# Official Secrets and the Gibbs Report: A Charter for Reform or a Tug of the Legal Forelock?

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## *Introduction*

The Final Report of the Review of Commonwealth Criminal Law chaired by the former Chief Justice of the High Court, Sir Harry Gibbs, was released in 1992. Part Five of the report recommends sweeping reforms to the law governing official secrets in Australia:[1]

> In brief, this part recommends that the UK *Official Secrets Act* be broadly followed in so far as that Act limits the application of criminal sanctions to the unauthorised disclosure of a limited number of narrowly described categories of official information, subject in most cases to a requirement of proof by the prosecution of damage resulting from the disclosure.

The report further recommends what it describes as significant modifications to the United Kingdom ("UK") model to avoid any unnecessary restrictions.[2] However, a close examination of the proposals reveals a voluminous coverage of government information and a draconian charter for silencing dissenting voices both within and outside the public service. The tone and inspiration of the report clearly derives from the reinvigorated secrecy culture ascendant in official information matters in Britain in recent years, as exemplified by the *Official Secrets Act* 1989 (UK). This legislation and the policies underlying it have been the subject of extensive and, at times, trenchant criticism.[3]

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1 *Review of Commonwealth Criminal Law: Final Report*, Canberra, AGPS, 1991, 234. Hereafter cited as the "Gibbs Report" or "report" in the text and *Gibbs* in footnotes.

2 *Gibbs*, 234.

3 See Griffith, J, "The Official Secrets Act 1989" (1989) 16 *Journal of Law and Society* 273; Palmer, S, "Tightening Secrecy Law: The Official Secrets Act 1989" [1990] *Public Law* 243; Reid, C, and Beaumont, P, "The Official Secrets Act 1989" (1989) 34 *Journal of the Law Society of Scotland* 457; Stevens, I, "The Official Secrets Act 1989: the Right Balance?" [1989] *Denning Law Journal* 169; and Zellick, G, "Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties" in

This paper examines the developments that led to changes in the *Official Secrets Act* (UK) with which our current legislation and the report's recommendations are intrinsically linked. It then notes the report's adoption of the UK model in preference to a more appropriate alternative adapted to a working democracy. An examination of protected categories of information, people affected and other proposed reforms follows. Analysis of the motives behind the recommendations and the means envisaged to carry them out, reveals the enormously expansive nature of the proposed official secrets offences. However, these offences are not balanced in an accused's interests by equally rigorous requirements of proof of damage. Nor are easily accessible defences or credible means of redress provided to those acting without criminal intent. The paper concludes with the view that the report contains a thoroughly regressive series of proposals that would, if carried through, actually undermine modern democratic processes.

## *Context of the Reforms to the UK Official Secrets Act*

Official secrecy reforms were enacted in the UK in the form of the *Official Secrets Act* 1989 (UK). This Act replaced the long criticised blanket provision of s 2 of the *Official Secrets Act* 1911 (UK) by instituting a series of protected categories of official information. These reforms are relevant to the Australian proposals for two important reasons. First, s 79 of the existing *Crimes Act* 1914 (Cth) adopts, with some variations, the now repealed s 2 of the *Official Secrets Act* 1911. Unlike the blunt instrument of the old s 2, the *Crimes Act* differentiates between disclosure of prescribed information with a purpose intended to be prejudicial to the safety or defence of the Commonwealth,[4] mere communication of such prescribed information,[5] and the mere disclosure of information acquired by virtue of office.[6] These differences make the Australian provisions more susceptible to an argument of a public interest right of disclosure. Secondly, the 1989 UK reforms were not the product of any enlightened liberalisation of the law relating to official secrets. Instead, they were a legislative response intended more to avert future political and administratve embarassment in litigated *Official Secrets Act* matters than to prevent any demonstrable threat to national security.

The catalyst for the UK reforms was the acquittal of civil servant Clive Ponting on a s 2 charge of having wrongfully

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Shetreet, S (ed), *Free Speech and National Security*, Martinus Nijhoff, Dordrecht, 1991, 93 and especially 111-117.

4 *Crimes Act*, s 79(2).

5 *Crimes Act*, s 79(3).

