employment."[261]

It should also be noted that the Information Privacy Principles 10 and 9 respectively, of the *Privacy* regimes of the Commonwealth and of South Australia, prescribe the uses that can properly be made of "personal information" by "record-keeper" *agencies*.

2. New South Wales

(a) "A Minister shall not use information obtained in office to gain a direct or indirect private advantage for himself or herself, or for any other person."[262]

(b) "Executives should not misuse information gained in their official capacity"[263]

3. Victoria.

"A person employed in any capacity (whether permanently or temporarily) in the service of the State of Victoria shall not –

... use except in or for the discharge of his official duties any information gained by or conveyed to him through his connexion with the public service."[264]

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[261] *Public Service Regulations*, Reg.8A(h).

[262] *Code of Conduct for Ministers of the Crown*, para.4.2.

[263] *Code of Conduct for Puhlic Sector Executives*, para. 5.2.

[264] *Constitution Act, 1975*, s.95(1)(b).

4. Queensland.

"Official information should not be used by officers to gain improperly any kind of advantage for themselves, or for another person or organisation."[265]

5. South Australia

"Employees shall be ... scrupulous in the use of official information ..."[266]

6. Western Australia

"An officer shall not —

... use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service."[267]

For completeness, as also because it applies to the officers and employees of State-owned companies, the provisions of the *Corporations Act, 1989*, s.232(5) should be mentioned:

> "An officer or employee of a ... body corporate, or a former officer or employee of a ... body corporate, shall not make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the body corporate."

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[265] *Code of Conduct for Officers of the Queensland Public Service*, para. 4.1.

[266] *Government Management and Employment Act 1985*, s.7(b).

[267] *Public Service Regulations* 1988, Reg. 8(b).

Reference will in addition be made below to how information misuse is brought within the respective jurisdictions of New South Wales' Independent Commission Against Corruption and Queensland's Criminal Justice Commission.

For the purposes of exposition this Section is divided into two parts: the first addresses the common law; the second, such statutory and other provisions as we have. Though the law on misuse applies to officers and employees both during the currency of office holding etc. and on termination thereof, discussion here will be limited to the former of these. Post-employment obligations are considered generally in the final Section of this Report. The two matters which should be noted about the ensuing account are (i) that its principal focus is on the use of official information which does not invlove or necessitate its disclosure[268] and (ii) that the possible misuse which can occur when an official makes public comment on the affairs etc. of government will not be considered here. This raises other and distinctive issues going beyond misuse. "Public Comment" will be considered in a separate Report concerned with Compromising Relationships and Other Activities.

A.

THE COMMON LAW

A considerable range of information acquired in office can, potentially, be of use to a public officer for purposes other than the discharge of his or her official duties. Instructional programmes, professional education, or employment information, may provide skills and information which can be carried over into private and other activities. The knowledge gained of the nature and workings of a governmental programme may enable an official, as citizen, better to secure rights or entitlements under that programme. Familiarity with legislative proposals may be able to be used in making decisions affecting the ordering of one's private affairs. Or the possession of financially sensitive information

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[268] A comment made to another, for example, may involve a use of official information even though no such information is actually communicated; it may merely inform or colour the comment made.

may facilitate "informed" private speculation for personal gain. Though all such uses may be unauthorised by the authority under which office is held, some clearly can be as unobjectionable as others are objectionable. Short of attempting to prohibit outright any and all use of information acquired in office, save in the course of official duties — a step both unreasonable and impracticable, though nonetheless taken legislatively in Victoria and Western Australia — the law's task (and it has been shouldered primarily by the common law) has been to draw an acceptable and workable line between the permissible and impermissible use.

The common law has available to it two separate but overlapping approaches, the one based on the protection of confidentiality, the other on the fiduciary notion of loyalty and fidelity. For the purposes of regulating information disclosure, the former of these (confidentiality) has been found the more appropriate to weigh and balance the various interests that disclosure brings into contention — a state of affairs reflected in the only fleeting reference so far made to loyalty and fidelity in this Report.[269] When one turns to information misuse, the duty of loyalty and fidelity comes into its own and for the reason that the phenomenon of misuse brings more directly into focus the constraints, the "employment" role and responsibility of an official or employee impose on his or her private actions. Illustrative of this are the provisions of the *Corporations Act 1989* set out above which, as will be indicated, are based on a loyalty, not a confidentiality model.

Both bodies of law will be considered separately. Each has a role to play in proscribing misuse, though save in cases where it is clearly demonstrable that an identifiable piece of confidential information has been misused and that there is an advantage in remedy in relying on breach of confidence (e.g. to recover profits made), loyalty, given its larger ambit, is more likely in practice to be the vehicle of recourse. As will be suggested below, loyalty provides the more appropriate basis for adoption by government in erecting statutory or other regimes outlawing misuse.

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[269] See Section III "Employment Obligations".

1. Confidentiality

The trio of requirements necessary to bring the law of breach of confidence into play against an officer or employee are (a) that the officer is subject to a duty of secrecy; (b) that that duty extends to the information in question which is itself confidential; and (c) that an unauthorised[270] use has been made of that information. As the gist of the wrong is the use itself, it is not necessary to show either that it occasioned actual damage to the person or body owed the duty, or that it resulted in any benefit or advantage being derived by the misuser — though, as has been seen, where governmental information is protected only (if at all) by the "public injury" test, proof of likely injury to the public interest is a precondition for obtaining secrecy protection in the first place. For common law purposes,[271] the actual consequences of a misuse are relevant only to the selection of the remedy appropriate to a given case.

As the common law has earlier been discussed in some detail only a few additional comments need be made in this context.

(i) The net effect of the trio of requirements noted is that, as with disclosure, they leave a significant body of official information available for lawful use by officials. This may be (a) because the information is publicly available; (b) because, even if not publicly available, it is not information which will in the circumstances attract secrecy protection — it may, for example, be third party personal information which has been rendered anonymous;[272] it may be governmental information not saved by the public injury test; or (c) because the use proposed has in fact been lawfully authorised. This said, there undoubtedly remains a wide body of confidential information in the hands of government the use, and particularly the

[270] I.e. unauthorised either by law (usually statute) or by the person to whom the duty is owed.

[271] Breach of the common law can also have employment consequences e.g. it may evidence "misconduct" for the purposes of public sector disciplinary provisions.

[272] Which ordinarily, though not invariably, takes it outside the scope of any secrecy obligation owed to third parties in respect of their personal information.

private or non-official use, of which by an officer or employee will be offensive and wrongful. "Insider trading" with confidential commercial or financial information (whether supplied to government by a third party or generated by government itself) can be impugned on this basis.

(ii) Though confidential information can be misused in ways which do not bring benefit or advantage to the misuser, misuse for gain is properly regarded as a particularly approbrious form of wrong to be guarded against, as witness the provisions of the Commonwealth *Public Service Regulations*, Reg.8A. To be noted here is that the common law's remedy system will allow the authority under which the wrongdoer's office is held to recover from that official all pecuniary gains made from the misuse. Put bluntly the official can be compelled to disgorge the fruits of his or her wrongdoing.[273]

2. Loyalty and Fidelity.

Whether or not engaged on a contract of service, public officers and employees and the officers and employees of State-owned companies, are, by virtue of their positions, subject at law to a duty to serve with loyalty and fidelity. If employed on a contractual basis, that duty will, as in the private sector, take effect as an implied contractual term of employment; if not so employed, then as a fiduciary duty of office. Loyalty and fidelity will be considered in detail in the Report on Compromising Relationships and Other Activities. Their effect in the public sector is by no means as uncomplicated as in the private and this because the positions occupied by officials etc. can make them at once servants of the authority under which they hold office and servants of the public. For this reason, and as with the law of confidentiality as it applies to governmental information, the "public interest" and not merely the "employer's" interests, can affect the incidents of the duty itself. Suffice it to say here that that duty arises because the positions public officers

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[273] Cf. *Snepp* v *United States* 100 S.Ct. 763 (1980). It is to be noted that a profits remedy was formally sought in the Spycatcher litigations in the U.K.

and employees occupy exist to serve interests other than their own. Having been entrusted with those positions and that service, they are in consequence to be expected to serve those interests with loyalty and fidelity. Put in very general terms, the burden of that expectation is that officials will not make their service the vehicle or occasion for serving interests other than, or for causing detriment to, the interests they have undertaken to serve. In the public sector the maintenance both of public confidence in government, and of governmental confidence in its officers and employees, rests in no small degree upon the honouring of this expectation.

For purposes relevant to information abuse the public sector loyalty obligation can be cast in the following terms:[274]

> Officials and employees may not use their position, or knowledge or opportunity obtained by reason of it —
>
> (a) to their own or to a third party's possible advantage; or
>
> (b) to the possible disadvantage of any person or body (including the authority under which office or employment is held) —
>
> where that use is likely to injure the public interest.

While the "public interest" formula in a sense provides no positive guidance as to when a use will be objectionable, it is noteworthy that legislative attempts to formulate the duty have a similar imprecision. As the *Corporations Act 1989*, s.232(5) and the Commonwealth's *Public Service Regulations*, Reg. 8A illustrate, the wrong is expressed characteristically through the use of the term "improper". The principal reason for this imprecision — and the imprecision is unavoidable — is that a variety of considerations of by no means equal significance in a given case can bear on the question of the propriety or otherwise of the use: the nature of the information and whether or not it is publicly available; the nature of the noffice held; the possible effects of allowing its use in the

274 These are an adaptation of those used by Deane J. in *Chan* v *Zacharia* (1984) 154 C.L.R. 178, at 199 in formulating the fiduciary duty of loyalty.

circumstances of its use; the actual or likely consequences of that use; and the public interests which might justify or deny the use. This acknowledged, the only point at which that imprecision has significant practical effect is where the misuse in question does not involve confidential information. But even here in the end, one's simple concern is to ascertain whether the use so departs from what can be regarded as reasonable and acceptable for a person in the official's position, as to warrant its being condemned as improper and wrongful.

What needs be emphasised is that the loyalty obligation can have a wider possible operation than secrecy law[275] for the reason that its object is not simply to protect the integrity of confidential information as such. A government official who uses even non-confidential information to assist a pressure group deal with his or her agency may be in breach of the duty, not for any reason relating to the information used itself, but because the official's conduct in the circumstances may be inconsistent with what properly could be expected of a person in his or her official position. This said, and as with secrecy law, there nonetheless remains a significant body of information acquired in office which an official is lawfully entitled to use freely for his or her own or for a third party's advantage.

B.

STATUTE AND CODES

As the statutory provisions, regulations and Codes set above illustrate, two alternative approaches have been adopted to proscribe information misuse in those jurisdictions which formally have addressed the matter. The one, reflected in Victoria's *Constitution Act, 1975*, s.95 and Western Australia's *Public Service Regulations*, Reg.

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[275] It can, e.g., proscribe uses of even non-confidential information: for a private sector example see *Hivac* v *Park Royal Scientific Instruments Ltd.* [1946] Ch.169.

8(b), attempts to protect information as such.[276] If acquired in office it cannot be used except in the discharge of office. No attempt whatever is made in either provision to isolate information for which even a remote "public interest" reason could be given to justify sterilisation from use. All is caught. This legislation is offensive for the same reasons that the official secrecy laws of those States are offensive. They are vastly over-inclusive in their coverage. It seems extraordinary that the laws of either would purport to ban the private use of information enhancing personal skills, for example, computer use, because that information was "gained...through employment in the Public Service." To the extent that the approach in these States has any resonance at all in the common law it is with breach of confidence.

The alternative approach — found in the Commonwealth's *Public Service Regulations*, Reg. 8A, in the *Codes of Conduct* of Queensland and New South Wales and, let it be said, in the *Corporations Act 1989*, s.232(5) in its application to officers and employees of State-owned companies — adheres to the loyalty based model of the common law. Though the Commonwealth and Queensland provisions refer in terms only to uses for the advantage of the official or of a third party (and not to detrimental uses), the focus of all of the above is not on use as such but on its propriety. Hence the use of the qualifying adjective "improper" or, in the case of New South Wales, the direct reference to "misuse".

