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Reforms to counter a culture of secrecy: Open government in Australia

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ABSTRACT

Governments for most of recorded history have surrounded their information and decision-making with a culture of secrecy. By the latter half of the 20th century western liberal democracies, driven by right-to-know movements, slowly moved away from secrecy towards more openness of government through public access to its information. Australia, with a series of reforms beginning in the late 1970s, declared in 2010 that government information was a national resource, and public access was the default position. This paper, by providing a history of the Australian Commonwealth legislative and regulatory reforms, their impetus and interpretations, explores the ebb and flow of openness and the intended and sometimes unintended, consequences for traditional government secrecy. Using the complete freedom of information datasets made available by these reforms, the paper presents an insight into government attitudes to openness by providing access to its information. These datasets also enable research into government and bureaucratic actions to pushback against these reforms for pragmatic or ideological reasons. The paper concludes that although there continues to be worrying vestiges of secrecy, on balance, Australia has achieved much in countering a culture of secrecy and the delivering more openness of government.

1. Introduction

Open government, the twentieth century zeitgeist of liberal, democratic societies, promises transparency, the empowerment of citizens, the fight against corruption, and the harnessing of new technologies to strengthen governance.[1] Rulers throughout history have collected information for practical, legal and administrative purposes, in the interests of state stability, taxes, economic development and trade. Sometimes this information was about the people they governed and sometimes it was non-personal information, still the normative practice of contemporary governments. However, in the main these records were available only to the ruler and his bureaucrats. Secrecy was the norm. The gradual eroding of secrecy as a normative practice is a relatively recent phenomenon that builds on the liberal ethos of Thomas Hobbes, Edmund Burke and John Stuart Mill and on the movements of the eighteenth century when the revolutions in England and France fostered questioning the legitimacy of absolute autocracy and state secrecy.

One of the drivers that challenge state secrecy is the demand for information, which, in turn, drives reform that delivers more demand, often with unexpected impact and consequences that include demands for further reform. This paper proposes that reforms are often incremental with an ebb and flow nature; that government policy adoption and implementation "do not operate in a vacuum" (Julnes & Holzer, 2001, p. 696). There are many factors that influence these incremental changes, not all of which are legislative or regulatory. As Kreimer (2008) points out there are other actors who affect the governmental reform process—bureaucrats, national and international institutions, an open media and civil society actors who pursue campaigns for transparency and the right to know. One must also consider political and commercial factors and the implications of self-interestedness. An early and long-lasting action for opening government policy discussions to the public was in 1783 when the ban on the 4th estate taking notes of English parliamentary debates was lifted. This reform enabled greater public scrutiny of parliamentary proceedings, leading to disquiet among the parliamentarians. Ultimately, in an act of commercial and political expediency, William Cobbett, a publisher, persuaded the parliamentarian William Windham that Cobbett's *Parliamentary Register* would be politically important as a check upon the pro-ministerial newspapers. In time Cobbett's Parliamentary Debates, became the official parliamentary record, the precursor of contemporary official Hansards (Grande, 2014, p. 47). While the public parliamentary debates are still recorded and available to the public, as we shall see, non-public deliberations and decision-making processes are not; they remain secret and exempt from disclosure.

It is also difficult to discount the disruptive and transformative power of technologies in driving reform; the invention of the printing press leading to the reformation movement comes to mind.

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[1] *Open Government Partnership,* https://www.opengovpartnership.org/about/.

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Analogously, much of the current discourse around the concept of open government focusses on e-government which of its nature demands more and more access to information; as Castells remarks "reform of the public sector commands everything else in the process of productive shaping of the network society. This includes the diffusion of e-governance (a broader concept than e-government because it includes citizen participation and political decision-making)" (Castells & Cardoso, 2006, p. 17). And indeed, many of the recent major reforms for greater access to government information in Australia were driven by the 2009 Government 2.0 Taskforce set up to examine how the collaborative tools of the Web could achieve open, accountable, responsive and efficient government (Gruen, 2009).

The paradox is the pushback against reform to self-interested secrecy. Self-interestedness can be about power, expediency or cynicism. As Weber memorably commented "every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret" (Weber, 1946, 2009, p. 223), or in the words of Brown (2007) freedom of information "can be inconvenient, at times frustrating and indeed embarrassing for governments". The Government 2.0 represented "a shift to an assumption that government information is open by default, in the absence of good reasons to the contrary" (Gruen, 2009, p. 4); it is these reasons that are the basis of often controversial decisions that cause or underpin resistance to openness and perpetuate the perception that there is still a culture of secrecy.