6 *Crimes Act*, s 70.

communicated prescribed information to a Member of Parliament regarding the sinking of the Argentinian ship *Belgrano* during the Falklands war.[7] Ponting gave evidence that his motivation for the disclosure was that Parliament had been misled by Ministers and that it was further planned to mislead a Parliamentary Committee.[8] His defence was, to use the words of s 2, that he communicated this information to a person to whom it is in the interest of the state to communicate it. The trial judge, McCowan J, rejected this defence and directed the jury that "duty" meant official duty and that "interests of the state" were synonymous with the policies of the government of the day,[9] that is, those policies laid down by the recognised organs of government and authority.[10]

Despite this direction, the jury exercised its constitutional right and acquitted Ponting of the charge. The public interest in seeing impropriety disclosed had been upheld in spite of the law, and at considerable political embarassment to the Thatcher administration. It is significant for our present purposes that the Gibbs Report adopts the jury direction of McCowan J by equating a disclosure lawfully made with one made in accordance with the Commonwealth officer's official duty.[11]

Two further cases highlighted the UK government's vulnerability in national security matters under the then existing legislation. In the Zircon affair[12] warrants were issued under s 9 of the *Official Secrets Act* 1911 as part of the investigation into a film documenting unauthorised expenditure by the Ministry of Defence on a secret electronic surveillance project. Efforts to suppress the film and the reporting of it proved troublesome and, eventually, unsuccessful. In the celebrated Spycatcher case, the government was forced to proceed by applying for injunctions to restrain the publication of the memoirs of a retired secret service agent, as he was beyond the jurisdiction of the English courts. These applications

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7 *R v Ponting* [1985] *Crim LR* 318.

8 For an account of this and subsequent national security matters leading to reform of the *Official Secrets Act* (UK) see Ewing, KD and Gearty, CA, "The National Security State" in *Freedom Under Thatcher*, Oxford, Clarendon Press, 1990.

9 Thomas, R, "The British Official Secrets Act 1911-1939 and the Ponting Case" [1986] *Crim LR* 491 at 497.

10 Ewing and Gearty, at 146.

11 See cl 85DH of the draft Bill. Subsequent references in the text and footnotes will be to the clauses of the draft Bill.

12 See Bradley, A, "Parliamentary Privilege and the Zircon Affair" [1987] *Public Law* 1, and Bradley, A, "Parliamentary Privilege: Zircon and National Security" [1987] *Public Law* 488.

failed in several jurisdictions and, eventually, in England itself.[13] They prompted a package of reforms in the UK which in turn underpin the legislative recommendations of the Gibbs Report.

## *A Rejection of the Model of Open and Accountable Government*

The Gibbs Report canvasses a number of options for reform of official information matters in Australia.[14] One of the most striking omissions from these options is an approach modelled upon the United States ("US") system. This omission appears to be quite deliberate. The fundamental assumption of the First Amendment of the United States Constitution protecting freedom of speech is that information held by government should be disclosed unless it falls within specifically identified categories, such as espionage and national defence. This starting point is radically different from the secrecy culture prevalent in the UK from which the Gibbs Report draws its recommendations. The report flatly rejects any suggestion of adapting the US methodology to the Australian context. Its reasons are unconvincing in the extreme. Instead of focusing upon desirable public policy goals of government scrutiny and accountability, it distinguishes the United States system as arising from historical and constitutional circumstances unique to that country, such as the presence of the First Amendment and the executive powers of the President.[15] There is no analysis of the effectiveness of the US system in balancing and reconciling the national interest in the preservation of legitimately claimed secrecy with the necessity for information in a functioning democracy. There are no plausible reasons advanced to illustrate how the US methodology has compromised national security or government integrity.

In rejecting any incorporation of these principles into its recommendations, the report makes the extraordinary admission that it has not attempted to determine, as a matter of fact, whether there have been specified disclosures of official information in the past that have significantly harmed Australia's interest.[16] Merely on the basis of unsubstantiated assertions by the Attorney General's Department that the public interest has in the past been damaged by unspecified

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13 *Attorney General v Guardian Newspapers Limited No 2* [1988] 3 All ER 545; *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Attorney-General for UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129.

14 *Gibbs*, 279-292.

15 *Gibbs*, 299.

