law in a smaller world. Furthermore, if the ALRC can get it right, its report could be useful throughout the Commonwealth of Nations at least, where many of the countries are in the same legal position as Australia: looking backwards to English legal principle, developed in earlier times, for different needs and now significantly modified in their place of origin.

freedom day?

> But the privilege and pleasure
> That we treasure beyond measure
> Is to run on little errands for the Ministers of State
> Sir Wm Gilbert, *The Gondoliers*

predicted armageddon? The Australian Federal Freedom of Information Act came into force on Wednesday 1 December 1982 with a herald of editorial comments which could be described as hopeful rather than optimistic. Take the *Canberra Times* (1 December 1982):

> Emasculated or not, enough of the fundamental idea remains for things never to be the same for bureaucracy or for Government. The Australian system of Government now has firmly set in place legislation which makes the process of decision an open one. Citizens have a right to know and to challenge. A new type of accountability takes its place beside the old idea of ministerial responsibility -- an ideal which, as events in the past six months have shown, has not been working, which arguably cannot work when government administration is spread so wide, and when no minister can hope to keep abreast of what is happening even if, so rare these days, he is prepared to take responsibility. Open government is, of course, as much an attitude of mind as a matter of law.

Labelling the Freedom of Information Act a 'bold attempt to bring accountability into more routine areas of government' the *Canberra Times* pointed out that each year a full report would be given to Parliament on how it was operating and whether 'the much predicted Armageddon' had occurred.

The *Sydney Morning Herald* on the same day under the banner 'Foot in the Door' pointed out that it was nine years since the promise had been made of a Freedom of Information Act:

> But once launched, proposals like this assume a momentum that any amount of bureaucratic restraint cannot stop. . . . To be sure the legislation falls a long way short of its original intentions . . . The repeated sniping from bureaucrats and politicians has ensured in the end that there are too many exemptions and qualifications . . . The motivation behind this resistence is clear enough. Secrecy has been seen all too often as a convenient shield against accountability. Life is much easier if information on what is being done (and sometimes not done) is kept from the public.

Singled out for special concern by the *Sydney Morning Herald* was the exemption for so called 'internal working documents'; described a 'no go' area involving 'the most important workings of government'.

Speaking at the opening of a conference of Australasian Ombudsmen on 25 October 1982, the Prime Minister, Mr Malcolm Fraser, said with heavy irony that the public service was looking forward to the legislation with 'joy and elation'. He praised the Ombudsman as an institution helping government administration to be responsible and adaptive and sensitive to the needs of average citizens. And he conceded:

> It is also worth noting that freedom of information legislation is not the answer to all requests for information. I don't think one of those telephone book-thick sets of papers that John Howard tabled the other day would have got through if you had applied a freedom of information test. So, some things being tabled still will depend on the attitudes of governments rather than on the law itself.

slow learners. Numerous news items accompanied the enactment of the legislation, with wry comments from hard bitten journalists:

- Jack Waterford in the *Canberra Times* (25 November 1982) suggested

that the government had already adopted a 'hard line approach' to the interpretation of what were 'internal working documents' and had imposed a six year rule on disclosure of any documents involving ministers. On the other hand, he pointed out that even a six year 'rule of thumb' would possibly presage much earlier access to Cabinet documents than at present, when they are restricted for much longer terms. He described as 'anti-journalistic' provisions warning against the automatic official release of documents which have already been 'leaked'.

