Privacy Commissioner (and this indeed might be possible even where there is overlap between the two concepts); see IPP 7 and ss 13 and 36ff of the *Privacy Act* 1988.

2. The conclusion of the Tribunal that information concerning a person's work performance related to personal affairs where it also had the character of relating to and tending to destroy a person's professional reputation is an interesting and plausible application of the analysis of 'personal affairs' by the court in *Department of Social Security v Dyrenfurth*. The question will be how far this goes. It might be argued that any information in the document(s) in issue which raise serious questions about a person's competence in her or his vocation or profession should similarly be seen to relate to personal affairs, and on this basis *Re Jones and Attorney-General's Department* (1989) 16 ALD 732 could have been decided the other way.

3. The approach of the Tribunal to the question whether a statement was incomplete is of interest. One possible approach to this question would be to ask whether the statement was complete in itself — that is, intelligible as to what is conveyed — so that reference to some other material was not necessary in order to understand what was conveyed to the reader. This approach might be supported by reference to the way that the Tribunal in other decisions has approached s.12 of the Act (see *Re Waterford and Department of Treasury* (1983) 5 ALD 193, discussed in Bayne, *Freedom of Information* (1984) 63ff). But clearly the Tribunal did not take this approach, and looked instead to the quality of the information in the statement in the sense of asking whether it presented a complete (in the sense of adequate) picture of the topic addressed by the statement. On this approach, as *Re Toomer* illustrates, it is open to an applicant to adduce evidence of other elements of the topic which were not adverted to in the statement and then to ask the Tribunal to find that the statement is thereby incomplete. Whether in a particular case that conclusion should be drawn is of course a matter about which reasonable minds can easily disagree, not only about the ultimate question, but about just what is the topic to which the statement may be said to relate.

A more particular question is whether in making this assessment the Tribunal should put itself in the position of the maker of the statement and consider what he or she should have considered relevant to a complete statement, or, alternatively, approach the question objectively and take into account matters which the maker of the statement should have considered. The examples noted above (see in particular para. 8 of Document 2) suggest that the Tribunal took the latter approach.

The holding that a statement was incomplete and misleading if it did not provide a valid reason to explain it is of interest (see para. 9 of Document 1). This may suggest a means whereby applicants can seek review of statements in documents which do not provide reasons and, further, that they may attack the validity (in the sense of persuasiveness) of the reasons given.

4. In relation to statements of opinion, the Tribunal follows the now accepted approach that it is not limited to an examination of whether the opinion was recorded correctly, but may go further to examine whether it was correct in the sense that having regard to the underlying facts it should have been formed. Again, it seems that the Tribunal took an objective approach, for it considered underlying facts which in all probability were not known to the maker of the statement.

It might be noted that the Tribunal was not loathe to record adverse opinions about persons; see for example its comment on the technical expertise of the Sydney office. Could those persons — who one might presume could be identified by the Department, and whose reputation might suffer — seek the amendment of the Reasons for Decision of the Tribunal?

It should also be noted that it is probable that the opinions in the documents about the competence of Mr Toomer had been traversed in a 1974 Disciplinary Appeal Board hearing and in a 1977 inquiry (paras 55 and 57). The case may therefore illustrate the use of the s.48 procedure to canvass again matters which have been the subject of formal (although non-curial) determination. Again, it might be asked whether a determination of the AAT could be re-opened in this way (see Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation* (1987) at 213ff).

5. The hearing of this matter took 40 days, primarily in taking and testing evidence given by Mr Toomer. The Tribunal also heard oral evidence from other witnesses, but the maker of the statement (Dr Mathieson) and Mr Dienhof did not give evidence (which may have lead the Tribunal to more readily accept the evidence of Mr Toomer). Perhaps a hearing of this length and complexity was inevitable, but the cost to the public must be a matter of concern.

[P.B.]

RECENT DEVELOPMENTS

VICTORIAN GOVERNMENT RESPONDS TO LEGAL AND CONSTITUTIONAL COMMITTEE REPORT

Late in 1989 the Legal and Constitutional Committee released its report on the operation and administration of the Victorian *FoI Act*. The report's recommendations are outlined in 25 *FoI Review*.

The following are excerpts from the Government's response to the Committee's report.

Cabinet Documents

By the terms of reference, the Committee was called upon to consider the means to preserve Cabinet confidentiality of working and other documents leading up to, or forming part, of the Cabinet process to ensure effective government administration.

The principle of Cabinet confidentiality lies at the heart of the Westminster system of government.