Given that this approach more closely reflects what is the common law obligation of public officers and employees, given the likely difficulties to be encountered in draughting an acceptable secrecy based provision, and given that the loyalty approach itself draws upon the legal and constitutional responsibility of public officials, it is the one more appropriate to be adopted by government when formalising, through statute or otherwise, the standards of conduct to be expected of public officers and employees. The formulation

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[276] The provisions would seem to have originated in the regulations made under the *Commonwealth Public Service Act, 1902*, (reg. 41).

suggested in this Report is an adaptation to the public sector of the provisions of the *Corporations Act, 1989*:

> An officer shall not make improper use of information obtained in office to gain, directly or indirectly, an advantage for himself or herself or for any other person or body or to prejudice the government or any other person or body.

One additional comment needs to be made here of misuse of "personal information". Information Privacy Principle 10 of the Commonwealth's *Privacy Act 1988*, and principle 8 of South Australia's *Cabinet Administrative Instruction: No.1 of 1989*, both limit the uses that "record-keeper" agencies can make of personal information in their hands. Their negative effect is to indicate what uses would be improper for an agency and, hence, for an agency official. For this reason they give direct substance to what would be an "improper use" of personal information in the conduct rule proposed, for officials in the Commonwealth, the A.C.T. and South Australia. But because those principles encapsulate in large measure what would be the case at common law, they in fact provide substantial guidance as to what would be an improper use in all jurisdictions.

Criminal and Related Laws

Quite egregious forms of official misconduct can involve no more than a misuse of information acquired in office. "Insider trading" is the most obvious example. Yet those jurisdictions which have invoked the criminal law directly to punish the disclosure of official information have not taken a like step in relation to misuse. The Bowen Committee in its *Report on Public Duty and Private Interest*,[277] acknowledging that misuse for private gain can, in effect, be "a form of corruption",[278] recommended not only that their proposed Code of Conduct provide expressly for information misuse[279] (a recommendation partially reflected in the Commonwealth's *Public Service Regulations*,

277 A.G.P.S., Canberra, (1979).

278 Para. 14.18

279 Para. 4.9, principle 7.

Reg. 8A(h)) but also that the *Crimes Act 1914*, s.70 be amended to include a simple proscription on the "misuse of official information". The Committee was strengthened in this view in that the then equivalent of the *Corporations Act, 1989*, s.232(5) attached penal sanctions to its breach.

Surprisingly the specific recommendation made in relation to the *Crimes Act* would have made <u>any</u> misuse of official information an offence, an effect going far beyond the reason given by the Committee for proposing the amendment, i.e. to proscribe misuse <u>for private gain</u>. A recommendation so flawed led the later Gibbs Committee[280] to the tentative view that only the "unauthorized <u>disclosure</u> of official information for private gain merits the application of criminal sanctions."[281] As will be seen, save in one minor respect, this view adds nothing to what is already provided for in the *Crimes Act* s.70.

The recommendation of the Bowen Committee and the view of the Gibbs Committee are both unacceptable — the former because of the potential breadth it would have, the latter because it fails to address adequately a species of misconduct which in its extreme manifestations not only is "morally reprehensible"[282] but also is subversive of the very principles upon which our system of government is founded. It does seem anomalous that legislation quite readily imposes severe criminal penalties on the officers and employees of companies for some forms of improper use of information acquired in office,[283] while refraining from so doing for their public sector counterparts.

More generally it is probably the case in the non-*Criminal Code* jurisdictions that a knowing misuse of at least confidential official information for the purposes of private gain

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280 *Review of Commonwealth Criminal Law, Discussion Paper No. 20;* "Disclosure of Official Information", (Dec, 1988).

281 Ibid., para 9.8; emphasis added.

282 Ibid., para. 9.4.

283 *Corporations Act, 1989*, s.232(5).

would be held to constitute the common law offence of official misconduct and that because of the abuse of position involved in such an activity.[284]

Finally, in New South Wales and Queensland, the *Independent Commission Against Corruption Act, 1988* and the *Criminal Justice Act 1989* define "corrupt conduct" and "official misconduct" respectively in terms which include the "misuse" of information acquired in office for the benefit of the misuser or of a third party.[285] Importantly, because such misuse (a) would as of course constitute both a disciplinary and/or an employment wrong for all officers and employees engaged under public service/public sector management legislation in both States, or otherwise on a contractual basis;[286] and (b) in New South Wales, could constitute the criminal offence of official misconduct,[287] both the I.C.A.C. and C.J.C. have jurisdiction in some range of misuse cases.

V.

THE CRIMINAL LAW

It is not the purpose of this Report to consider the proper province, if any, which the criminal law should have in protecting official information. Nor is attention given to the myriad of specific statutes which reinforce with penal sanctions the particular secrecy obligation they impose. The present discussion is limited to a consideration (a) of the laws of those six Australian jurisdictions whose criminal law contains a general statutory offence governing the disclosure of official information; and (b) of the relationship of

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284 On this offence see P.D. Finn, "Official Misconduct", [1978] 2 Crim. L.J.307.

285 S.8(1)(d) and s.2.23 respectively; but note the limitations imposed by s.9 and s.2.23.

286 Both because of the common law obligation of fidelity which will be implied as of course into the contract of employment and because of the meaning to be given to "misconduct" in the disciplinary provisions of their respective public service/public sector management Acts: see *Public Sector Management Act, 1988*, s.66 (N.S.W.); *Public Service Management and Employment Act, 1988*, s.29 (Qld).

287 No *Criminal Code* offence in Queensland appears to cover misuse.

those offences to the official secrecy regimes created by or under public service/public sector management legislation, the common law or contract.

The Six Jurisdictions

The Commonwealth,[288] Queensland,[289] Western Australia,[290] Tasmania,[291] the Northern Territory,[292] and the Australian Capital Territory,[293] each have a general statutory offence governing the improper disclosure by officials of information acquired in public office or employment. The Commonwealth, additionally, has a separate official secrecy offence which is applicable (inter alia) to public officials.[294] By way of contrast New South Wales, Victoria and South Australia have abjured such a use of the criminal law[295] — a phenomenon notable for reasons which require no elaboration. Despite some formal similarities, the offences of the six jurisdictions are markedly divergent in their possible applications and are arbitrary in their compass. Brief reference will be made to the elements of these offences before consideration is given to their relationship to the official secrecy regimes created by public service/public sector management legislation, etc. Because of its atypical character the Northern Territory offence will require separate treatment.

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[288] *Crimes Act, 1914*, s.70.

[289] *Criminal Code*, s.86.

[290] *Criminal Code*, s.81.

[291] *Criminal Code*, s.110.

[292] *Criminal Code*, s.76.

[293] *Crimes (Offences against the Government) Ordinance 1989*, s.10.

[294] *Crimes Act, 1914*, s.79.

[295] All three jurisdictions do, however, use criminal sanctions in and for the purposes of specific statutes imposing particular secrecy obligations.

1. The Elements (Excluding the Northern Territory)

(i) The range of public officers and employees covered by the offences varies widely from jurisdiction to jurisdiction. Tasmania, uniquely, applies its offence to "public officers", a term its *Code* defines in an essentially common law way.[296] Though this may well result in a considerable body of public sector employees being beyond the scope of the offence,[297] it makes Tasmania along with the Commonwealth in its specific official secrets offence[298] the only jurisdictions which unequivocally apply the criminal law to ministers.[299] The remaining jurisdictions cover at least officers and employees engaged under public service/public sector management legislation. Their personnel coverage beyond these to, for example, consultants and the officers and employees of statutory corporations is random and varying. Little purpose would here be served in analysing the possible officer coverage of the offences on a jurisdiction by jurisdiction basis. (That there is such variation itself raises obvious questions about the purpose of the offences themselves.) What should, however, be noted is that the Commonwealth and the A.C.T. extend their offence to ex-officers.[300] .

(ii) In all of the jurisdictions the offence only applies to "publication", "communication", or "disclosure". It does not apply merely to use without disclosure no matter how corrupt or harmful that use.

(iii) In all jurisdictions the disclosure must be of a "*fact or document*"". This requirement is particularly curious. Where a document is not disclosed all that is protected

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296 *Criminal Code*, s.1.

297 Cf Ex p. *Kearney* (1917) 17 S.R. (N.S.W.)578; *Pemberton* v *Attorney-General* [1978] Tas. R.1.

298 The definition of "Commonwealth Officer" in the *Crimes Act 1914* in terms is capable of embracing ministers for the purposes of s.70, but the distinction drawn between "Commonwealth officer" and "public officer" in s.79 of the Act suggests that only s.79 and not s.70 will bind ministers.

299 In Queensland and Western Australia this question turns upon whether ministers will be held to be "employed in the Public Service", a question unlikely to be answered affirmatively.

300 This extension is considered separately in the final Section of this Report.

is a "fact"; where a document is disclosed its contents need not be ones of fact. Unless "fact" is given a meaning which covers disclosure of advice, opinion, intention, etc., the scope of the offence is manipulated simply by the particular means (oral or documentary) used in the disclosure. The Northern Territory, as will be seen, has avoided this anomaly. It equally is avoided in the "official secrets" offence of the *Crimes Act 1914* which encompasses "information" as such.

(iv) In the Commonwealth and the A.C.T., the fact or document must be one which it is the official's duty not to disclose"; in Queensland, Western Australia and Tasmania, the official's "duty to keep secret". It is doubtful whether there is any operative difference between the two formula.[301] Of vital importance, though, is that in no instance does statute itself define the meaning of the formula. Rather the formula simply presupposes the secrecy obligation binding an official by virtue of public service/public sector management legislation, the common law, etc. This matter is returned to below.

(v) In all jurisdictions except Queensland and Western Australia, the disclosure to be offensive must be to someone other than a person to whom the official is "*authorised*" to make the disclosure. In Queensland and Western Australia it must be to someone other than a person to whom the official is "*bound*" to make the disclosure. The Queensland/Western Australian exemption, if read literally, produces the extraordinary result that a disclosure which an official is actually authorised but not obliged to make, will be an offence if in fact made.

(vi) To the extent that the offences have an "authorised disclosure" exemption they raise in direct form the question of the "individual authority" an official has by virtue of the function he or she performs, to determine what and to whom official information can be disclosed.[302]

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301 See *Cortis v R.* [1979] W.A.R. 30.

302 This matter is considered earlier in this Report. And see *Report on Section 2 of the Official Secrets Act, 1911*, Cmnd 5104, H.M.S.O. London, (1972), para. 18.

(vii) In the Commonwealth the "disclosure" offence of s.70 of the *Crimes Act, 1914* is supplemented by the "official secrecy" offence of s.79. Though the latter, as noted, covers disclosure of "information" and not merely of a "fact or document", it, like s.70, is premissed upon the officer having a duty to keep the information secret and upon the officer not being authorised to communicate it *or* not having communicated it to a person "to whom it is...in the interest of the Commonwealth...his duty to communicate it." If the "in the interests of the Commonwealth" proviso is wider than the "authorisation" proviso, a disclosure which is justifiable for s.79 purposes on "interest" grounds may nonetheless be offensive under s.70.

The anomalies within and differences between the offence of each jurisdiction, of themselves give reason for pause. But what makes the offences particularly objectionable as they now stand, is that they simply criminalise any breach of the official secrecy regimes created by public service/public sector management legislation, contract, etc. in the jurisdiction in which they apply, howsoever justifiable or otherwise those regimes may be.

2. The Northern Territory

The *Criminal Code*[303] makes it a crime for public servants (and specified others) unlawfully to communicate confidential information acquired by virtue their positions. On its face this would seem simply to criminalise the common law of secrecy, at least for the purposes of unauthorised disclosure. Whether or not this be its object, the offence in its terms is not free from doubt. The principal cause of this lies in the meaning to be given to "confidential information". If it is to be taken to mean information which is confidential in the sense of not being available to or known to the public, the term has considerable breadth. If it be equated with the view the Public Service Commissioner seeks to have accepted by public servants, it would encompass "all information handled by employees in their normal day to day activities".[304] If it be equated with such information as the

303 s.76.

