are apparently seeking information to assist with a claim or appeal. So far as I am aware the vast majority have been satisfied with their perusal of their files.

It may well be that the Veterans' Affairs experience is different from that of other Departments because of the long-standing arrangements for access to files and assistance in understanding their contents.

I make a final point: that a continuation of a situation where remarkably few instances of internal review arrangements having to be used will cause problems for those who are to undertake reviews. In reading Mrs Burnett's paper I was struck by how much the passage of time has dimmed my recollection of various sections in the FOI Act on which I had been well briefed only six to nine months ago. It seems that the more senior people in the Public Service will face problems of coming to grips with their responsibilities if the matters coming to them for review are as few and far between as has been the case to date. I hope this will not lead practitioners of investigative journalism to make and pursue requests to assist us in recalling the provisions of the Act.

## Mr ROGER GYLES*

It has been a very polite seminar so far and the reasonableness of the public servants who have spoken has been noteworthy. May I just inject a slight note of scepticism, based probably upon the number of years one has sought access to information on behalf of clients, and been refused; and sought to challenge decisions when there have been no reasons given. Perhaps more importantly I have been involved in cases where either the other side or my own side has made claims for Crown privilege. I think those of us who have been involved in cases where Crown privilege was claimed in pre *Sankey* v *Whitlam*[1] days will appreciate that those claims were very often very poorly based. I am not speaking simply of Commonwealth authorities, my greater experience is with the various State authorities. I think it is also fair to say that *Sankey* v *Whitlam* has not received universal approval at all levels of the public service both Commonwealth and State. We now sometimes have the opportunity of actually seeing the documents that have been withheld because of the high public interest involved. This cannot help but make us rather sceptical because they are often very routine in their nature.

May I also be allowed a little scepticism about attitudes to freedom of information. Being a statutory office holder for the time being I am myself confronted with the demands of the new administrative law. I was discussing a question with an official from a very important department and I said "Well, I suppose you can put a note on your file about that". He looked at me as if I was absolutely mad and said "Files? I have no files, I have a series of internal working documents!" With that slightly sceptical eye, may I turn to some of the issues that have been raised by the previous speakers this morning.

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[1] (1978) 142 CLR 1.

As with Mrs Burnett may I take them in the following order: Administrative Appeals Tribunal ("AAT"); then the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act"); and finally the Freedom of Information Act 1982 (Cth) ("FOI Act").

The most significant point that Mrs Burnett has drawn to our attention concerning reasons for decisions in the context of the AAT is her understanding of that part of the guidelines which Dr Taylor prepared some time ago, which could involve, as she put it, the rewriting of reasons. Now I think there may be a good deal of scope for misunderstanding about that paragraph, and until I read her paper and heard her comments I had not quite appreciated the ambiguity that may lurk within it. I am quite sure that neither Dr Taylor nor members of the Administrative Review Council ("ARC") would agree with the sanitisation of reasons. That guideline is certainly not intended to provide a mechanism whereby either the legal section of a department or senior officials could bolster up their case by, in effect, rewriting reasons. The intention, as I read it, was that in the event that the reasons given by the primary decision-maker demonstrated that the decision was unsound, but for other good reasons the department wished to maintain that position, it is best to concede that the first decision is wrong, and make another one, and make the other one on the correct grounds, and then publish that as the actual decision. Now it may be a thin line between, on the one hand, sanitising reasons, and, on the other, coming to an independent decision which has the same effect but for different reasons. To the extent that there was any suggestion that the Administrative Review Council favoured the first of those, it certainly was not its intention that this should be so.

I also wonder whether there is not a misconception as to the complexity of the obligation which is placed upon a primary decision-maker in recording his reasons. As many speakers here have pointed out, most decisions are taken at a fairly junior level. I would imagine that most decisions would be taken on fairly standard grounds. Last night at the dinner somebody raised the question of a printed form being available for decision-makers. I do not know whether there are in fact printed forms within departments but there seems to me to be no difficulty at all in having a form which contained in a particular area, say five standard reasons, and then space for any other reasons, and the decision-maker could tick the appropriate box. I can imagine many circumstances where that could quite adequately indicate the basis for the decision. Section 26 of the FOI Act is statutory language, and one would not give a clerk instructions in those terms. However I believe that the concepts behind it are not difficult to put into layman's language. If the decision is based upon facts, as it always would be, and upon materials upon which those facts were based, as part of any decision-making process those matters would have to be identified as a matter of course by the person making the decision. The material will normally be the documents in the file—even an interview would be recorded in this fashion. It would not be difficult to itemise or indeed itemise incorporating by reference, the documents in the file to that point together with interview on such and such a day and then record (if it were relevant) what the officer's finding was at the interview, and then to come to a decision. I would have thought that a great deal of this could be reduced to a standard form, with facts relied upon, documents referred to, other material, reasons for decision one through five, and then another paragraph for other reasons. I think there is great scope for

simplifying the procedures, because in this, as with the whole of the new administrative law it would be a pity if perceived complexities led to a backlash to the great disadvantage of people generally. There is a risk, I think, that the baby might be thrown out with the bathwater in situations like this. I think I reflect the views of those who sat on the ARC when I say that we did recognise the need for simplicity. That cannot be said too often.

I also wonder whether there are not misconceptions held about the complexities of the current procedures of the AAT. If those perceptions are correct, then it is a matter the Tribunal itself will have to take into account. There is a fine line to be drawn here between, on the one hand doing things properly, and in accordance with law in a reasoned fashion, or, on the other hand, becoming too complex so that people are intimidated by the situation, leading to pressure from both the public and the public service to alter the system.