16 *Gibbs*, 298.

disclosures,[17] the Committee is satisfied that the potential exists under Australian law for significant harm to the public interest.[18] In keeping with the far reaching reforms advocated, it might be expected that the extent of this potential be examined against competing public policy considerations. A detailed exposition of the public interest as it impinges upon official information would likewise be beneficial. Neither are to be found in the report.

## *Outline of the Report's Recommendations*

### Categories of Protected Information

The report recommends that the existing catch-all official secrets provisions of the *Crimes Act*[19] be repealed and replaced by a series of protected information categories. These categories are (1) security and intelligence (cl 85DB); (2) defence (cl 85DC); (3) international relations (cl 85DD); (4) criminal investigations (cl 85DE); (5) information resulting from unauthorised disclosures or entrusted in confidence (cl 85DF); and (6) information entrusted in confidence to foreign countries or international organisations (cl 85DG). In each category the release of information without lawful authority constitutes an offence punishable by up to two years imprisonment. In the first four prescribed categories the prosecution must satisfy the requirement that the disclosure is damaging within generously drafted statutory criteria, which include the mere likelihood of such damage. In two of the prescribed categories damage is either assumed to be inherent in the disclosure itself or is assessed on more stringent criteria.[20] A disclosure is only authorised if it is made in accordance with official duty or with authority duly given by a Commonwealth officer (cl 85DH).

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17 *Gibbs*, 296.

18 *Gibbs*, 299.

19 *Crimes Act* (Cth), ss 70, 79 and 80.

20 See cl 85DB(1), disclosure of security or intelligence information where no damage need be proven for disclosures by members or former members of the security and intelligence services or notified persons; cl 85DB(2) and (3) where disclosures by Commonwealth officers or government contractors cause damage to the work of, or of any part of, the security and intelligence services; and cl 85DE(1)(a), information relating to crime or criminal investigations.

**People Affected by the Provisions**

Three classes of people are affected by the report's recommendations:

(i) Present and former members of the security and intelligence services and notified people whose work is connected with the security and intelligence services (cl 85DB(1)(a) and (b)). These people have a lifelong obligation of silence about any security and intelligence information, purported or real, acquired during employment or while the notification was in force. For this category of people the restrictions are at least as severe as the current *Crimes Act* provisions.

(ii) Commonwealth officers and government contractors are subject to a range of restrictions on information relating to security or intelligence, defence, international relations and crime and criminal investigations. In each instance, they have a statutory defence that subjectively, and on reasonable grounds, they did not know that the disclosure would be damaging or that it related to information within that prescribed category.[21]

(iii) Other people are also liable under categories five and six. These are people generally who have disclosed any information falling within the first four categories *after* an initial action involving disclosure without authority, unlawful obtaining or entrustment to the person in confidence (cl 85DF). Recipients of information about intelligence, defence or international relations previously communicated by Australia to another country or to an international organisation, who disclose that information without authority and in a fashion which would not constitute an offence elsewhere in the provisions, likewise commit an offence if the disclosure is damaging within the meaning of the section (cl 85DG(1) and (4)). These provisions would clearly extend the range of offences to include actions by journalists, publishers and intermediaries in the process of unauthorised disclosures. The latter offence, in particular, seeks to close loopholes that may otherwise circumvent the provisions through the obtaining of information from a non-Commonwealth intermediary. There is no explicit statutory defence for either of these categories. The prosecution must prove the additional elements of knowledge or reasonable grounds of belief as to the damaging characteristics of the disclosure at the time when the disclosure is made.

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21 Clauses 85DB(4), 85DC(3), 85DD(4), and note the omission of information within the prescribed category in cl 85DE(2).

**Other Proposed Reforms**

The report recommends that the current s 79 *Crimes Act* offence of disclosure of prescribed information for a purpose intended to be prejudicial to the safety or defence of the Commonwealth be repealed. In its place there should be a new offence of disclosure without lawful authority of any official information where the person knows that the disclosure is likely to damage the safety or defence of the Commomwealth (cl 85DM). Whilst the penalty of a maximum of seven years imprisonment is identical to the existing offence, the proposed section goes well beyond the categories of information discussed above. It defines "information" as that held by a Department of State or a public authority under the Commonwealth (cl 85DM(2)). This is much broader than s 79(1) of the *Crimes Act* which requires the inference or actuality of a duty to treat the matter as secret. Accordingly, any semblance of an existing public interest defence is expunged by the report's proposals. Futhermore, there is no provision for an explicit statutory defence of also acting for non-prejudicial purposes.