304 Circular 1989/3, "Confidentiality of Information and the Northern Territory Criminal Code".

common law would protect ,it has a much more straightened compass particularly in relation to governmental information. For the present, though, it is of no particular moment as to which of these one finds the most congenial. Whatever the true meaning,[305] the communication must be "*unlawful*", i.e. it must be without "authorisation, justification or excuse".[306] These latter terms, in turn, are defined in various ways in the *Code*,[307] the provision of immediate relevance being s.26 which includes amongst authorised acts those done —

"(a) in the exercise of a right granted or recognised by law; [or]

(b) in...conformity with, the law."

Hence, despite the uncertainty referred to the practical issue is one either as to the right an employee has, or, alternatively, as to the extent to which the law permits a public servant, to make a disclosure. Though the matter is not altogether free from doubt, but for the reasons given earlier in this Report,[308] that right or permission will be coextensive with what is allowed to a public servant by the common law — save where a particular statute imposes its own specific secrecy obligation in which case the terms of that statute will determine what communications are lawful. In consequence and this exception apart, only information which the common law will protect can, for the moment,[309] be said to be information the unlawful communication of which will give rise to an offence.

3. The Offences and Official Secrecy Regimes

In all jurisdictions save the Northern Territory the offence requires that the information disclosed be information which it is the official's duty "not to disclose",[310] "to

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305 Only the third possibility, it is suggested, should be accepted for the purposes of the criminal law.

306 *Criminal Code*, s.1, "unlawful".

307 Div. II.

308 See the discussion of secrecy in the Northern Territory in "The Common Law and Contract".

309 It would be otherwise if the *Public Service Act* regime itself stipulated what were to be considered "unlawful disclosures".

310 Commonwealth, s.70 and the A.C.T.

keep secret"[311] or "to treat as secret".[312] Appellate court exposition of these formulae has been slight, and while it has been recognised that in terms they do not necessarily match those used in public service/public sector management legislation etc. in imposing secrecy obligations, that legislation, etc. has been accepted as providing the substantive content of the formulae.[313] This conclusion seems an inevitable one given the frame of the offences. In consequence the official secrecy regimes created by legislation, regulations, the common law and contract have been transformed into ones carrying criminal sanctions for their breach. This can only be described as a lamentable state of affairs. To take the Commonwealth by way of example, Reg. 35 of the *Public Service Regulations* is manifestly and massively over-inclusive in its information coverage — to the extent that it is technically possible for a public servant to breach it when disclosing publicly available information. Nonetheless the *Crimes Act, 1914*, s.70 has the effect of making breaches of that Regulation a criminal offence.[314] Section 70 needless to say has been the subject of extensive criticism,[315] although Reg. 35 is as much the villain in the piece.

The vices in linking the general criminal law to official secrecy regimes are various. First, the duties imposed under those regimes whether by statute, the common law, contract or employment regulation, are imposed in circumstances or for purposes which are not necessarily related (if at all) to the purposes of the criminal law. Secondly, given the accidents of timing, reform, and, importantly, of source which have shaped the obligation which binds any given official, quite adventitious factors manipulate the scope of the offences and manipulate them from time to time as reforms and changes are made for

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311 Queensland, Western Australia and Tasmania.

312 Commonwealth, s.79.

313 See *Cortis* v *R.* [1979] W.A.R.30. It should be observed that the Court in this case was not altogether comfortable with the conclusion it reached. The decision in *Grant* v *Headland* (1977) 17 A.C.T.R. 29 provides little assistance on the "duty" question.

314 Subject to satisfaction of mens rea requirements.

315 See e.g. Senate Standing Committee on Constitutional and Legal Affairs, *Report on Freedom of Information*, 238 ff. AGPS Canberra (1979).

reasons unrelated to the criminal law. Thirdly, in the cases of the Commonwealth, Western Australia, Tasmania and the A.C.T. the offences are open to the same objection — only more so given their penal character — as can be made of the official secrecy regimes off which they feed (at least to the extent that these depend on public service/public sector management legislation): (i) they are over-inclusive in their information coverage; (ii) they demand what cannot reasonably be expected of public officials; (iii) they offend modern legal and constitutional policy on information management by government.

As noted at the outset of this Section, it is not the purpose of this Report to consider the limits to the legitimate role the criminal law has in protecting official information. What requires to be said, though, is (i) that if the criminal law is left unamended with its link to the official secrecy regimes maintained, there is a particularly urgent need to reform those regimes so as to impose reasonable and justifiable secrecy obligations on officials; but (ii) that that link itself should not be maintained. There may well be public interests served in subjecting some forms of improper disclosure of official information to criminal sanctions. But the public interests which justify, and the purposes which are served by the criminal law, are here not coextensive with those interests which justify, and those purposes served by, official secrecy regimes.

SECTION 4

THE "PUBLIC INTEREST" AND "WHISTLEBLOWING"

Background

The previous Section of this Report considered the limitations that secrecy and loyalty obligations place on information use and disclosure generally. The object of these obligations in their differing ways is — or at least should be — to protect the legitimate interests both of the public and its individual members, and of government and its agencies from the possibly deleterious consequences of information abuse. The scope to be given the obligations is necessarily controversial as of necessity they curtail the free flow of information within a community. Nonetheless we justify this limitation because of the value we are prepared to accord to those interests the obligations themselves protect.

As a matter of constitutional and of social ordering we have delegated to various organs of public governance — the Parliament, the courts and the law, Governments, ministers and the like — the responsibility within their several spheres both to identify the interests which merit possible protection and to balance, as appropriate, the relative claims of those interests with competing or conflicting interests. It obviously cannot be expected that the balances struck will win uniform consensus. Different people, understandably, will arrive at different evaluations of the respective demands of secrecy and openness in a given case or class of case. To this extent dissent from the demands of secrecy is predictable and inevitable. But it does not of itself make non-compliance justifiable even for the conscientious dissenter. There are very obvious rule of law reasons for this that need not be enlarged upon here. What should be said is that unless the balance between secrecy and openness is to be made a matter of idiosyncratic, personal judgement for each individual member of the community — and such is not the case — we are called upon to honour the judgement of those entrusted with the responsibility for making it in our civil order. Equally there are obvious prudential reasons which, quite apart from considerations of legality, justify precluding individual officials in particular from elevating their own perception of "the public interest" over the judgement of those charged with setting the limits of secrecy obligations in relation to a particular piece of information.

If this appears uncompromising in its insistence upon the primacy of obligation over individual opinion, it nonetheless proceeds upon two important premises. The first is that any information protecting obligation is *reasonable* in the sense that its *scope* is such that compliance with its requisitions can reasonably be demanded of the persons to whom it applies. The second is that any such obligation is *qualified* in the sense that it will not in a given case require a person to whom it applies to act in a way which is *contrary to the public interest.*

(1) "*Reasonable*"

If the obligation is over-inclusive in the information it embraces[316] (a) such that even the most zealous and scrupulous person is unlikely to be able to comply with it, in all circumstances, or (b) such that compliance in all circumstances would unduly inhibit ordinary and unobjectionable behaviour/activities of those to whom it applies, the obligation itself is objectionable to that extent on grounds of impracticability. Non-compliance is predictable — at least in relation to that range of information the coverage of which renders the obligation impracticable. As noted in Section 3 the secrecy obligations imposed on public servants in some Australian jurisdictions remain open to serious objection on this ground. The need for their reform is self-evident. In formally stigmatising innocuous behaviour they (i) can prejudice the very purpose of secrecy obligations; and (ii) make some level of non-compliance a systemic phenomenon. Because their demands can be at variance with what is reasonably to be expected of officials in contemporary Australia they can produce an obvious and undesirable collision between formal obligation and acceptable and ethical behaviour.

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316 E.g. Reg 35 of the Commonwealth's *Public Service Regulations* or the *Constitution Act, 1975*, S.95 (Vic).

(2) *"Qualified"*

This — the "public interest qualification" — is the one of immediate relevance to this Section of the Report. It has been recognised in the common law of secrecy virtually from its modern inception in the eighteenth century and provides the basis of the common law's own "whistleblowing" (or "just cause or excuse") exception. It acknowledges that, despite its importance, information protection itself is a relative not an absolute value in our civil order and that in exceptional circumstances it can and should be subordinated to other values upon which the preservation of our civil order is founded. The core notion here is as important as is the exception it justifies, narrow. Notwithstanding that a person may be subject to a secrecy obligation, particular information in that person's possession, despite its confidentiality, may not itself be a fitting subject for full (or for any) protection and this because the nature of the information is such that to accord it full (or any) protection would be seriously prejudicial to the public welfare. An obvious example is of information relating to the fraudulent or criminal activities of the person or body to whom the secrecy/loyalty obligation is owed. Information protection, in other words, loses its justification where to give protection would be to allow formal legal obligation to further ends which are offensive to public policy. Individual interests must in consequence give way to the public interest where their protection is positively harmful to the public interest.

As has already been seen, "the public interest" has been given an important role in the shaping of secrecy obligations generally and of the "injury" test applied to governmental information in particular.[317] Of concern here, though, is a particular and distinctive usage in which the *public interest provides just cause or excuse for qualifying or denying a secrecy obligation which, but for that just cause or excuse, is or would be binding*. For the purposes of Australian law,[318] this "public interest" is not ordinarily

[317] See e.g. *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485.

[318] The position in Britain, e.g., is somewhat different.

regarded as itself providing a direct basis for overriding secrecy obligations.[319] Rather, it provides the underlying explanation for such "just causes" or "excuses" as our law presently recognises will justify overriding secrecy. In this context, our judges have felt that the public interest of itself is too vague in its boundaries[320] to be of immediate practical utility in indicating when relief from secrecy should be allowed. This requires emphasis. Appeals to the "public interest" are commonly made by those who seek to disregard what is their duty simply because they do not accept as a matter of individual opinion the necessity or justification for secrecy maintenance over information publication in a given case. In consequence, judges have been driven repeatedly to reiterate that while many matters protected by secrecy obligations may be of interest to the public "there is a wide difference between what is interesting to the public and what it is in the public interest to make known."[321]

It will be indicated below what limits Australian law places upon common law secrecy obligations, and in what circumstances it will, in consequence, allow whistleblowing. The point to be made is that, as a matter of principle, secrecy obligations must admit of qualification if they are not to have effects which are positively inimical to the "laws of society". And this proposition is as apposite to the obligations imposed in the public sector as it is in the private. If officials in a government agency are engaged in fraudulent or criminal activity — if they are acting in a fashion which is a subversion of the constitutional responsibility of government — to insist that other officials who are employed in that agency cannot, because of their secrecy obligation, make any revelation of that wrongdoing even if only to superior officers or to appropriate investigative agencies, is to give secrecy itself a role in subverting government's constitutional

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319 The authorities are conveniently collected in the judgments of Gummow J. in *Corrs Pavey Whiting & Byrne* v. *Collector of Customs* (Vic.) (1987) 74 A.L.R. 428 and *Smith Kline & French Laboratories (Australia) Ltd.* v *Secretary to the Department of Community Services and Health* (1990) 95 A.L.R. 87; but cf. *Attorney-General (U.K.)* v. *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.L.R. 86 per Kirby P.

320 Cf. *Castrol Australia Pty. Ltd.* v *Emtech Associates Pty. Ltd.* (1980) 33 A.L.R. 31, at 55.

321 *British Steel Corporation* v *Granada Television Ltd.* [1980] 3 W.L.R. 774, at 821.

responsibility. Far from promoting integrity in government and from protecting legitimate governmental interests, secrecy obligations so become destructive of those very values which enliven secrecy in the first place.