This paper gives an overview of Australian reforms that were designed to enable access to Australian public sector information, specifically Commonwealth government information. In this context government information consists of all information products in any format, generated, created, collected, processed, preserved, maintained, disseminated, or funded by the Commonwealth (Gruen, 2009, p. 4). It recognises that at various times, some of this information may not necessarily be publicly available because of the constraints of other policies; policies such as intellectual property (IP) rights, national security or personal privacy. It is often the case that these same policies are also subject to reform—relaxing, narrowing or interpreting—and the determination of what is openly accessible to citizens. The paper explores the gamut of reforms that were born out of ideals and pragmatism, and then examines the factors that militate against these same ideals—realism, expediency, ideology and, possibly, cynicism; or as Worthy (2017) provocatively wonders "how and why governments pass laws that threaten their power".

2. Thirty years of access to information reform

Secrecy laws that impose obligations of confidentiality on individuals handling government information—and the prosecution of public servants for the unauthorised disclosure of such information—can sit uneasily with the Australian Government's commitment to open and accountable government. Secrecy laws have also drawn sustained criticism on the basis that they unreasonably interfere with the right to freedom of expression (Australian Law Reform Commission (ALRC), 2009, p. 21).

According to Paul Finn (1991, p. 90), in Australia "official secrecy has been the legislatively enforced norm". The first colonial secrecy provision, *Victoria 1867*, required 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", a secrecy mechanism that continued, until the reforms of 2010, in the guise of ministerial vetoes and conclusive certificates. Furthermore, in Australia, a Westminster system of government, all "documents prepared by Crown servants become Crown property and, as such, matters which the Crown could disclose or withhold at will" (Campbell, 1967, p. 77). It should be noted that while a non-Westminster system such as the United States where works of the Federal Government do not have copyright protection (s 105 of the US Copyright Act 1976), it doesn't necessarily mean that it is made available or disseminated to the public (for a comparative discussion see Gilchrist, 2012). By the time of Australian federation in 1901, McGinness (1990) notes that the first federal secrecy provisions were legislated in the Commonwealth of Australia. Post and Telegraph Act (1901) and, based on the British Official Secrets Act, continued primarily to be concerned with defence and security. However, after World War II as the role of the Australian Commonwealth expanded into other areas "such as taxation, health, education, welfare, scientific research, industry assistance and regulation, secrecy provisions increased in number as a reflection of the increase in personal and commercially sensitive information collected by the government" (McGinness, 1990, p. 49). A further consequence of this expanded role was the new provisions for the management of government information. Until the twentieth century, most government records were collected and housed in government administrative units. It was not until World War II that the decision was made to establish a Commonwealth archives housed within the Commonwealth Library, later the National Library of Australia, and in 1961 a separate institution was set up, finally to become the National Archives of Australia in 1974 (Cunningham, 2005). This, therefore, is the background to the reforms that brought about huge changes in the access to government information in Australia.

Beginning in the 1960s, the reforms were part of a gradual movement that can loosely be brought under the umbrella of the 'right to know' movements of the second half of the twentieth century and accelerating in the first decade of this century. There were two major periods of reform; the mid-1970s and early1980s when new laws were developed to enforce government accountability, including the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977, and the proposed Freedom of Information Bill (Thynne & Goldring, 1981). In 2009–2010 a second tranche of major reforms, riding on the open government movement, provided, at least in theory, the greatest openness in Australian history. In 2011, the Commonwealth declared that government information is a national resource and that "open access to information [is the] default position" (Office of the Australian Information Commissioner (OAIC), 2011).

Several of the most far-reaching of these reforms—the Archives Act 1983 (Cth), the Freedom of Information Act 1982 (Cth), the Privacy Act 1988 (Cth), Freedom of Information (Reform) Act 2010 (Cth), the Information Commissioner Act 2010 (Cth), and the Statement of Intellectual Property Principles for Australian Government Agencies 2010—successfully challenged and loosened state secrecy. I have already suggested that increased reform can impact government processes and citizens' demands in both predictable and unforeseen ways. As Stewart (2015) pointed out, parliamentary committees in their deliberations on more access to government information through legislation "fail[ed] to engage with the extent passage of the FOI Act might itself encourage further change and the implications that may have" (p. 104). To suggest that these reforms are inherently related, one can quote the first recommendation of Hawke (2013) Review of the 2010 FOI reform legislation: that a comprehensive review be undertaken in which it "might also consider interaction of the FOI Act with the Archives Act and the Privacy Act and other related legislation" (Hawke, 2013, p. 4). The following section briefly describes each of these legislative reforms in order to examine their consequences and the ramifications for the longstanding culture of secrecy in Australia.

2.1. Accessing the archive

> *There is no political power without control of the archive… Effective democratization can always be measured by this essential criterion: the participation in and access to the archive, its constitution, and its interpretation*
>
> (Derrida, 1996, p. 4).