Cabinet proceedings have always been regarded as secret and confidential. The efficiency and effectiveness of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they, or the topics to which they relate, are still current. Decision-making in government would become impossible if the decision-making processes of Cabinet and the materials on which they are based are not confidential.

While the majority report pays lip service to the need for this confidentiality, it fails to appreciate the true nature of the Cabinet process. As a result it has failed to deal adequately with the two critical problems which the current exemption poses for the Cabinet process. These are:

(1) the narrow interpretation placed on the definition of Cabinet documents by the Supreme Court and, in particular, upon the degree of Ministerial involvement stated to be required in the preparation of a document if it is to be classified as a Cabinet document; and
(2) the absence of statutory recognition of the principle that the disclosure of cabinet documents is a prerogative that properly resides in the Cabinet.

At best the current situation is confusing and the legislation should be rectified to clearly reflect the reality of government processes. The NSW Act does just this in its definition by which a document is exempt if 'prepared' for submission to Cabinet. So does the Commonwealth Act where a document is exempt if 'proposed' by a Minister for Cabinet. The NSW definition should be adopted in Victoria as being most in accord with the reality of the process.

Review of Cabinet documents

Neither the courts nor the AAT are appropriate bodies to review decisions on the classification of Cabinet documents. Neither are in a position to understand and assess the intricate and complex workings of Cabinet government. The classification of material as Cabinet material can only be done by the Cabinet itself. This has been accepted in the Commonwealth and, as recently as last year, in the NSW Act. For such decision, Cabinet should be responsible to Parliament, as with all other Cabinet decisions.

The inadequacy of the majority's analysis is demonstrated in the way they review the case law which has developed in recent decades concerning the doctrine of Crown privilege. In seeking to apply it to s.28, the *majority has failed to recognise the fundamental difference between discovery of documents in civil or criminal proceedings and access under freedom of information legislation.*

To say, as the majority do, that the fact that a Cabinet document may in some cases be disclosed to a court for use by a litigant demonstrates that Cabinet documents should be produced in other instances ignores the fact that any material, regardless of its sensitivity, which is produced in the course of litigation may be the subject of protection by the judge as to the nature and extent of its use and is produced under an implied undertaking that it will not be used for any purpose outside the particular piece of litigation. Disclosure of the contents of Cabinet material in such circumstances is not disclosure to the world at large.

By contrast, the access that is granted under the *FoI Act* can in no way be restricted and effectively gives access to the world at large.

Voluminous and vexatious requests

In its submission to the Committee, the Government argued that a provision similar to s.24 of the Commonwealth *FoI Act* should be inserted into the Victorian Act. The Committee has accepted this submission with the addition that the Ombudsman should have power to mediate where an agency and an applicant cannot agree.

The Government welcomes the Committee's acknowledgement of the need for a provision similar to s.24 of the Commonwealth *FoI Act.* However, the additional provision concerning the role of the Ombudsman may ignore the existing internal review procedures. It requires further consideration and the Government reserves its position on the issue.

Moreover, in rejecting the Government's submissions concerning vexatious and frivolous requests, but recommending a provision covering voluminous requests, the Committee has addressed only one half of the problem.

Further, in examining what constitutes a voluminous request, the Committee has failed to appreciate that an applicant may lodge a large number of individual requests which, when viewed separately, appear to be reasonable. However, when lodged together, often simultaneously, they form a package which is certainly voluminous, may be vexatious and in some cases even frivolous as well. Problems also arise where applicants make repeated requests for the same documents even where the agency's decision to deny access has been upheld by the Administrative Appeals Tribunal.

Costs

In its submission to the Committee, the Government raised the difficulties faced by public administration in recouping even a small proportion of the costs involved in processing a freedom of information request. While FoI was not designed to be self-funding, a reasonable balance between the cost of processing requests and the imposition of charges needs to be found. The most significant problem is created by Members of Parliament and others making voluminous requests which require much search and copying time in locating and providing documents which are never or only fleetingly inspected.

In recommending that the current limit of $100 on individual requests remain in the legislation, albeit indexed in the future, the Committee demonstrates a total lack of understanding of the vast time and effort involved in the processing of many FoI requests, even where the requests are not voluminous in nature. The Act provides adequate grounds for the waiver of charges by agencies, and agencies have been very willing to waive charges in the past in appropriate circumstances.

Currently the *FoI Act* imposes no fee on initial application or internal review. *FoI* charges are set at a level which does not discourage voluminous or vexatious requests. The maximum charge of $100 that can be imposed often results in the taxpayer footing the bill for unrestrained use of FoI. Further, the Public Service becomes distracted in FoI research instead of performing its primary task of serving the community.