The report advocates placing injunctive relief on a statutory footing upon proof of damage where there are anticipated or current breaches of the proposed legislation.[22] This is an attempt to overcome the reluctance of courts to grant injunctions in criminal matters in the absence of exceptional circumstances.[23] Other matters of major interest include the sensible addition of a defence of prior publication (cl 85DK) for offences committed under the proposals, and a restricted and ineffectual right of disclosure to prescribed people in the event of criminality, mismanagement or danger to public health or safety (cl 85DO). The latter provision ignores the wealth of research and legislative experience[24] in formulating the basic requirements of a workable whistleblowing system.

## *Motive for the Proposals: Increasing the Success of Prosecutions*

The report acknowledges that there have been few successful prosecutions under the existing legislation.[25] This factor, coupled

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22 *Gibbs*, 295-296, 299 and 327.

23 *Commonwealth v John Fairfax and Sons* (1980) 147 CLR 39.

24 For a comprehensive bibliography of these materials see *Report on Protection of Whistleblowers*, Electoral and Administrative Review Commission, Brisbane, EARC 1991, 238-244; *Whistleblower Protection Act 1989* United States Congress incorporated into Title 5 United States Code; and the *Whistleblower (Interim Protection) and Miscellaneous Amendments Act* 1990 (Qld).

25 *Gibbs*, 249.

with the reluctance of the High Court to grant an injunction restraining a breach of s 79 of the *Crimes Act*,[26] explains why the preferred option of the Committee is to adopt a modified UK approach. Although, superficially, the six prescribed categories relax the complete information coverage of the *Crimes Act*, they potentially incorporate substantial amounts of official information and ease the requirements of proving the elements of the offences for the prosecution.

## *The Impact of the Categories: Casting Wide the Net*

An exhaustive definition of the parameters of each category is not possible here, but a few examples will illustrate the potentially enormous breadth of the proposals. Disclosure of security and intelligence information includes any information of this nature obtained as a member of any of the listed security and intelligence services or as a notified person.[27] However innocuous the information, disclosures by this class of people attract a sentence of up to two years imprisonment.

Disclosure of defence information includes any information obtained by virtue of position relating to an extensive range of activities associated with the Defence Force, including operational, inventory, research, development, policy, planning, intelligence and maintenance matters. Any disclosure without lawful authority (for example, about the inability of the Defence Force to defend the continent or about collusive tendering procedures between the Defence Department and arms manufacturers), could be construed as a damaging disclosure. This is because it would undermine morale and therefore damage the capability of the Defence Force to carry out its tasks.[28]

Disclosures of international relations matters include any information obtained by virtue of position relating to international relations or any confidential information that was obtained from a foreign country or an international organisation (cl 85DC). "International relations" means the relations between countries, between international organisations or between one or more countries and one or more international organisations. It also includes *any* matter relating to a foreign country or to an international organisation that is *capable* of adversely affecting Australia's relations with another country or international organisation (cl 85DA). Therefore a disclosure of any information whatsoever without lawful

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26 *Commonwealth v John Fairfax and Sons* (1980) 147 CLR 39.

27 *Gibbs*, cll 85DB(1)(c) and 85DA(1), definition of "security and intelligence services".

28 *Gibbs*, cll 85DC(1) and 85DA(1), definition of "defence".

authority (for example, violations of human rights in East Timor or the abduction of children from Australia by a Malaysian potentate) would offend the section, providing such a disclosure is damaging.