It is, however, one thing to accept as a matter of principle that information protection must admit of some qualification. It is quite another to put in place an effective, workable and unobjectionable qualification. A large literature both on "whistleblowing" and on the common law's "just cause or excuse" exception attests to this. In what circumstances should a qualification be operative? Should a person who seeks to avail of it have reasonable grounds for believing that the information they possess justifies revelation? To whom can/should disclosure be made? To what extent, it at all, should the anonymity of the discloser be assured? To what extent can the interests of a person the subject of a disclosure be protected from false or erroneous accusation? To what extent can the discloser effectively be protected from reprisal? Etc. The common law suggests a basis for the answer to some number of these questions. As a matter of convenience in exposition it will be outlined first before more general consideration is given to the scope currently allowed for whistleblowing in the Australian public sector.

THE COMMON LAW

Though the major common law doctrine of present relevance is the "just cause or excuse" exception to secrecy, several other more limited principles warrant brief notice.

(a) Misprision of felony

> "From the early days of the common law it was the duty of the citizen to disclose any treason or felony of which he had knowledge. ... Failure to perform the duty constituted the offence of misprision of felony which was a common law misdemeanour punishable by imprisonment."[322]

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322 *A.* v. *Hayden* (1984) 156 C.L.R. 532, at 552 per Mason J., emphasis added.

Though subject to longstanding criticism this offence of non-disclosure still survives in some, but by no means all, Australian jurisdictions.[323] It applies only to the non-disclosure of offences of such gravity as are classified in the law as felonies. It is subject to uncertain exceptions of which a countervailing duty of secrecy may be one at least in some circumstances.[324] Importantly, where it applies it does not require that the person who fails to disclose the felony be in any way implicated in the commission of that felony or that that person benefit in any way from concealing the felony.[325] The offence is based simply upon the civic duty of a citizen to disclose a felony of which he or she has knowledge.

This offence is mentioned, not because it is a matter of serious concern to governmental agencies or public officials who fail to disclose a felony of which they have knowledge in those jurisdictions where the offence subsists.[326] Rather it is mentioned to emphasize, as Brennan J. does in *A.* v. *Hayden*[327] — (the A.S.I.S. — Sheraton Hotel raid case) — that whether or not one today can talk appropriately of a citizen's <u>legal</u> duty to assist in the detection and suppression of crime, the offence did — and does — point up an important <u>moral</u> duty where "the crime is ... a matter of public concern" and that this has important public policy implications where a secrecy obligation purports to "enjoin silence where disclosure is reasonably required".[328] As *A.* v. *Hayden* itself illustrates, irrespective of whether an offence of misprision is made out, a court will not lend its aid to the enforcement of a secrecy obligation which has a tendency to affect adversely the

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[323] See *R.* v. *Wozniak* (1989) 16 N.S.W.L.R. 185, at 188-189.

[324] *Sykes* v. *D.P.P.* [1962] A.C. 528, at 564.

[325] *R* v. *Crimmins* [1959] V.R. 270.

[326] Cf. *A.* v. *Hayden* (1984) 156 C.L.R. 532, at 552-553; 586-588.

[327] Supra.

[328] Ibid., p.587.

administration of the criminal law and whose enforcement would be contrary to public policy.

(b) The Employee's duty to disclose misconduct

At common law employees are not obliged to disclose to their employer information concerning their own misconduct which relates to their employment[329] — a proposition re-enforced by the distinct common law rule that a person cannot be compelled to answer a question whenever the answer would tend to expose him or her to any kind of punishment or penalty (the "self-incrimination privilege).[330] But if this be the case for one's own misconduct, there is significant English authority for the view that an employee may at least in some circumstances be under an implied contractual duty to disclose the misconduct of other employers to the employer.[331] This duty does not apply as of course to all employees.[332] We have not, for obvious reasons, sought to make "dobbing-in" a matter of general legal obligation in the employment context. Rather it has been suggested that —

> "whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, ... or the misconduct of his inferiors."[333]

Such indications as there are in the case law suggest that the duty will arise at least where the employee has a supervisory or reporting role in respect of some part of the employer's operations and the relevant misconduct occurs within that area of responsibility. And the

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329 *Bell* v. *Lever Bros Ltd* [1932] A.C. 161.

330 *Police Service Board* v. *Morris* (1985) 156 C.L.R. 397.

331 *Sybron Corp.*v. *Rochem Ltd.* [1984] Ch.112; *Swain* v. *West (Butchers) Ltd* [1936] 3 All E.R. 261; see also Macken, McCarry and Sappideen, *The Law of Employment*, 212-213 (3rd ed.,) Law Book Co., Sydney (1990).

332 "Ordinary usage is in many respects against such a rule": *Sybron Corp* v. *Rochem Ltd*, supra, at 129.

333 Ibid.

misconduct which the judges here seem to have in mind is that which would justify at least disciplinary action under the wrongdoer's contract of employment.

It remains an open question whether this English development will be accepted in Australian employment law generally. A version of it does, however, have a distinct ancestry in the Australian public sector in the statutory duties and responsibilities imposed on senior officers under early Victorian Public Service legislation and in contemporary legislation that still adheres to the early Victorian models. *The Victorian Public Service Regulations, 1884*, for example,

(a) made "senior officers ... at all times accountable for the maintenance of good order and the Regulations of the Public Service;[334]

(b) imposed on heads of department a duty to report quarterly "the names of any officers under his control whose ... conduct ... has been unsatisfactory";[335] and

(c) obliged every officer in charge or "sub-charge" to report to the permanent head "any officer under his control who is guilty of a breach of these Regulations".[336]

In contemporary Australian legislation, the *Commonwealth's Public Service Regulations*, for example, impose on "all officers in charge of any sub-department, branch or section of the Public Service" obligations similar in substance to (a) and (c) above.[337] Though some of the "new Public Sector Management" jurisdictions[338] have not retained such provisions

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[334] Reg. 25.

[335] Reg. 38.

[336] Reg. 41.

[337] Regs 29, 30.

[338] S.A. and N.S.W. but not Qld.

in their legislation, it is arguable that at least senior public sector officers in those jurisdictions are nonetheless bound by an implied contractual duty to report serious misconduct of subordinate officers, within their area of responsibility. Be this as it may, a failure by such an officer to take appropriate action in respect of serious improprieties occurring within his or her area of responsibility of which he or she has knowledge would itself, in all probability, constitute "misconduct" or "improper conduct" under public service/public sector management disciplinary legislation.

Finally, three comments on employee reporting.

First, the reporting obligation itself (be it derived from Public Service regulations or implied contract) seems to be limited to those officers/employees who have a significant supervisory function to discharge. In other words, it affects the "supervisor" but not the "supervised". Yet commonly enough it is the "supervised" who is the one put in the position of having to contemplate whistleblowing in respect of the activities of his or her superiors. That person is far less likely to be able to justify reporting on the basis of a positive employment obligation so to do. This reporting obligation itself reflects hierarchy.

Secondly, the duty to report is owed to the employee's employer. It is an "in-house" obligation and provides no justification for "going public". In the public sector context it would seem to require reporting up the ordinary chain of command to the Chief Executive Officer of the particular agency in which the employee is located. Reporting directly to an agency's C.E.O. is expressly required in those jurisdictions whose Public Service Regulations impose a Victorian style duty, i.e. the Commonwealth, the A.C.T., Victoria, Queensland, and Tasmania.

Thirdly, the scope of the reporting obligation in either its contractual or statutory form seems to be limited to the revelation of employee misconduct. In this, as will be seen, its coverage is somewhat more narrow than what is justifiable under the "just cause or excuse" exception to the common law's duty of secrecy. The two, though, do share a significant common territory insofar as misconduct is concerned.

THE "JUST CAUSE OR EXCUSE" EXCEPTION

Australian law on this exception has not, as yet, been settled authoritatively.[339] The point we have reached to date would limit it to the disclosure of serious misconduct (or "iniquity") or of matters which endanger the public. The exception in consequence is not, and "is not intended to be, a mole's charter".[340] Importantly we have not accepted — and are unlikely to accept — the bare view of a minority of English judges that all that the exception requires in any case in which it is invoked is the balancing of "the public interest in maintaining the confidence against the public interest in knowing the truth".[341]

Three matters require some elaboration before the effect of this exception in our public sector today is discussed. These are:

(i) the scope of the exception;

(ii) invoking the exception; and

(iii) incidental matters.

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339 In what is presently accepted, it diverges sharply from some of the more extreme (and open-textured) views espoused in English decision.

340 *Lion Laboratories Ltd* v. *Evans* [1985] Q.B. 526, at 553.

341 *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760, at 764; and for the Australian rejection see e.g. *Castrol Australia Pty. Ltd* v. *Emtech Associates Pty. Ltd* (1980) 33 A.L.R. 31, at 56; *Corrs Pavey Whiting & Byrne* v. *Collector of Customs (Vic.)* (1987) 74 A.L.R. 428, at 445 ff.

The Scope of the Exception

The modern genesis of the exception is to be found in an 1856 English decision which held that –

> "The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."[342]

From this developed what is now commonly called the "iniquity rule". And if it has been acknowledged that "what was [an] iniquity in 1856 may be too narrow ... for [today]",[343] that rule, nonetheless, occupies much the greater part of the ground covered by the modern just cause or excuse exception.

There has been controversy over this century as to the extent to which, if at all, it is appropriate to encompass within "iniquity" such matters as minor criminal offences or statutory breaches, and civil wrongs already committed. In 1968, in what has proved subsequently to be the most significant rationalisation of the iniquity rule, Lord Denning proposed:

> "The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always — and this is essential — that the disclosure is justified in the public interest."[344]

This observation has proved to be important in two respects: first, it tied the exception to the disclosure of misconduct; but secondly, it qualified the right to disclose by the need to make out that the disclosure itself was, in the circumstances, in the public interest. A consequence of this was — and is – that the exception does not justify as of course the disclosure of petty wrongs. But equally it does not require the misconduct be a civil or

342 *Gartside* v. *Outram* (1856) 26 L.J. Ch. (N.S.) 113, at 114.

343 *Initial Services Ltd v. Putterill* [1968] 1 Q.B. 396, at 410

344 Ibid., at 405.

criminal wrong before it can be disclosed; grave conduct which puts the public seriously at risk will suffice.[345]

Separate from the iniquity rule, and of much more recent origin, has been a parallel and more muted development in the exception. Accepting that a common vice in "misconduct" (or "misdeeds") is the serious harm that it can occasion to the public or its members, it has now been suggested that disclosure may be justified under the exception to avert serious danger to the public notwithstanding that this may not necessarily result from wrongdoing (or misconduct). The example usually given in the case law is of the "apprehension of an impending chemical or other disaster, arising without misconduct".[346] Though the emphasis here shifts from conduct to consequences, the common features of the two approaches are first, the gravity of the matter itself and secondly, the need to protect society or its institutions from serious imposition or injury. While this second ("public danger") approach has not formally been applied in Australia it is nonetheless consistent with at least some local judicial formulations of the exception.[347] For this reason it should, for present purposes, be taken as expressing the outer limits of the exception in this country, with the "iniquity rule" providing the predominant part of the exception's content.

A very obvious consequence of the narrow compass given to "just cause or excuse" — and the courts have not shrunk from accepting it — is that secrecy obligations as a result can, and often will, operate so as to deny the public access to information in which it may well have an interest,[348] or from the disclosure of which it may well derive benefits.[349]

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345 See *Beloff* v. *Pressdram Ltd* [1973] 1 All E.R. 241, at 260.

346 *Malone* v. *Metropolitan Police Commissioner* [1979] 1 Ch. 344, at 362.

347 See e.g. the "higher duty" principle advanced by Rath J. in *Castrol Australia Pty. Ltd* v. *Emtech Associates Pty. Ltd* (1980) 33 A.L.R. 31.

348 *British Steel Corp.* v. *Granada Television Ltd* [1981] A.C. 1096, at 1169;

349 *Church of Scientology of California* v. *Kaufman* [1973] R.P.C. 635, at 649.