In dealing with the issue of costs, as in a number of other aspects, the Committee has addressed FoI as if it were a single, isolated issue. But the Government can-

not do this. It must be balanced and responsible in its approach and must take into account a whole range of issues including FoI. To maintain the current situation, as the Committee has recommended, would be to risk serious detriment to public administration and resources and therefore to principles to which any responsible government must attend.

Accordingly, the Government maintains the position it put in its submission to the Committee, namely that:

(1) a flat non-refundable $15 initial application fee be imposed and the $100 limit on charges should be removed to allow the actual cost of the request to be recovered in accordance with hourly rates and copying fees set by regulation subject, of course, to provisions for waiving fees in appropriate cases;
(2) MPs should be charged for FoI requests on the same basis as all other applicants; and
(3) The AAT should have discretion to award legal costs to an agency where an application is vexatious or frivolous.

Exemption of agencies

In recommending that no agency exemptions should exist and that exemptions should only be made on a document by document basis, the Committee ignores the workload requirements imposed on agencies by the *FoI* Act. These requirements, and in particular the obligation to prepare Part II statements, the processing of requests and defence of decisions before the AAT and courts, and the preparation of materials for inclusion in annual FoI reports, are resource-intensive and have the potential to impede substantially the work of smaller agencies. Where much of the agency's material is exempt, because of the nature of the agency's work, this devotion of public resources to FoI is not justifiable. This is in addition to the problems experienced by investigative agencies such as the Ombudsman and the Auditor-General receiving, gathering, and handling sensitive information.

It is therefore the Government's intention to maintain the Freedom of Information (Exempt Offices) Regulations and not to bring the bodies thereby exempted within the ambit of the *FoI Act*. The Government may consider whether those regulations could be amended to bring the purely administrative aspects of those bodies within the ambit of the *FoI Act*. But any such consideration would involve careful assessment of the impact any such move would have on the primary roles of those bodies.

School councils

The Government made no submission to the Committee regarding the desirability of bringing school councils within the ambit of the *FoI Act*. Having considered the case which the Committee has made for this change, the Government is not yet convinced that it is, on balance, desirable.

School councils are locally elected bodies and it is notable that other elected bodies are not subject to the *FoI Act*. The Committee has considered the status of school councils as an abstract issue without due regard to the practical situation applying in school communities.

Documents held by school administrations are already within the scope of the legislation, as are all documents relating to school council contact with the Ministry of Education. The additional range of documents which would be available under FoI is minimal and must be balanced against the potential detrimental effect on community participation and the possible use of the legislation to polarise small communities over minor disagreements.

Because of the role of school councils, the Ministry and the councils themselves are anxious to create open processes in the work of the councils. Meetings are open and informal with the object being to create the greatest possible participation by all members of the school community in decisions about that school.

Incorporated companies and associations

The Committee has recommended that incorporated companies and associations established by government to pursue public purposes should be included within the ambit of the *FoI Act*. Such bodies are exempt from the provisions of both the Commonwealth and New South Wales *FoI Acts*.

In reaching its conclusion the Committee does not appear to have examined the issues and makes no reference to evidence save for one submission by the Law Institute.

In the absence of a proper examination of the issues balancing the community interest with the position of the particular companies or associations, the Government cannot accept the Committee's recommendation.

Local Government

The *Local Government Act* 1989 constituted a major step in the reform of local government processes in Victoria. That Act makes Councils more accessible to residents. It is the Government's view that an adequate period should be allowed in which to assess the operation and effectiveness of the new legislation.

It would only be after an adequate assessment of the operation of Councils under this new Act that it would be responsible to then consider the applicability of the current provisions of the *FoI Act* to local government. Clearly, the Committee has not been in the position to give adequate consideration to this issue.

For this reason, it is not the Government's present intention to accept the Committee's recommendation that local government be brought within the ambit of the *FoI Act*. However, government is undertaking consultations with local government and the wider community and is aware of growing support for the introduction of FoI legislation specific to local government. Accordingly, FoI legislation designed to meet the particular circumstances of local government will be considered once this consultation is complete. The Government's view is not intended to discourage individual Councils from adopting FoI standards in the meantime.

Integrating public access systems

In its submission to the Committee, the Government made a number of recommendations designed to better integrate the access available under the *FoI Act* with that available under the *Public Records Act*. The Government is pleased that the Committee has accepted those recommendations. Implementation of the recommendations, however, will be dependent upon the availability of necessary funding.