- In the *Canberra Times* of 28 November 1982, an unnamed journalist attributed to 'senior public servants' worry about how 'a certain fairly flamboyant permanent head' will tackle requests. As reported, this unnamed mandarin had declared that he proposed to reject all requests and make everyone who persisted go to the courts'. Fear was expressed that this might lead to a curial and public reaction.
- Reporting in the same journal on 2 December 1982, Jack Waterford was able to reassure the anxious citizens of Canberra that the structure of Australian Government had not collapsed with the introduction of the FOI Act. He estimated that approximately 100 applications for access to Government documents were filed on the first day, but that the biggest problem of the Public Service concerning the Act was 'profound boredom'.
- Greg Turnbull in a front page spread in the *Sydney Morning Herald* (1 December 1982) told the bemused readers ' How to Get Access to your File'.
- Stephen Mills in the *Age* (1 December 1982) predicted that Federal Public Servants were 'continuing to dig their heels in against its smooth implementation'. For a practical exercise in the world of 'Yes, Minister' nothing, declared Mills, could be more instructive than the list of 21 form letters prepared by the Australian Public Service to meet all situations that may arise 'in the new information game'. While suggesting that the Bill was a 'toothless tiger', he was willing to concede that the strength of the Bill was the requirement that all requests had to be answered within 60 days and provision for appeal against delays, denials and charges to the Ombudsman, the Administrative Appeals Tribunal or the newly created Documents Review Tribunal. The facility of access to personal files is also seen as an important step forward.
- Writing on day 5 in the *Canberra Times*, Jack Waterford (5 December 1982) recounts the training techniques being used by Federal departments. One, he alleges, is unkindly dubbed 'The School for Slow Learners' and is set up to ensure that the FOI spirit eventually 'percolates through'. How the Ombudsman, much praised by the Prime Minister, will be able to cope in his already hard pressed, lean administration, is yet to be made clear. There has been a tendency of late to heap more jurisdiction on the Ombudsman and AAT, without commensurate increase in skilled personnel and resources.

state moves. In the Australian States, moves towards FOI have begun. On 14 October 1982, the new Premier of Victoria, Mr. John Cain, moved the Second Reading of the Victorian Freedom of Information Bill. He declared that it was 'tangible proof' of his Government's commitment to open Government in Victoria. He pointed out that Victoria would be the first State in Australia to enact FOI legislation and that the Bill provided

people with a legally enforceable right of access to government records. An Implementation Committee under the chairmanship of the Law Department had been established to implement a code and to prepare guidelines for the FOI Act. Provision is made for internal review and for review by appeal to the County Court of Victoria against a decision denying or deferring access. Provision is also made for the amendment of personal records. On 16 December, Mr Cain's prediction was fulfilled when the Freedom of Information Bill passed through the Legislative Council of Victoria and came into law.

The introduction of the Victorian Freedom of Information law was accompanied by a Government requirement that departmental and statutory officers are to present statements of financial interest before they take up appointments. Furthermore, major changes are to be made for the procedures for declaring interests of Members of Parliament and State employees to widen the number of people who have to make declarations and to widen the range of assets that have to be disclosed. These moves were welcomed by the Melbourne *Herald* (21 October 1982) in an editorial under the heading 'On to Open Government'. The FOI Act was, poetically described as 'one of the jewels of the Government's reformist crown'. One amendment to the original Bill, however, removes automatic notification where a third party seeks information about the data subject. Another allows a court to award costs against the public authority where an applicant for information successfully appeals to the County Court.

In the other States, progress is more cautious. As the *Sydney Morning Herald* noted on the commencement of the Federal Act, observers of the New South Wales Government are still waiting. Apparently willing to wait no longer, the Shadow Attorney-General, Mr. T.J. Moore, on 14 October 1982 introduced his Freedom of Information Bill on behalf of the Opposition. The Bill provides a role for the State Ombudsman, including representing people before a court on appeal against refusal to supply developments. In addition to this and internal review, it provides for an appeal to the Administrative Division of the Supreme Court against the refusal to supply documents or delay in their provision. The Moore Bill had not made much progress when the N.S.W. State Parliament rose for the Christmas recess. Whether it will stimulate the presentation of the N.S.W. Government's legislation remains to be seen. A report in the *Sydney Morning Herald* (11 September 1982) by Milton Cockburn suggests that the Deputy Premier, Mr. Jack Ferguson, has resolved that 'pressure' for the early introduction of the State FOI Bill proposed by Professor Peter Wilenski 'must be stepped up'. The same article concedes that there 'has been little enthusiasm in official circles in N.S.W. for this type of legislation'.