The offence of making damaging disclosures, without lawful authority, of information that itself results from unauthorised disclosures or has been entrusted in confidence (cl 85DF) is intended to extend the reach of the provisions discussed above and to contain the adverse effect of any initial disclosure. It is directed against second actors who become the recipients of information disclosed or unlawfully obtained in contravention of the first four categories. Its use of the word "person" is consistent with the width of the existing s 79 of the *Crimes Act*. Its duplication of the "damaging" criteria from the first four categories would assist the prosecution in conducting joint trials of several accused. The provision complements the ability of the Attorney General to apply for an injunction to prevent a breach of a provision of the proposed legislation (cl 85DJ). Its likely impact would be to induce caution and an unwelcome degree of self censorship. Journalists and publishers, mindful of the real chance of prosecution, would need to reflect carefully about the source, character and probable effect of certain classes of information if disclosed. Such disclosure includes merely parting with possession of the document or article.[29] The provision alleviates one of the key problems faced by the prosecution, namely, the absence of evidence establishing the identity of the Commonwealth officer who made the disclosure.[30] That is, the provision insists only that the "person" has reasonable grounds to believe that the information concerned was originally disclosed without authority or was unlawfully obtained. Furthermore, the proposals ignore the selective nature of this offence. It is likely only to be invoked if the disclosure incurs the disfavour of the government or the bureaucracy and is done without their permission. Leakages of information to journalists, damaging to the interests identified, are often the suspected modes of operation of senior politicians or bureaucrats seeking to advance their own interests or to thwart the plans of factional or departmental rivals.

The final category (damaging disclosures without authority by recipients of information entrusted in confidence to foreign countries, which relates to security or intelligence, defence or international relations), implicitly recognises the limits of extraterritorial jurisdiction by focusing solely upon the recipient of such information. It provides the prosecution with the option of proceeding with criminal charges where the disclosure of the information without lawful authority by the recipient would not

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29 *Gibbs*, cl 85DA(1), definition of "disclose".

30 *Gibbs*, 249.

constitute an offence against any of the previous provisions (cl 85DG(1)(b)).

## *The Requirement of Harm: More Imagined than Real?*

The prosecution is required to show in the proposed offences that the disclosure was "damaging" within the meaning of each category. There are two exceptions where damage is presumed to be inherent in the disclosure: disclosures of security and intelligence information by members or former members of the security and intelligence services or notified people (cl 85DB(1)(a) and (b)); and disclosures of information about crime or criminal investigations by Commonwealth officers or government contractors which bring about specified results (cl 85DE(1)(a)).

The criteria for a "damaging" disclosure are tailored specifically to the characteristics of each subject matter. The effectiveness of the prosecution is enhanced by the comprehensive nature of the criteria. Disclosures of security and intelligence information are damaging if it can be shown that they cause damage to the work of, or any part of, the security and intelligence services (cl 85DB(3)). Defence information disclosures are damaging if, amongst other things, the overseas interests of Australia are endangered; the promotion or protection of those interests are seriously obstructed; or the safety of Australian citizens overseas is endangered (cl 85DC(2)). Apparent features of these words are both their flexibility and ambiguity. They would enable the prosecution, in seeking to prove this element, to make a range of submissions on broad policy-based evidence. The criteria for "damaging" disclosures of international relations (cl 85DD(2)) are drafted similarly to those for defence disclosures, with slight modifications.

Two further observations can be made about the requirement of the prosecution to prove harm in most of the categories. The first is that whilst it may be argued that, by prescribing the circumstances necessary to constitute harm, the prosecution is put to the test of producing evidence that will satisfy a jury's understanding of the statutory criteria, there is another effect. The structure of these sections ensures that the jury's attention is concentrated exclusively upon the supposedly objective *effect* of the conduct rather than upon the *motives* behind the conduct.[31] In some situations, the motive may be a high sense of public altruism in disclosing illegality, mismanagement or fraud. There is no provision in any of the categories for acknowledging the issue of real damage to the very interests that the scheme purportedly protects if these types of

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31 See Palmer, work cited at footnote 3, at 243, 251 for observations about the comparable UK provision.

conduct would have continued unchecked but for the disclosure. Instead, upon proof of one of the prescribed circumstances of harm, a disclosure automatically *is* damaging. At best, motive would be a matter relevant only to sentence. Secondly, in each of the six categories the prosecution has the option of showing that the disclosure is of information *likely* to cause the form of damage specified. This element will be established where it is shown that it is merely more probable than not that the disclosed information would have the specified effect. A further complication in both of these matters is that, given the highly sensitive nature of the material upon which the prosecution case will rest, lack of access to that information will severely impair the defence's capacity to make credible submissions that cast a reasonable doubt on the aspect of damage alleged by the prosecution. The mere possibility that information within the protected categories may inadvertently be revealed during the course of a trial may also explain the report's loosely defined statutory criteria. This would minimise the need for specificity in proving the offence. In turn, it would reduce the need for more forthright submissions to be made by the prosecutor.