These simply are costs that flow from the balances we have struck between secrecy and openness in the cause of protecting the legitimate interests of the persons and bodies who constitute our society.

The narrowness of the exception obviously denies it the character of a "mole's charter". More importantly, in its scope it has an emphasis similar to that found in both common law doctrines discussed above — misprision of felony and the employee's duty to report. The discovery/non-protectability of serious misconduct is integral to all three. Equally, it is instructive to compare the exception with the types of conduct the disclosure of which can qualify for protection under the United States' federal *Whistleblower Protection Act 1989* :[350] "a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." While there is not a perfect symmetry between the two, the similarities are still striking.

Invoking the Exception, its Effect and the Disclosure it Justifies

The virtual equation of the exception with the iniquity rule has created the assumption, acted on in some judicial decision, that within its scope the exception relieves a person totally of such secrecy obligation as applies to that person thus allowing him or her freely to disclose the relevant information. With the limited but nonetheless progressive expansion of the exception, two factors in particular have cast doubt upon this assumption as one of general validity. The first has been the role played by the media in particular in exploiting the exception. The second has been the recognition that it is one thing to make an allegation of misconduct, another properly to substantiate it, and that the interests of the person owed a secrecy obligation, or else of the person the subject of the disclosure, can require protection from disclosures which, on full inquiry, may be found to be baseless or at least insufficient to justify unlimited disclosure in the circumstances.

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350 P.L. 102-12, para. 1213.

Both of these factors have led to the emergence in modern case law of the proposition that, in some cases at least, for the disclosure to be justifiable it must be made "to one who has a proper interest to receive the information"[351] — to a "proper authority" as it is commonly put.

As the "proper authority" doctrine itself evidences, modern consideration of the exception is being affected increasingly by the public purposes to be served in a given case by giving lawful justification to what otherwise would constitute an actionable breach of confidence. Those purposes can vary with the circumstances of the case: it may be to instigate an investigation, to facilitate law enforcement, to prompt remedial action, to inform the public generally, etc. And with consideration of purpose has come a greater concern with the means which are appropriate to achieve a given purpose in a particular instance. The principal stimulus to this concern has been that in much the greater number of cases raising the exception, disclosure has been made to the media (sometimes anonymously, sometimes not) with a view to general publication of the information in question. While accepting the invaluable function the media performs in exposing crime, anti-social behaviour, etc., the courts have not been prepared to accept the appropriateness of disclosure to the media in all circumstances. In a case involving the threatened media publication of tapes revealing criminal activity in the conduct of horse races, for example, an English judge observed:

> "[The media] are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not

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[351] *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, at 405.

equally be served by giving them to the police... Any wider publication could only serve the interests of the [newspaper]".[352]

Objection to media publication has been even more pronounced where the disclosure is more in the nature of an allegation of serious misconduct than of proof of it. As was said in the House of Lords in the English "Spycatcher" case:

"In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected".[353]

Significantly judgments both in the Court of Appeal and the House of Lords in the "Spycatcher" case emphasized that importance was to be attributed to the availability of "proper avenues of complaint" in determining whether a disclosure which did not avail of them is justifiable.[354] A similar approach has been taken in modern Canadian law.[355]

The point of convergence in recent English case law – and it is used in the absence of significant Australian authority – would seem to be that the nature of the alleged misconduct itself, the institutional or other setting in which it is alleged to have occurred, and the channels of complaint that are available to receive allegations of the type in question, will in large measure contrive in many cases to whom disclosure would be

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352 *Francome* v *Mirror Group Newspapers Ltd.* [1984] 1 W.L.R.892, at 898.

353 *Attorney-General* v *Guardian Newspapers* Ltd (No.2) [1988] 3 All E.R. 545, at 649; see also at 659-660; see also *In re a Company* [1989] 1 Ch. 477.

354 Ibid., 603 ff; 659-660.

355 See Ontario Law Reform Commission, Report, *Political Activity, Public Comment and Disclosure by Crown Employees* (1986), p.68 ff.

justifiable. This may be to the police, to an independent regulatory agency, to a Minister or senior departmental official, or to the media.

This trend towards regulating the scope of permissible disclosure and the related emphasis given to the availability of proper avenues of complaint are of obvious importance in any consideration of the desirability of, and scope of, institutionalised whistleblowing regimes in the public sector. An important message emerging, particularly from the Spycatcher case insofar as institutions are concerned, is that the more explicit, convincing and credible government's own reporting procedures are, the less the lawful justification for an employee "going public". It should, however, be noted that in the Spycatcher case in the Court of Appeal, Donaldson M.R. understandably would not accept that, despite available avenues for complaint, "there could never be any justification for wider dissemination of ... wrongdoing."[356] He instanced a recalcitrant failure to investigate a serious allegation.[357] It is equally worthy of note that in a case involving disclosure to the media of alleged deficiencies in breath-testing equipment — a matter within the area of responsibility of the Home Office — the court did not require that the newspaper go to the Home Office in the first instance.

> "The public stance of the Home Office is that there is no risk of a false conviction as a result of the use of the machine. The Home Office is an interested and committed party. Of course I do not suggest that the Home Office would deliberately shut their eyes to evidence that the machine, or the manufacturers, might not be as reliable as they thought; but civil servants are human, and beauty lies in the eye of the beholder. I think in all the circumstances that the "Daily Express" is not to be criticised for thinking that the impact of the revelations in their

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356 *Attorney-General* v. *Guardian Newspapers Ltd (no.2)* [1988] 3 All E.R. 545 at 604.

357 Ibid., 604.

> newspaper would be more likely to galvanise the authorities into action than a discreet behind-doors approach."[358]

The little we have in Australian authority dealing with the disclosure justified by the exception suggests that we will, in all likelihood, follow the trend now evident in England.[359]

Incidental Matters

Because they are matters which tend to be raised in general discussions of "whistleblowing", three additional things should be said of the common law exception.

(i) It is not at all a precondition of availing of the exception that the discloser reveal his or her own identity. In the many instances in which the exception has been relied upon successfully by third parties so as to publish information received from a "confidence breaker", the "confidence breaker" has acted anonymously. The point though which should be emphasised is that where the identity of the confidence breaker is known to the third party and the disclosure in the circumstances is not justified by the exception, the person to whom the duty of confidence is owed can at law compel the third party to reveal the identity of the confidence breaker.[360] For practical purposes, such "discovery proceedings" in the public sector would almost inevitably result in an open confrontation between government and the media. Australian governments to date have shown no propensity at all to pursue "moles" in this way.

(ii) The exception's concern being solely with justifiable disclosure, it does not in any way address the question of the protection from reprisal to which a person should be entitled consequent upon his or her invoking the exception. Indeed Australian common law is conspicuously silent on this matter.

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358 *Lion Laboratories Ltd.* v *Evans* [1985] 1 Q.B.526, at 553.

359 See e.g. *Corrs Pavey Whiting & Byrne* v *Collector of Customs (Vic)* (1987) 74 A.L.R. 428, at 432.

360 *British Steel Corp.* v *Granada Television Ltd.* [1981] A.C.1096.

(iii) Because the exception is directed primarily towards the protection of the public from serious imposition, harm etc., the motive of the discloser in making his or her disclosure is irrelevant to invoking the exception, though it may be a factor taken into account in limiting the scope of permissible disclosure.[361]

When one aggregates the three common law doctrines outlined above, a very obvious conclusion can be drawn. Not insignificant foundations already exist in our present law for a regulated scheme of "whistleblowing". Importantly the common law tells us that the decision to reveal wrongdoing cannot be said to rest simply upon moral duty. Within limits it is (and should be) for public policy reasons a matter of legal right if not, in some cases, of legal obligation.

THE PUBLIC SECTOR

Two rather distinct matters need mention. The first, briefly, is the extent to which government itself can properly act as a "whistleblower" in respect of information it receives in confidence from the public. The second is whistleblowing by officers and employees relating to misconduct or maladministration within government.

1. *Public Sector Agencies as "Whistleblowers"*

The matter to be canvassed here is of limited compass. Public sector agencies and officials, when obtaining information from the private sector in circumstances where they are subject to a duty of secrecy to the information supplier, are not precluded from themselves availing of the "just cause or excuse" exception.[362] But where the unauthorised use or disclosure they intend to make is based on the exception and not upon some independent statutory right, they remain subject to all the limiting requirements of the common law in relation to the exception.[363] Though these legal propositions are not

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[361] See *In re a Company* [1989] I.Ch. 477.

[362] See e.g. *Allied Mills Industries Pty. Ltd.* v *Trade Practices Commission* (1981) 34 A.L.R.105.

[363] See e.g. *Castrol Australia Pty. Ltd.* v *Emtech Associates Pty. Ltd.* (1980) 33 A.L.R.31.

themselves controversial, the application of the exception is not always a straightforward matter.

First, as indicated in Section 3, confidential communications from the private sector to a public sector agency or official ordinarily result in a variety of duties of secrecy being owed in respect of that information. There are two paradigm cases.

(a) If the communication is made to the agency itself through its officers, it will be the agency (or the Crown) which owes the primary duty of secrecy to the information supplier. The officers who receive and handle that information will owe a derivative duty of secrecy to the "outsider" but their primary secrecy obligation will, as employees, be to their employer agency (or the Crown). If the agency is to invoke the exception it will necessitate a decision so to do being taken by an official who has authority to authorize the action the agency intends to take in reliance on the exception.

(b) If the communication is made to a public sector employee rendering a professional service to the public on a professional-client basis (e.g. as a doctor, a lawyer, or a counsellor) it will be that professional/employee who owes the primary duty of secrecy to client-members of the public. The professional's employing agency will owe at least a derivative duty of secrecy to those clients. And the professional as employee will owe a primary duty of secrecy to his or her employer in respect of client information. Here, applying the exception can be problematic because of the interacting secrecy obligations. To crystallise the issue, take the example of the Health Authority employed doctor who has reasonable grounds for believing a patient is a subject of child abuse in a jurisdiction which does not have mandatory reporting legislation. Is it the doctor or the Authority which has the right to determine whether or not a "just cause or excuse" disclosure should be made? The prudential answer would seem to be that the decision is the professional's but that because his or her decision at least to disclose may affect the interests of, and may have possible liability consequences for the agency itself, that decision at least should be taken in consultation with appropriate authorities within the agency. If this appears to give "professional ethics" a certain primacy over employment considerations, it most likely reflects more closely the stance professionals would, and would assert they are obliged to, take.[364]

Secondly, given the prevalence of fraud and deception practised particularly but not exclusively on "client" agencies, to what extent can the exception itself be used to justify information handling and dissemination practices designed to facilitate the detection of fraud, etc. in the absence of independent statutory authority permitting information use for these purposes? It is noteworthy in passing that both the *Privacy Act, 1988* [365] and South Australia's *Cabinet Administrative Instruction No. 1 of 1989* [366] both authorise the use of personal information where this is —

> "reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue";[367]

or where it is believed —

> "on reasonable grounds that the use ... is necessary to prevent or lessen a serious and imminent threat to the life or health of … [some] … person".[368]

The substantial similarities between these Principles and the common law's "just cause or excuse" exception are self-evident.

Notwithstanding its role in facilitating the discovery of serious misconduct (including fraud and deception), the exception does not justify mere fishing expeditions.

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364 A strong legal argument can be advanced to justify this which places its focus primarily on the professional-client relationship. But there is a counterveiling one which focusses more on the obligations flowing from the employment relationship.

365 Commonwealth.

366 "Information Privacy Principles Instruction".

367 Principle 11(1)(e) (C'wealth); Principle 8(e) (S.A.).

368 Principle 11(1)(b) (C'wealth); Principle 8(b) (S.A.).

Though judicial decision is not altogether consistent it seems to be the case that before information covered by a secrecy obligation to another can be used or disclosed in reliance on the exception, it is necessary to show there are grounds for suspecting that the use or disclosure of <u>that information</u> will be of material assistance in detecting or preventing misconduct/public harm of the type covered by the exception.[369] There is, furthermore, authority for the proposition that where Agency A has a remit to investigate particular wrongdoing, an allegation against a person whose information is in the hands of Agency B would allow Agency B to disclose that information to Agency A in reliance on the exception, if the information itself relates to matters falling within the investigative remit of Agency A.[370] While in such a case there is no requirement that Agency B has reason to believe that the information subject has been guilty of wrongdoing, the exception will <u>only</u> justify disclosure in such circumstances to Agency A – it is a "proper authority" for this purpose.