federal review. In the midst of these important FOI changes, other developments have been occurring in the administrative law area which should be noted:

- the three man review of Commonwealth administration led by Mr. John Reid is completing its examination of the Federal Public Service and plans to deliver its report in early 1982. According to Mr. Fraser's address to the Ombudsmen (see above) the team 'is not trying to see what has gone wrong in one area or another. What it is seeking to do is to see whether the service and the Second Division in particular, has available to it the management tools, the techniques, the equipment and the support that is necessary not to drag along behind the private sector and those elements of the private sector that would challenge proper administration, but rather to enable the Public Service to be so far ahead'.
- The Public Accounts Committee of the House of Representatives chaired

by Mr. David Connolly, M.P., presented its report with some salutory facts about the narrowness of the Federal Public Service. According to a review by Michelle Grattan in the *Age* (1 November 1982), Public Service management needs managing. Various thoughts raised include the appointment of departmental heads for a fixed term (generally suggested to be 5 years) and greater opportunity for recruitment from outside the Service at the top level. On the one hand fear is expressed in some quarters that this would politicize still further the Australian Public Service.

- The continuing advance of effective judicial review can be read into a decision of the High Court of Australia in a case involving a challenge by the Church of Scientology to a suggested investigation by the Australian Security Intelligence Organisation. The Chief Justice, Sir Harry Gibbs and Justices Mason, Murphy and Brennan, went to some pains to assert that the Court could scrutinise the activities of ASIO and that it was not, by some means, outside the scope of constitutional judicial review. In October 1980, Mr Justice Wilson had upheld an application by the Commonwealth to strike out a statement of claim forming the basis of the action. He dismissed the action in language which suggested that ASIO might be beyond the review of the Court. Although the actual case was dismissed on appeal, the judges being divided on the result, the notions of immunity from review by the Court were rejected. Mr. Justice Murphy said that ASIO and its members were subject to administrative control by the Federal Executive Council. He pointed out that Parliament had not purported to 'immunise' ASIO from judicial process and that constitutionally it could not do so. He suggested that the necessity for controls was demonstrated by the history 'of such organisations here and overseas'. Characteristically, from time to time, they exceeded and misused their powers. Mr. Justice Brennan pointed out that judicial review was neither more nor less than the enforcement of the rule of law over Executive action. The secrecy of the work of a body such as ASIO was essential to national security. Nevertheless 'the veil of secrecy was not absolutely impenetrable'. Once again, an important assertion by the 'least dangerous branch' of its ultimate review function.

- In an address to the Law Society of Western Australia, Allan Hall, past ALRC Commissioner and now a Senior Member of the Administrative Appeals Tribunal, called attention to the flexibility and informality of the procedures of the AAT. In a useful review of the increasingly widening and varied jurisdiction conferred on the AAT, Mr. Hall set out to scotch the complaint voiced in some administrative quarters that it was too legalistic and curial in its approach. Because of the diversity of jurisdictions which the AAT is called on to exercise, Mr. Hall pointed out that there 'is not and there cannot sensibly be any standard procedural mode to which all proceedings before the Tribunal must conform. To a greater extent than is normally expected of any court, the Tribunal must develop procedures that are appropriate to the task in hand'. Certainly, the AAT is giving the lead with its innovative preliminary conferences and telephone hearings. Mr. Hall broke further ground in November 1982 when he undertook an interview for the A.B.C. program 'The Law Report'. In sensible and simple language, he

outlined the work functions and procedures of the AAT. The need to interpret helping bodies to a wide community is not perceived in all judicial and quasi judicial quarters.