## *The Defences: Illusory or Absent?*

In each of the first four categories it is a defence to prove that, at the time of the alleged offence, the accused neither knew nor had reasonable grounds to believe that the information was "damaging" or that the information related to the relevant protected category.[32] Once the mere probability of damage has been established by the prosecution (according to the broadly defined statutory criteria), an accused wishing to raise a defence has the burden of proving[33] both a subjective lack of knowledge and an absence of reasonable objective grounds of belief that the information related to the category's subject matter, or that it would be damaging within the meaning of the category, including of course, the likelihood of damage. The onerous character of this defence is again emphasised by the difficulties of disproving damage when access to evidence and experts would be limited because of the sensitive nature of the material.[34] Just as the role of the jury is carefully circumscribed by its being compelled to focus upon the supposedly objective criteria of damage, there is every chance that, in these circumstances, a defence may not go to the jury because of a lack of evidence.

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32 *Gibbs*, cll 85DB(4), 85DC(3), 85DD(4), 85DE(2). The one exception to "relevant protected category" is information relating to crime or criminal investigations.

33 *Crimes Act 1914* (Cth), s 15D.

34 See Palmer, work cited at footnote 3, at 246 for the problems associated with the defence in the comparable UK provision.

More significant perhaps is the deliberate omission of a defence of disclosure in the public interest in matters of illegality, mismanagement and fraud. As discussed earlier, McCowan J in *Ponting* specifically ruled out the availability of such a defence in a s 2 prosecution. His Lordship equated the interest of the State with the interests of the government of the day. This interpretation relied heavily upon the interpretation of "interests of the State" by Lords Pearce and Devlin in *DPP v Chandler*,[35] a previous s 1 espionage prosecution, involving entry to a prohibited area for a purpose prejudicial to the interests of the State. Their Lordships' interpretation was consistent with the view expressed in an earlier s 2 case that the motives for disclosure of information were irrelevant.[36] This common interpretation was achieved notwithstanding significant contextual differences between the two sections in subject matter, class of offence, and the essentially *prohibitory* character of "interest" in s 1, contrasted with its essentially *permissible* character in s 2.

The Gibbs Report's omission of a public interest defence would remove the potential for defence submissions in Australia on *Crimes Act* charges to highlight these inconsistencies and to argue that the UK interpretation should not be followed, even though the existing *Crimes Act* offences are based on the corresponding provisions of the repealed *Official Secrets Act* 1911 (UK). Indeed, the assertion in the report that it is doubtful that a defence of public interest is available in a prosecution under s 79 of the *Crimes Act*[37] is suspect for a further reason. The *Crimes Act* uses, throughout ss 78 and 79, the words "prejudicial to the safety or defence of the Commonwealth or part of the Queen's dominions" instead of the words "prejudicial to the safety or interests of the State". It arguably follows that the meaning attached to "interest of the Commonwealth or a part of the Queen's dominions" cannot be used interchangeably as the phrase "interest[s] of the State" was used in applying the majority interpretation in *Chandler*, a s 1 prosecution, to a s 2 prosecution in *Ponting*. The sharper focus of the existing *Crimes Act* in distinguishing the communication of prescribed information with a purpose intended to be prejudicial, from the mere communication of such prescribed information,[38] also highlights a different concept of "interests of the Commonwealth".

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35 [1964] AC 763 per Lord Pearce at 813 and Lord Devlin at 807.

36 *R v Fell* (1962) 107 SJ 97.

37 *Gibbs*, 335.