The cases, then, seem to suggest that there must be a suspicion/allegation of wrongdoing against the member of the public owed a duty of secrecy by an agency, before an unauthorised use or disclosure of that person's information will be justified by the exception. For this reason, it is apparent that information disclosure techniques designed simply to facilitate the general detection of fraud, etc will ordinarily require independent, statutory justification.

2. *Public Officers/Employees and "Whistleblowing"*

> <u>Note</u>: The term "whistleblowing" is used in the following discussion to cover all forms of unauthorized disclosure of wrongdoing whether the disclosure be "in-house", to another governmental agency, or "going public". The range of possible disclosure this covers is wider than some purists would regard as encompassed by

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[369] Cf *Malone* v *Metropolitan Police Commissioner* [1979] 1 Ch. 344 at 377.

[370] *In re a Company* [1989] 1.Ch. 477.

the term but for present purposes little would be served in differentiating types of disclosure.

The differences between private and public sector employment are thrown into stark relief when one asks: to what extent are officers and employees in either sector lawfully entitled to whistleblow consistently with the secrecy obligations to which they are subjected? As a secrecy obligation in the private sector will only arise as a result of contract or of common law rules, its limits are those set by the common law, and particularly by the "just cause or excuse" exception. For the public sector officer and employee a markedly different situation can obtain. The nature and scope of the official secrecy regime imposed on a public officer or employee can be such as to make all but the most attenuated form of whistleblowing an unlawful, even criminal, activity.

For those public officials whose secrecy obligation depends solely upon contract or the common law, whistleblowing is permissible to the extent allowed by the common law. For practical purposes, the issue for these officers is not so much with their entitlement to report wrongdoing, etc, as with the constraint the "proper authority" doctrine imposes upon the form of reporting they are entitled to make. But for the official whose secrecy obligation has a statutory foundation, such entitlement as there is to report will itself depend upon whether, if at all, the particular statutory scheme to which he or she is subjected, itself allows reporting in some form.

Before considering reporting on a jurisdiction by jurisdiction basis one general matter relevant to all officers and employees in all jurisdictions needs mention. It relates to reporting by an officer to the C.E.O. of his or her agency.

"In-House" Reporting

Though no official secrecy regime in any jurisdiction provides or allows in express terms for "in-house" reporting, it is not open to serious doubt that an officer or employee is lawfully entitled to report any information acquired in office to his or her C.E.O., save in two exceptional cases. The first of these exceptional cases is where the officer personally owes a common law duty of secrecy directly to a third party in circumstances where that duty prevents such reporting. In such a case report can only be made to the C.E.O. if justified by the common law's "just cause or excuse" exception, or if expressly authorised by or under statute. For practical purposes the class of officials caught by this exception are those who render a service to the public in a professional-client relationship.[371] The second exceptional case is where statute itself expressly precludes such reporting — a rare phenomenon.

These exceptions apart, the entitlement to report in-house inheres in the very organisational scheme of the public sector itself. The legal "right to know" that ministers, C.E.O.s, members of statutory boards and company directors have in relation to information of and about their agency; the entitlement to information implicit in the power given to ministers and or C.E.O.s to give "express authority" to disclosures by officials; the constitutional arrangements and the legal obligations characteristically cast on ministers and/or secretaries in their departments by public service/public sector management legislation;[372] and the essentially employment and contractual character of most official secrecy regimes — all reinforce the existence of the entitlement to report referred to. Two observations should be made about that entitlement. First, it is not limited to matters which would be justified by the common law's exception. It extends to any matter relating to the administrative and other concerns of the agency in question, and to the conduct of its officers or of third parties dealing with the agency (whether or not this relates to wrongdoing). Secondly, the entitlement is not as such founded on the "course of duties" provision found in most official secrecy regimes. It inheres in the chain of responsibility which underlies the structure of administrative government itself.

Beyond the entitlement referred to, a range of "superior" or "supervisory" officers are <u>obliged</u> either by statute or, in the absence of statute, by implied contractual duty, to report at least some species of wrongdoing by subordinate officers. In the

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371 See e.g. *Slater* v *Bissett* (1986) 69 A.C.T.R. 25.

372 See e.g. *Public Service Act*, 1922, s.25(2) (C'wealth).

Commonwealth, the A.C.T., Victoria, Queensland and Tasmania, Regulations made under public service/public sector management legislation require designated "officers in charge" to report to their C.E.O. any breaches of the Regulations coming to their knowledge.[373] Supervisory officers not subject to this statutory requirement in the five jurisdictions mentioned (e.g. senior officers in State-owned companies), and supervisory officers generally in New South Wales, South Australia, Western Australia and the Northern Territory are, in all probability, subject to an implied contractual duty to report to their C.E.O. the employment related misconduct of subordinate officers for whom they have supervisory responsibilities.[374]

Reporting (Other than "In-House")

The discussion which follows will proceed on a jurisdiction by jurisdiction basis, and primary attention will be directed to such official secrecy regimes as are created in or under public service/public sector management legislation. By way of prefatory comment, three matters should be noted.

(i) The entitlement of any official in any Australian jurisdiction whose secrecy obligation rests only on the common law or on contract, to make a "public interest" disclosure notwithstanding his or her duty of secrecy, is coextensive with that allowed by the common law and by the "just cause or excuse" exception in particular.

(ii) Where a specific statute imposes a particular secrecy obligation for its own purposes, the terms of that obligation will determine the "public interest" disclosures that can lawfully be made of information it embraces. This may admit of reporting in some prescribed form, e.g. in some instances legislation allows inter-agency communications by designated officers. It may allow reporting where there is "lawful excuse" (or some like

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[373] Public Service Regulations, Reg.30 (C'wealth and A.C.T.); Public Service Regulations, Reg.16.8 (Vic.); Public Service Management and Employment Regulations, Reg.7 (Qld); Tasmanian State Service Regulations, 1985, Reg.84 – this last is repeated throughout the various Divisions of the Regulations.

[374] This implied contractual duty has been discussed earlier in this Part.

formula). In the latter case the common law's exception would, in all likelihood, be held to provide such "lawful excuse" although before any individual officer could rely on the exception to make a report beyond his or her own agency, that officer's position in the agency would need to be such as giives that officer individual authority to make the extra-mural disclosure.

(iii) Because the "properr authority" doctrine will in all probability be held to impose a constraint upon the discloosures that an official or employee is entitled to make in any event, the nature and remit of iinvestigative agencies existing in any jurisdiction will in many instances contrive to whom a report can properly be made.

A. The Commonwealth

1. Public Service Regulations

The terms of Reg.35 are such as would seem to preclude an officer's reporting, either publicly or to another agency, information allowed to be disclosed by the common law's exception, save where this is done in accordance with the regulation's "express authority" proviso or in the "course of officiall duty." The plight of a Commonwealth official in this is, of course, exaggerated by the role the *Crimes Act, 1914*, s.70 has in sanctioning breaches of Reg.35. To establish even a limited infra-governmental whistleblowing scheme would require either the overriding of Reg.35, or an express enlargement of "official duties" to encompass such reporting.

2. *The Crimes Act, 1914* s.79

The *Crimes Act* exempts from its official secrecy offence communications made –

(a) to a person to whom the official is authorised to communicate the information; or

(b) to a person to whom it is, in the interests of the Commonwealth, the official's duty to communicate it.[375]

The latter alternative is to be noted for it apparently countenances an otherwise unauthorised communication which an officer nonetheless has a "duty" to make because it is "in the interests of the Commonwealth."

Both exemptions derive from similar exemptions in the now repealed *Official Secrets Act*, 1911, s.2(1) (U.K.). The latter of them was the subject of judicial direction in the controversial "General Belgrano" prosecution.[376] The civil servant's defence in that trial was that his disclosure was protected by the U.K. counterpart "in the interest of the State" exemption. The trial judge seems to have held (i) that the reference to "duty" was to a duty arising by virtue of office — was an official duty rather than a moral, contractual or civic duty; and (ii) that "in the interest of the State" meant what was in the interest of the State as expounded by the Government of the day. Both propositions are contestable — the first because it appears to be inconsistent with the first exemption; the second, because it assumes an unrestricted entitlement of the organs of government to act in ways which may in fact be contrary to their constitutional duty.

Little purpose would be served in attempting to divine the extent to which any form of whistleblowing could be justified by s.79(3) itself despite the *Ponting* ruling. Unlike in Britain, the official secrets offence is supplemented by the *Crimes Act* s.70's "unauthorised disclosure" offence and that offence does not contain within it a possible whistleblowing defence. The same facts, in other words, could justify a prosecution under either section. For so long as s.70 remains on the statute-books in its current form it renders criminal, conduct that may be exempted by s.79(3) — assuming the second exemption in s.79(3) allows some form of whistleblowing.

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375 S.79(3).

376 *R.* v *Ponting* [1985] Crim.L.R.318.

3. *Crimes Act, 1914* s.70(2)

This section extends the reach of the criminal law to the disclosures of ex-officers. Its effect will be considered in the next Section of this Report which considers "Post-Employment Obligations" generally.

B. The A.C.T.

Territorial public servants are in a position similar to that of their Commonwealth counterparts in that they remain subject to reg.35 of the Commonwealth's *Public Service Regulations*, and are equally subject to a local equivalent to the *Crimes Act, 1914*, s.70.[377]

C. New South Wales

Save where specific statutes impose particular secrecy obligations, official secrecy in this State is a matter of common law or contractual obligation. Accordingly, it is the "just cause or excuse" exception which contrives the extent to which whistleblowing can be a lawful activity in the State. Given the increasing use made of express contractual duties of secrecy,[378] it should be emphasised that such contractual provisions will not be enforceable when enforcement would be contrary to public policy[379] — and this will be so when the common law exception can properly be invoked.

The practical legal issue for officials and employees is not whether they have some entitlement to disclose information relating to "iniquity" or "public danger." Rather it is to whom such a disclosure can properly be made. Given that the common law seems to be moving progressively towards the position that where appropriate avenues of complaint are available, these ordinarily should be availed of, it is likely that only in exceptional cases would a public sector officer or employee be lawfully justified in "going public" and this not where the essence of the disclosure is an allegation requiring investigation. The array

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[377] *Crimes (Offences Against the Government) Ordinance*, 1989, s.10.

[378] E.g. in the S.E.S. Code of Conduct.

[379] *A.* v *Hayden* (1984) 56 A.L.R. 82.

of governmental agencies with remits to investigate corruption, violations of particular laws, and maladministration in N.S.W., constitutes a significant institutional framework within which complaint can be made and corrective action taken to protect the integrity and effectiveness of the governmental system. And while no one governmental agency has a remit which would cover all matters possibly caught by the "just cause or excuse" exception, the totality of these agencies, when coupled with regulatory units within the public service itself, would seem to provide such appropriate avenues of complaint as to limit justifiable disclosure to disclosure to these agencies/units (save in exceptional cases). The I.C.A.C. in particular, has a central role in this respect. Though the *Independent Commission Against Corruption Act, 1988* is not as unequivocal as it might be for present purposes, it is likely to be regarded as the proper authority for complaint of any matters falling within its generous definition of "corrupt conduct". The Act allows "any person" to make complaint to it;[380] it obliges prescribed officials to report wrongdoing — and to that extent expressly overrides their secrecy obligation;[381] and it can protect complainants from victimisation or harassment.[382] The limited overriding of secrecy obligations in the Act's s.11 may well create the impression that officials not falling within that section remain subject to secrecy such as to preclude lawful complaint to the Commission. This may well be so in those instances where specific statutory secrecy duties are imposed on officials in respect of particular legislative programmes. But where all that is in issue is the employment obligation, the common law exception itself would provide the relevant immunity to an officer making complaint to the Commission.