- One interesting development in the AAT is the growing tendency of Tribunal members to call to notice the need for law reform in cases coming before them. Mr Ewart Smith, Senior Member, did so in September 1982 in the case of *Rucevic and Director General of Social Security.* In that case he called attention to the unfair operation of sickness benefits provisions under the Social Security Act. Mr. R.K. Todd, Senior Member, drew attention to anomalies in the handicapped child's allowance in the decision in *Schramm and Director General of Social Security* in October 1982. The role of the AAT in aggregating review experience and proposing the needs for reform (possibly in conjunction with the Administrative Review Council) is something to be watched.
- The *Canberra Times* on 18 October 1982 brought the news of a strong call at the Annual Conference of the National Party for review of the Australian taxation system. The Conference had before it the report of a committee appointed to the Party's Federal Council in 1980. In its discussion paper, the Committee said the present Income Tax Assessment Act was the product of '46 years of adjustment, amendments and patching' which has made the Act 'complex, discriminatory and inequitable'. One of the current tasks of the Administrative Review Council is review of income tax procedures. A discussion paper is being circulated by the Council suggesting reforms in review of income tax decisions. The National Party discussion paper would go further, suggesting major overhaul of the legislation.
- In a number of jurisdictions, the power of the Ombudsman, especially in relation to police, has been under review in the last quarter. In the Supreme Court of New South Wales Mr. Justice Lee held that the lamp of scrutiny 'only flickers uncertainly' when the Ombudsman investigates police. He suggested that the Act passed by the N.S.W. Parliament 'seriously' inhibits the Ombudsman in the investigation of complaints. In October 1982, the N.S.W. Premier, Mr. Wran, said that he would seriously consider a call by the State Ombudsman, Mr. George Masterman, Q.C. for greater powers to investigate complaints against police. Greater powers are enjoyed by the Commonwealth Ombudsman, Professor Richardson under legislation which broadly follows an earlier ALRC report. In New Zealand, in an address to the Annual General Meeting of the New Zealand Council for Civil Liberties, the Chief Ombudsman, Mr. George Laking, spoke of the limitations on his functions in investigating complaints against the police in New Zealand.
- An interesting review of the Federal administrative law is contained in the article by Brian Jinks "The 'New Administrative Law': Some Assumptions and Questions' published in the *Australian Journal of Public Administration* September 1982, 209. Concern is expressed that some of the provisions of the new Federal administrative law might themselves 'lead to further expansion of government'. It is also suggested that insufficient attention has been paid to the need to prevent administrative errors. Instead there is a pursuit of the lawyer's normal concern to correct errors and redress them after they have occurred. Perhaps the Reid enquiry will provide suggestions for more such preventa-

tive attention.

- The Australian news media have been full of talk in recent weeks about the new Federal administrative law in Australia. In a series of articles Anne Summers in the *Australian Financial Review* talked of 'Bureauracy in crisis' and suggested that the new legal developments were 'the hottest growth industry in town'. Picking up a point similar to that made by Dr. Jinks, she described how, in her words, 'a well intentioned reform is threatening to turn into an administrative monster'. At the heart of the problem she claimed was a breakdown in trust between Cabinet and the bureaucracy, described by one official as 'the subversion of the advisory process' (*Australian Financial Review*, 17 November 1982). The articles are heavy with quotations from unnamed departmental officers critical of the 'little publicised reforms' which 'open avenues for the judicial review' of administrative decisions. The articles mobilised Mr. R. V. Gyles, Q.C., a Sydney barrister and a long time member of the Administrative Review Council to point to the function of that Council as a body that strikes the right balance. According to Mr. Gyles, the Summers' articles reproduced 'almost verbatim the unattributed views of the most entrenched and reactionary members of the senior bureaucracy, who have fought a mighty rearguard action against these modest reforms since their introduction and who are now mounting a counter attack'. 'Methinks' said Mr. Gyles 'they protest too much'.
- By the same token, an Assistant Commissioner of the Australian Public Service Board, Mr. Bruce McCallum, was reported in the *Sydney Morning Herald* (23 October 1982) as calling for a halt to 'indescriminate criticism' of the Public Service which he described as a body 'under organisational stress'. He talked of the past decade as 'a decade of turbulance' for the Service with vastly increased workloads, yet cuts in staff and deterioration in industrial relations, a series of Government reviews and ever increasing scrutiny from all sides.

meanwhile overseas . If Australian bureaucrats feel beleaguered, they can perhaps take comfort from the fact that they are not alone. Things are happening in foreign parts.