May I then turn briefly to the ADJR Act, and the remarks that have been made concerning reasons for decision in that context. May I first just say that I have often heard it said that Mr Justice Lockhart was born with a silver spoon in his mouth, but I have never heard it suggested his name should be written in gold. I wonder whether the decisions which are being quoted today do any more than apply fairly well recognised principles on which discretionary decisions can be reviewed. My recollection is that Peter Bayne referred to some of these cases in his paper. For the lawyers amongst you *R* v *Connell*,[2] and many other cases, say that if you can come to the conclusion that a person exercising a discretion has truly failed to take into account something relevant, or has truly taken into account something which is irrelevant, then the decision can be upset. That is old well established law, and I suspect that ADJR cases to which reference has been made apply it. Of course that test is, as we know, now included in the Act itself. The line between judicial activism and judicial restraint will vary with the particular personality of the judge concerned, and it is a proper function of bodies and meetings like this to indicate that judicial activism may be becoming too strong. I am not convinced myself that that is the position at the moment. There are a number of judges of the Federal Court each of whom has his own approach to the matter. It may be that the immigration cases have tended to go on one side of the line. We must bear in mind that many of the immigration cases have Federal Court Judges sitting as members of the AAT, where they are actually reviewing the merits, and that may have coloured their approach.

I support the view that the statutory obligation to give reasons is the fundamental improvement or reform effected by the ADJR Act. The actual remedies, and the grounds for judicial review under the Act, I do not believe are any significant advance upon the previous law. The growth of the declaration in administrative review has meant that there are very few cases, if any, that could not be properly reviewed under the existing law, and the principles developed to review discretionary provisions are almost as wide as the grounds in the Act. The crucial difference, however, is that now one can receive a statement of the reasons of a decision-maker. Now I think we would all share the views expressed by officials and by judges that it is wrong to treat the reasons of a decision-maker as being a statute or the opinion written by a

[2] *R* v *Connell: Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

judge or some other person of that sort. They should be viewed in a common-sense way. However what they do is to reveal the basis on which a decision is given, and if it is a wrong basis it enables it to be corrected. Now that is a very great advance in the field of administrative law. I think some of us here will recall that when the ARC was considering the exemptions which were proposed by departments from the obligations to give reasons, at a very critical stage of discussions the then President of the ARC received a very good pep talk from a former Attorney-General, who stressed to him that this was the fundamental section of the Act, and if anything was to be compromised it should not be the obligation to give reasons. I support that view.

May I then turn to the obligation to give reasons under the FOI Act. Before doing so, may I take the opportunity to do what all speakers are doing, and make a very short policy statement.

I was very disappointed to see the handwritten addition to the ministerial press statement including internal working documents in the conclusive certificate provisions. I should not mince words about that. I think it is a significant retreat from an established position. There were no reasons advanced to support it. I think it will prove to be a very unsatisfactory feature of this legislation. I agree that probably the political backlash may come in the field of invasion of privacy rather than s 36, but I think in truth that there is great scope for the use of s 36 by recalcitrant officials, in a way which will make it very difficult for the citizen to obtain access to documents. The reasons for having these documents subject to a conclusive certificate are, to me, extremely unconvincing.

Having got that off my chest, may I turn to the obligation to give reasons under s 26 of the Act. Mrs Burnett refers in her paper to the grounds upon which refusal to access will be made. Now looking at those grounds and the function of s 26, I take it all would agree that it would be an inadequate statement of reasons for refusal to simply state—"on the ground that the document is an exempt document".

I think we would all agree it would be inadequate to say simply it is an exempt document under s 36 or under s 41. It would be requisite I think you will agree, to give the reasons why it is an exempt document, and go to the section concerned, and explain why it is that it falls within theterms of the exemption.

The framing of reasons will I am sure, for a time, provide a little difficulty, because as Mrs Burnett makes clear, the reasons to be given are not reasons to do with substance of the decision which is involved in the document, they are the reasons for not producing the document. Thus the type of reasons and the type of reasoning will be quite different to that involved in a statement of reasons under the AAT Act and the ADJR Act. Indeed the fact that the formula in this Act is very similar to the formula in the other Acts may be a little misleading on that point. However, if one turns to the various exemptions, and I will not go through them, it will be seen that there are questions of fact which will normally be involved in a decision to exempt the document. The obligation imposed by s 26 is to state the facts which have led to the conclusion and what material led to those facts, being the basis for the reason and a fair statement of the reason for exemption.

I was just puzzled a little by the indication that the giving of oral reasons has

speeded up the process in the Repatriation Tribunal. I presume there would be a method of recording them and having them freely available. It would be rather anomalous if the Tribunal was able to get away without written reasons, when it is the decision-maker's obligation to give them.

The other interesting thing from the facts emerging about the use of the FOI Act is that, apart from denying the "floodgates" argument that was advanced so readily before the legislation came into force, it is fairly clear from the material presented here both as to this Act and as to the ADJR Act, that the area of employee/employer has proved to be the most fruitful source of work under this package. I have always been a little bit sceptical or concerned as to that, but certainly the evidence appears to indicate that that is the major source of use of the statutory provisions. This probably indicates that government officials and public servants are better informed about the legislation than the general public. It probably also points to the need for a little more emphasis on simplicity and for making the essential process of the administrative review mechanisms known more widely to the public.