D. Victoria

The *Public Service Regulations, 1985* Reg.16.5(7) creates a distinctly unpropitious environment for whistleblowing. Unless expressly authorised by the Minister or the chief

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380 S.10.

381 S.11.

382 S.50.

administrator, an officer is not entitled to make any communication to any person, whether an officer of the public service or otherwise, unless *that person is officially entitled thereto*. "In-house" reporting to C.E.O apart, the scheme of the *Public Service Act, 1974* would seem to make the Public Service Board[383] and, possibly the Office of Merit Protection,[384] "persons" who are "officially entitled" to receive communications for the purposes of Reg.16.5(7) including communications which might be the appropriate subject of whistleblowing. But because the regulation incorporates within itself a "proper authority" principle, it clearly would preclude both an officer's "going public" and an officer's disclosure to an agency of government other than the Public Service Board/Office of Merit Protection — save, in the latter case, where that agency is so constituted as to "officially entitle" it to the "communication" in question. It is an imponderable question as to which if any agencies in the State can be said to be in such a position of entitlement, the more so given the uncertainty in meaning of the "officially entitled" formula itself.

As noted earlier in this Report, the secrecy obligation which inheres in the *Constitution Act, 1975*, s.95[385] in no way alleviates the position of the "whistleblowing" public official in Victoria. On its face it only admits of disclosure "in or for the discharge of ... official duties."

E. Queensland

The *Code of Conduct for Officers of the Queensland Public Service* purports only to protect from unauthorised disclosure, information which is "confidential or privileged." It is strongly arguable that information relating to "iniquity" or "public danger" would be treated at law as exempt from those formulae, at least to the extent that

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[383] Ss.15A,16.

[384] Reg.17.

[385] Its reference to "use" clearly encompasses "disclosure.

that information would be denied protection by the common law.[386] But even if this be so, the nature of the disclosure an officer or employee would be entitled to make would, in all probability, be limited by the proper authority doctrine. The legislative establishment of the Criminal Justice Commission and the Electoral and Administrative Review Commission provides institutional arrangements for the reporting of official misconduct/maladministration such as would preclude "going public" in all but extreme cases. The Official Misconduct Division of the C.J.C. has a statutory remit to investigate all cases of "alleged or suspected official misconduct by persons holding appointments in … units of public administration, that come to its notice from any source, including by information from an anonymous source".[387] "Official misconduct" is widely defined in s.2.23. The Act furthermore entitles <u>any person</u> to furnish complaints, and positively obliges designated officials to report perceived official misconduct.[388] Officers in the latter category are to that extent expressly absolved of such secrecy obligation as might otherwise apply to them.

The E.A.R.C. for its part has wide powers to investigate and report in relation to any "part of the public administration of the State".[389] The Act's anti-victimisation provisions[390] (which themselves are distinctive), the referral powers,[391] and the matters covered in the Act's Schedule all suggest that report may be made to the Commission in respect of specific matters suggesting "deficiency in a system of administration." Though the functions of the E.A.R.C. are more general, less instance specific, in character, it

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[386] This argument is based on the twin considerations that the Code's premise is that the relevant information caught by the formulae is itself a "worthy subject of protection", and that the common law's exception aims to deny the benefit of confidentiality to information which it allows to be disclosed.

[387] *Criminal Justice Act, 1989*, s.2.20(2)(e).

[388] S.2.28(1), (2) and (3).

[389] *Electoral and Administrative Review Act, 1989*, s.2.10.

[390] S.2.25.

[391] S.3.1.

nonetheless seems to be constituted as a body appropriate to receive allegations of wrongdoing/maladministration in public administration.

Notwithstanding that the legislation creating both bodies does not expressly override secrecy duties — save to the limited extent noted above with the C.J.C. — the scheme of both Acts and their apparent purposes (i) would seem to justify official reporting to both bodies notwithstanding the provisions of the Code; and (ii) as noted above, would be likely to be taken as precluding an official's "going public" save in the most exceptional of cases.

Finally, it should be noted that the E.A.R.C. has issued an Issues Paper (No.10) on whistleblower protection in that State which may well herald the first comprehensive legislation on the subject in Australia.

F. South Australia

The *Government Management and Employment Regulations, 1986*, Reg.21, though markedly more liberal in the official secrecy regime they impose than is the case in most other jurisdictions, do not accommodate whistleblowing with real ease. Officers and employees bound by the Regulations are authorised to disclose information of or about the Public Service, (inter alia) if the disclosure —

> "is of such nature and made in such circumstances as to create no reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies" and "is not made contrary to any law or lawful instruction or direction."[392]

Potentially an avenue for significant whistleblowing is opened up here, as it is for the dissemination of official information generally. At least in its possible subject matter, the Regulation could well admit of disclosures paralleling those allowed under the United

[392] There is an additional "advantage" limitation which is not of present relevance.

States' *Whistleblower Protection Act, 1989*.[393] The important qualification in the Regulation, though, lies in the "made in such circumstances" proviso. If the manner in which disclosure is to be made creates the "foreseeable possibility of prejudice" etc. it is improper. In other words the Regulation itself envisages that the relevant possible prejudice may result, not because an information disclosure is to be made as such, but because of the way the disclosure is to be made. The "in such circumstances" proviso would seem to contemplate in some instances a form of "proper authority" doctrine which would, for example, allow infra-governmental whistleblowing but not going public — and would allow this because the former but not the latter would not be likely to create the relevant prejudice.[394] If this be an uncertainty in the Regulation's, possible condonation of whistleblowing, it equally suffers from a significant deficiency.

As noted in the discussion of the common law, the subject matter of whistleblowing is, often enough, an allegation the substance of which requires consequential investigation — and investigation which may prove the allegation to be not substantiated though not improperly made. The Regulation as it stands is inadequate to deal with the balancing of interests that can be required if whistleblowing itself is to be prevented from being a possible instrument of injustice to others. The Regulation seeks to protect governmental interests. It does not explicitly protect the interests of officials or, for that matter, of members of the public — though the public's interests obtain some level of protection in consequence of the privacy regime established by *Cabinet Administrative Instruction No.1 of 1989*. While it represents a laudable departure from the rigid "Victoria" model of official secrecy, the Regulation is not adequate to deal effectively with the specific phenomenon of whistleblowing.

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393 ..."a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, or abuse of authority, or a substantial and specific danger to public health and safety."

394 Judgments of the House of Lords in the English "Spycatcher" case canvas this possibility in a public sector context: see *Attorney-General* v *Guardian Newspapers Ltd (No.2)* [1988] 3 All E.R. 545.

G. Western Australia and Tasmania

For practical purposes the situations that obtain in these two States in the regimes created under the *Public Service Act , 1978*[395] and the *Tasmanian State Service Act, 1984*,.[396] respectively, mirrors that in the Commonwealth under Reg.35. And as in the Commonwealth, the position of a whistleblower is further jeopardised by the provisions of each State's *Criminal Code*[397] which attach criminal sanctions to breach of an official's secrecy obligation.

H. The Northern Territory

"In-house" reporting apart, whistleblowing in the Territory would seem, both for *Public Service Act, 1976* and for *Criminal Code*[398] purposes, to be regulated by the common law's "just cause or excuse" exception.[399] As has been seen, *The Public Service Act* has not been used to date to create a statutory regime imposing official secrecy obligations; and the *Code* only proscribes disclosures of confidential information where the disclosure is not permitted by law. The central issue for officials and employees is, in consequence, to whom can they lawfully make disclosures in reliance upon the exception. Unlike in New South Wales, for example, there is no body such as the I.C.A.C. which for most purposes could be said to be the "proper authority" to receive reports. At the moment all that can be said is that, in principle, disclosures of "iniquity/public danger" may be allowable but that the more public the disclosure the more hazardous it becomes because of the limitation on disclosure that may be found to arise in a particular instance from the "proper authority" doctrine.

[395] See *Public Service Regulations 1988* Reg.8(b) and *Administrative Instruction 711*.

[396] S.54(1)(i).

[397] S. 81(W.A.); S.110 (Tas.).

[398] S.76.

[399] Save in cases where specific statutes impose their own particular obligation.

SECTION 5

EX-OFFICE OBLIGATIONS

A secrecy obligation limited in its duration to the period in which office or employment is held cannot in the end ensure protection for those very interests which justify secrecy in the first place. Should loss of ministerial office itself allow an ex-minister fully to publicise any and all information (including cabinet information) acquired in office? Should a public servant on resignation be entitled freely to utilise official information for his or her own purposes? Should an officer or employee of an agency engaged in commercial or research activities be able to make the "trade secrets" of the agency available to a later employer in the private sector? Surprisingly, save for the criminal law in the Commonwealth and the A.C.T.,[400] the statutory official secrecy regimes to be found in this country simply do not address post-employment secrecy. If this anomaly is striking — the more so given the extensive use made in the private sector of contractual stipulations imposing post-employment obligations — it is, in a sense, explicable. There are formidable, practical difficulties to be confronted in making any sensible general differentiation between information which should be free for use and that which should remain embargoed. But perhaps more significantly, post-employment information abuse is merely one part of a more general complex of problems raised both for government and for the law by the "revolving door" phenomenon.[401] Suffice it to say here that it can bring into contention such diverse matters as (a) an official's actions affecting his or her future employer, prior to termination of office; (b) permissible subsequent employment given the office previously held; (c) the possible misuse of influence acquired while in office; and (d) the effective utilisation of individual skill, experience and knowledge. Equally the resolution of these matters has been complicated by government sponsored mobility between the private and public sectors, by early retirement and compulsory retirement programmes, and by the

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400 *Crimes Act, 1914*, s.70(2); *Crimes (Offences against the Government) Ordinance*, 1989, s.10(2).

401 Some number of these were considered by the Bowen Committee in its *Report on Public Duty and Private Interest*, Ch. 13, A.G.P.S., Canberra, (1979).

compromises which have to be struck between high principle, practical necessity and individual justice to an ex-officer or employee.

This section addresses "post employment" in only a limited and specific way. The subject is considered generally in the subsequent *Report on Compromising Relationships and Other Activities*. The concern here is with information protection alone and then only to the extent that it can be separated realistically from other more general issues raised by post-employment activity. Discussion for the most part will centre on the common law given the central role it has in this arena — if only by default. Reference will, however, be made to the rather extraordinary criminal offences of the Commonwealth and the A.C.T.

What needs to be said at the outset is that the extensive legal learning we have on post-employment secrecy relates almost exclusively to the private sector. In consequence, much in what follows is based upon general principle and analogy. Necessarily it will be somewhat speculative in character.

1. THE COMMON LAW

On resignation, retirement or removal from office, an official's duty to serve with loyalty and fidelity comes to an end[402] and with it any direct use that can be made of that duty to protect official information (confidential or otherwise) from use or disclosure by an ex-officer. But at this point the duties of secrecy and of fidelity part company. It has long been accepted that the common law's duty of secrecy imposes a continuing obligation: if there remains confidential information in an ex-officer's hands which warrants protection, that protection will be given. This said, the factors which will lead the common law to say that protection is warranted are not coextensive with those which can hold sway during office holding. The expectations relating to official secrecy which government can properly entertain of its own officers when in office are, necessarily, affected by the consideration that those officers are the servants and agents of government with responsibilities to and for government

402 Such residual effects as it can have are not of present relevance.

arising from that service. What properly can be expected of an ex-officer, likewise, is necessarily affected by the consideration that no longer a "public servant", the ex-officer now has legitimate private and personal interests of which account needs be taken in giving secrecy its post-employment province. In other words, the secrecy demands that can properly be made of an officer are not on all fours with those that can be made of an ex-officer.