38 Contrast s 79(2) and s 79(3) of *Crimes Act* (Cth).

By omitting such a statutory defence the report intends that access to information within the prescribed categories be tightly confined to matters of official duty. For these matters, the report implicitly assumes that the interests of the State are best served by public servants and others subordinating their opinions to that of the elected government in every circumstance (subject to limited rights of disclosure to designated officers and the Ombudsman (cl 85DO(1)). Ideas that interests of the State should include overriding obligations such as the proper observance of Parliamentary and administrative conventions; that the rule of law should apply to the organs of government and those governed equally and indiscriminately; and that these objectives may sometimes need to be secured by a strictly controlled right of public disclosure, are not considered. The clear impetus of the report is to narrow the public interest to managing sensitive information in a fashion consistent with the policies of contemporary administration. Certain exculpatory statements (for example, that the categories adopted should be no more widely stated than is strictly required for the effective functioning of government;[39] that of the total mass of information held by federal departments and agencies, only a very small proportion would be subject under the proposed provisions to criminal sanctions for unauthorised disclosure;[40] and that specific avenues of complaint be established[41]), suggest that the Committee believes that it is not in the public interest for the public to learn of anything in the nominated categories other than what the government thinks fit. This would be the case however outrageous or illegal those activities might be.[42] In particular, the ability to disclose such information to a designated departmental officer does no more than formalise an already existing method of complaint. The only action required of the designated officer is to publish a record of the general nature of the disclosure in the next annual report of the department or agency (cl 85DO(3)). The sole protection that the person making the disclosure has is that he or she is not subject to disciplinary action (cl 85DO(4)). However, no sanctions are imposed for a breach of this "protective" provision. In addition, "disciplinary action" is left undefined. Nor is consideration given to the real possibility of informal retaliatory methods or to inertia on the part of the designated officer in responding to the disclosure. Experience overseas,[43] where there are far more

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39 *Gibbs*, 317.

40 *Gibbs*, 337.

41 *Gibbs*, 338.

42 See Reid and Beaumont, work cited at footnote 3, at 460 for observations about the UK government's rejection of a 1987 Private Members Bill designed to confer a tightly defined right of disclosure.

43 United States, 1988, Congress: Senate Committee on Governmental Affairs, "Whistleblower Protection Act of 1987: Hearings before Sub-committee on Civil Service", Washington, US Government Printing Office, 1988; Devine, T and Aplin, D, "Whistleblower Protection - The

comprehensive schemes, suggests that such a token approach will prove grossly inadequate.

## *Conclusion*

Far from confining criminal provisions to a precise body of sensitive information, the report recommends comprehensive prohibitions on disclosure across broadly defined categories. These categories extend far beyond what can legitimately and demonstrably be shown to be damaging to the national interest if disclosed. The report fails to articulate a detailed and balanced view of the role of the public interest in a functioning and participatory modern democracy. It confuses all too readily the need for secrecy in a few areas of administration with the desire of politicians and bureaucrats to shield their activities from public scrutiny. Based upon the widely criticized 1989 reforms to the *Official Secrets Act* (UK), the report's modifications are mostly of token value. The underlying message of the report is one of tightening the law of official information and strengthening the hand of government in managing and controlling that information.

Enactment of the recommendations would have a chilling effect upon the quality of Australian democracy. Most particularly, it would curtail the level and quality of debate, analysis and accountability of government in the media. The threat of more easily conducted prosecutions or more readily obtainable injunctions would engender caution and self-censorship in publication, even where there is overwhelming evidence of wrongdoing. The recommendations clearly excise any suggestion of a public interest defence for the listed categories in even the most compelling of circumstances. It is in this respect that the report is fundamentally retrograde in its approach to public accountability. In an era increasingly characterised by a growing concentration of executive power, it affirms wholeheartedly the anachronism that "government knows best".

In seeking to import into the Australian legislative calendar a further element of the secrecy ethos, the report fails to establish any convincing rationale for a series of quite draconian proposals conceived in a legal environment both characterised by and ridiculed for its obsession with official secrecy. It would be a superb irony for a

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Gap Between Law and Reality" 31 *Howard Law Journal* 223 (1988); Fisher, B, "The Whistleblower Protection Act of 1989: a false hope for whistleblowers" 43 *Rutgers Law Review* 355 (1991). Whilst the *Gibbs* Report acknowledges the existence of US legislation and local reports (*Gibbs*, 335) its treatment is peremptory, and its only recommendation for any form of adoption of any of these principles is for information falling outside the protected categories (*Gibbs*, 340-353).

government which has regularly beat the drum of republicanism to defer to the principles enshrined in this report and proceed to enact it as legislation.[44]

44 As suggested by the title to this article, such action could well be described as a "tug of the legal forelock". The Prime Minister, the Right Hon Paul Keating, has recently revived a similar Dickensian expression. See House of Representatives *Weekly Hansard* 36th Parliament, 1st Session, 5th Period, 27 February, 1992, 374.