- In Canada the Access to Information and Privacy Act was given the Royal Assent in 1982 after a long meandering procession to the law books. An article by Tom Riley in *Miniature Computer News* (October 1982) suggests that Canada may be able to teach the United Kingdom that freedom of information is compatible with the Westminster system. Perhaps Australia will have lessons too.
- In Britain, the sceptics remain in the ascendant. Although a promise of privacy laws has been made by the Government in compliance with the obligations imposed by a Convention of the Council of Europe, the enthusiasm for FOI remains distinctly muted. On September 25, 1982, came the news of the decision of the Court of Appeal in *Air Canada and Anor* v. *Secretary of State for Trade* (Times Law Report, 25 October 1982). In one of the last judgments delivered before his retirement, Lord Denning and Lords Justices Watkins and Fox, held that where 'public interest immunity' was claimed by a Government department in respect of documents, the production of which was sought by a plaintiff for use at the trial, it was for the Court to decide whether the docu-

ments should be produced in the interest of justice. But justice did not always depend on eliciting the real truth of what happened and sometimes the plaintiff may have to prove his case without discovery. Air Canada was denied access to Ministerial documents relating to the formulation of Government economic policy which the Secretary of State for Trade decided it was not in the public interest to disclose. The Court would not override a Ministers certificate 'except in extreme cases'. Lord Denning suggested 'the open Government' calls were voiced 'mainly by the press, critics and oppositions who want to know all about the discussions that went on in the inner circles of Government'. So far, not with much luck in Britain.

- Indeed, in an only partly humorous item in the London *Times* in November 1982, it is suggested that the secrets of the war of 1066 cannot yet be disclosed for fear of irreparable damage to the public interest.
- An important new book has just been published by Tom Riley and a co-author Harold Relyea '*Freedom of Information Trends in the Information Age*, Frank Cass, London, 1982. The book reviews the moves towards FOI and contains reports on the operation of the United States law.
- Another useful reflection is the examination by Mr David Williams, President of Wolfson College Cambridge and an authority on administrative law of the Donoughmore Report in retrospect. It is published in *Public Administration*, vol. 60, 1982, 273. The report appeared in 1 932. It made numerous proposals concerning minister's powers. Its implications for the adjustment of institutions to the growth of governmental and departmental authority, the accession of the United Kingdom to the EEC and the fears expressed by Lords Devlin and Denning in recent writings are all tackled in this thoughtful article by Mr Williams. He points out that there has never been an official enquiry into administrative law as a whole in Britain. The 1969 proposal by the English Law Commission that a Royal Commission should do this was rejected by the Lord Chancellor in the same year. An effort to export a few Australian ideas to Britain and Europe may be found by the recent visit of AAT President, Mr Justice Davies to England and Europe. His Honour is one of the small international team of distinguished consultants working on the Justice and All Souls review of administrative law in Britain. And there are doubtless one or two salty Australian administrators who would have something to tell their counterparts in the plush imperial offices overlooking Whitehall.

medical law

Either he's dead or my watch has stopped.
Groucho Marx c 1935

tissue transplants. The venture of law reform into the bioethical sphere really started in Australia with the project of the Australian Law Reform Commission on Human Tissue Transplants. The ALRC report (ALRC 7) has now been adopted, with minor variations, in the A.C.T., Queensland and the Northern Territory. In the last quarter, two further Australian jurisdictions took the plunge:

- In Western Australia, the Human Tissue Transplant Bill 1982 was introduced based upon the Commission's report.
- In Victoria, the Human Tissue Bill 1982 was prepared by the new State Minister for Health, Mr. Tom Roper,