Recognition of this difference in the private sector has been marked and regularly reiterated by courts. While there may be a clear public interest in the protection of secrets, there is a countervailing public interest in promoting the effective utilisation of individual knowledge, skill and experience. In consequence, and in an attempt to strike an accommodation between these interests, the courts in the post-employment context have contracted somewhat the range of information that will be protected by a duty of secrecy, notwithstanding that information now no longer protected may have been protected from unauthorised use or disclosure during the currency of the employment.[403] A test has been formulated which requires the drawing of a somewhat arbitrary line between "species" of information possessed as a result of prior employment.

> If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a person of ordinary honesty and intelligence would recognise to be the property of the old employer, it will be protected. If, however, it merely constitutes knowledge, skill and experience which, as a result of the previous employment, has become the employee's own, it will not.[404]

What needs to be said immediately of this test — apart from the obvious difficulty in applying it — is that it is very much a creature of the private sector employment context for which it was developed. While balancing the public interests noted above, its unstated but palpable object is

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403 Justification for the enlarged protection given during the employment relationship is often enough justified on the basis of the loyalty duty.

404 This is a composite of the various tests used in a number of cases: see R. Dean, *The Law of Trade Secrets*, 201 ff. Law Book Co., Sydney, (1990).

to protect an employer's economic interests from unfair competition. Other than illustrating that secrecy requires accommodations to be struck in the post-office context, the test itself is not obviously transportable to the public sector — save to protect the trade secrets of government where government is engaged in research or commercial activity.

Unless public office holding is to give rise to a form of information bondage — and the case law indicates it will not[405] — "public interest" accommodations necessarily have to be struck between the enduring entitlement of government to secrecy protection and the entitlement of an ex-officer to use or disclose information acquired in office. Quite apart from the subject matter of the information in question, those accommodations will in all likelihood be affected in a given case:

(a) by the nature of the office previously held by the official — the English Radcliffe Committee, for example, was prepared to make some concessions to ex-ministers in later justifying and explaining their actions in office given the impediment collective responsibility posed to their so doing while in office;[406]

(b) by the use or disclosure proposed — disclosure to the public at large, for example, may be acceptable whereas private disclosure for the advantage of a specific individual may not; and

(c) by the "staleness" or otherwise of the information in question (the temporal factor).

As no single generalisation will differentiate adequately between what is or is not permissible to an ex-officer, one can only illustrate the possible impact of the law by reference to the treatment likely to be given to the varying species of information which the *common law*[407] would protect during office holding.

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405 See *Attorney-General* v *Jonathan Cape Ltd.* [1976] Q.B. 752 — a decision the principle of which has been endorsed in Australia: see *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R.485.

406 *Report of the Committee of Privy Councillors on Ministerial Memoirs*, Cmnd. 6386 (1976).

407 One here must disregard the statutory official secrecy regimes found in most jurisdictions given their excessive information coverage.

(i) Third Party Information

This occasions the least difficulties. Confidential private, personal and commercial information acquired in office for official purposes will, as of course, be subject to an enduring duty of secrecy *owed to the third-party information supplier* until that information passes into the public domain (i.e. ceases to be confidential). For this reason an ex-officer would be debarred from passing on to a new employer confidential business information acquired in office relating to a competitor of that employer. Likewise would an ex-officer who, as a journalist, sought to publish identifying personal information obtained in office. In rare cases the common law's "just cause or excuse" exception may be able to be invoked by an ex-officer against a third party to justify disclosure. But this apart, a third party's confidential information will so obviously be said to "belong" to that person as to preclude any claim of entitlement to use or disclose by an ex-officer.

The interest most immediately affected by misuse here is that of the third party. But government, as the medium through which the ex-officer acquired the information, must retain a significant moral, if not legal,[408] obligation to third parties to ensure insofar as is practical that the integrity of their information is maintained in the hands of ex-officers. Both in the steps taken on severance and, if necessary, through resort to legal proceedings against an ex-officer,[409] government has a signal responsibility to reassure the public that their information when put in its hands will be safeguarded from misuse by persons to whom access to it has been given by government. Where obviously sensitive personal or commercial information is entrusted to a particular officer or class of officers, explicit notice should be given that officer or those officers of their secrecy obligation on termination of office.

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408 Cf the dubious decision of *Easton* v *Hitchcock* [1912] 1 K.B. 535.

409 The basis of such proceedings would be breach of the continuing "employment" duty of secrecy owed government in respect of confidential information acquired in office even though that information relates to a third party.

(ii) The Commercial Information of Government

As noted earlier in this Report, to the extent that government engages in "non-governmental" or commercial activity, some range at least of the information generated in that activity will be given the same "trade secrets" protection as would be accorded a private sector employer.[410] In consequence government is entitled, for example, to deny an ex-employee —

> "the commercial benefit derived from misuse of commercial information that the government has a proprietary interest to use, if it choose, for its own commercial benefit."[411]

Here, the private sector test applied to ex-employees (noted above), is applicable directly to public sector ex-employees. That test, which seeks to differentiate between the employer's trade secrets on the one hand and the ex-employee's own knowledge skill and experience on the other, is notoriously difficult to apply save where the trade secrets in question are clearly discrete and identifiable. For this reason, though not only for this reason,[412] private sector employers in some contexts at least have abjured reliance upon secrecy law to protect their trade secrets in favour of imposing limited controls on the subsequent employment activities of their ex-employees through restraint of trade covenants.[413] Though such a course is not one to be taken lightly by governmental bodies engaged in commerce, government participation in commerce may make this an appropriate step to take in distinctive circumstances where its own "trade secrets" give it a significant competitive advantage which warrants protection in this fashion.

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410 See *Attorney-General (U.K.)* v *Heinemann Publishers Australia Pty. Ltd.* (1987) 10 N.S.W.L.R.86, at 99-100 per Street C.J.

411 Ibid., at 100.

412 See R. Dean, *The Law of Trade Secrets*, Ch. 10. Law Book Co., Sydney, (1990).

413 See generally, ibid.

(iii) Governmental Information

Much the most practically significant species of information for most ex-officers, this is also the most difficult. The common law test to be applied to gauge the legality or otherwise of ex-employee use or disclosure is the same as applied during the currency of office: use or disclosure will only be prevented when it can be shown by government that it "is likely to injure the public interest."[414] The very same considerations of public interest as justify protection during office remain relevant in the post-employment context and will, inevitably, result in a significant range of governmental information continuing to be bound by secrecy. Simply by way of note, it is to be observed that those considerations mirror closely the ones which inform the exemptions of *Freedom of Information* legislation.[415] The complicating factors in applying the "injury" test to ex-officers are (a) the likely greater emphasis to be placed on the significance to be given open government, the more so the more distant the event etc. to which the information relates;[416] and (b) the concession likely to be made to the ex-officer where the information in question relates to knowledge acquired of the workings and processes of government — such information could, for many purposes, be treated as the public sector equivalent of private sector information regarded as part of an ex-employee's own stock of knowledge, skill and experience.

Little purpose would here be served in attempting to predict how the test is likely to operate in illustrative cases. The very obvious comments that should be made are (a) that save in clear cases involving obviously sensitive information, the test has little predictive value; and (b) that the protection it gives is instance specific and is, essentially, remedial not regulatory in character. What is demonstrable is that, on its own, the common law is an inadequate (though still necessary) instrument through which to protect such governmental information as still warrants protection. If that protection is to be effective it needs to be founded upon procedures

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414 *Commonwealth of Australia* v *John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485, at 493.

415 This is discussed in detail in Section 3.

416 See *Attorney-General* v *Jonathan Cape Ltd.* [1976] Q.B. 752; and see the observations of Mason J. in the privilege context in *Sankey* v *Whitlam* (1979) 53 A.L.J.R. 11, at 44-45.

operative at the time of, and subsequent to, termination of office which enable government both to exercise some control over later information use, and to reenforce officer appreciation of the enduring secrecy obligation. Illustrative of these are:

(a) requirements of prior consent to publication of material embodying information acquired in office;[417]

(b) in the case of ex-ministers, regulated access to information relating to the period of office;

(c) explicit secrecy agreements in relation to designated information;

(d) controls on documentary material that can be retained by an officer; and

(e) regulation of ex-officer contact with governmental agencies in the course of subsequent employment.

At this point, though, protection of official secrecy becomes caught up in other issues bearing more generally on regulation of the post-employment activities of ex-officers. And while information abuse can logically be treated as a discrete phenomenon, such regulatory steps as may be able to be taken to guard against abuse are better seen and considered as part of the totality of regulatory action that government needs to contemplate where exercising "public interest" control over the post-employment activities of ex-officers. For this reason those steps are considered in the *Report on Compromising Relationships and Other Activities*

2. THE CRIMINAL LAW

Only the Commonwealth and the A.C.T. have general criminal offences governing the disclosure of official information by ex-officers.

<u>The Commonwealth</u>

(a) *Crimes Act, 1914*, s.70(2).

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417 See e.g. *Report of the Committee of Privy Councillors on Ministerial Memoirs*, Cmnd. 6386, H.M.S.O., London (1976); *Snepp* v *United States* 444 U.S. 507 (1980).

> "A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him) any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence."

Even more so than its "in-office" counterpart offence, this can be both objectionably wide in its scope and mysterious in its possible applications.

First, for officers previously subject to the *Public Service Regulations*, this offence extends the operation of Reg. 35 to post-employment disclosure. If applied strictly it would impose a form of "information servitude" of extraordinary severity, and one which the common law, as has been seen, would not countenance. Though limited in its compass to the disclosure of "facts or documents", it could prevent, for example, information about the workings of government or of governmental programmes (if this knowledge was had "officially") ever being disclosed by an ex-officer unless the officer had "lawful authority or excuse" for the disclosure. Unless the section is to be allowed sterilize a considerable range of information which it would be quite inoffensive (apart from the section) to disclose, the "lawful excuse" proviso must necessarily be given an expansive meaning. If equated with what would be excused by the common law (an arguable interpretation), the sting of the offence is much diminished. But even then one may well ask why breach of what becomes in essence a common law duty of secrecy should be visited with criminal sanctions.[418]

Secondly, as applied to an officer not previously caught by the *Public Service Regulations*, the offence gives continuing effect to such contractual, common law or other duty of secrecy as bound that officer prior to termination of employment. There is a distinct curiosity in this at least where that duty was a common law one. As noted earlier in this Section, to accommodate interests arising consequent upon termination, the common law duty

418. The vice in this approach, though, is that the "lawful excuse" must be to disclosing what Reg. 35 and not what the common law prohibits.

continues but may contract in its information coverage. This offence disregards both the continuing nature of common law duties and the effect termination itself can have on them.

(b) *Crimes Act, 1914*, s.79.

The official secrets offence created by this section proscribes the unauthorised communication of information which the ex-officer was obliged to treat as secret when the information was obtained. While "unauthorised" refers to the time of the communication itself, the secrecy obligation would seem to refer to the time at which the information was obtained. The effect of this is to produce a situation comparable to s.70 because s.70 itself regulates the lawful authority the ex-officer has to make post-employment communications of "facts or documents". For information other than "facts or documents" — and in this s.79 is wider than s.70 — authority for post employment disclosure will depend on the common law, upon such valid express contractual provision as imposes a post-employment obligation of secrecy, or where relevant, upon such specific statutory provision as applies to post-employment disclosure of the information in question.

(c) *Crimes (Offences against the Government) Ordinance, 1989*, s.10(2)

The offence created under this section is similar to that of the *Crimes Act, 1914*, s.70(2) with the important difference that it does <u>not</u> contain a proviso which allows disclosure with "lawful excuse". In consequence, it has a decidedly larger ambit than its Commonwealth counterpart. It should again be noted that the Commonwealth's Reg. 35 applies to Territorial public servants.

While the criminal law may well have some appropriate role to play in sanctioning some forms of disclosure by ex-officers (a matter on which no opinion is expressed in this Report), it need only be said here that the offences in the two jurisdictions mentioned have little to recommend them, and for reasons similar to those which make objectionable their counterpart offences governing officials while in office.