The Royal Commission on Australia's Security and Intelligence Agencies

Mark Brogan

The final report of the Royal Commission into Australia's Security and Intelligence Agencies is currently being prepared and will be delivered shortly. In this article the author discusses the archival status of Security and Intelligence agency records, an issue with implications not only for archivists, but also for the wider community. The article as been condensed from a submission to the Royal Commission made by the author in December 1983.

On 12 May 1983, the Prime Minister, Mr. Hawke, announced the establishment of a Royal Commission under Mr. Justice Hope to inquire into the activities of Australia's Security and Intelligence Agencies.[1] The Terms of Reference for this inquiry were divided into three parts. Parts (a) and (b) empowered the Royal Commissioner to investigate and report upon the activities of Security and Intelligence agencies generally, with particular emphasis on such issues as accountability, the need for changes to existing laws and progress made toward implementation of Government decisions including those arising from a previous Royal commission in 1974.[2] Part (c) required the Royal Commissioner to inquire into and report upon circumstances surrounding the expulsion from Australia of Mr. Valeriy Nikolayevich Ivanov, a Russian diplomat, and the involvement of Mr. Harvey David Mathew Combe, a Canberra lobbyist.[3] Interested persons or organisations were invited to make written submissions to the Royal Commission by 23 December 1983, provided that such submissions to the Royal Commission were pertinent to Parts (a) and (b) of the Terms of Reference. Investigation of what had become popularly known as 'the Combe-Ivanov affair', in contrast, was to be strictly 'in house' and very judicial business.

The terms of reference provoked considerable interest amongst members of the Adelaide archival community, some of whom were of the opinion that they facilitated a submission on the subject of disposal of non-current Security and Intelligence Agency records. Others considered that this amounted to drawing a very long bow indeed and that the Royal

Commission would have nothing to say of archival consequence. But draw the bow some of us did, a process resulting in a private submission of some 12,000 words lodged three days prior to the official date of closure.

Logically, assuming that this was not the act of deluded or lunatic individuals, the question arises of what legitimate interest, if any, archivists may have had in making such a submission. The 'long bow' had been drawn in relation to parts a(iii)A and a(iv) of the Terms of Reference, which stated respectively that the Royal Commissioner was to inquire into

- whether any changes in existing law and practices are required or desirable to ensure that the agencies are properly accountable to Ministers and the Parliament
- whether there is adequate provision for effective redress for any persons who may be unjustifiably disadvantaged by actions of the agencies.[4]

Superficially at least, establishment of logical connections btween the Terms of Reference and disposal practices for Security and Intelligence Agency records might seem to present difficulties. Upon closer examination however, the implications appear obvious, albeit more obvious in some instances than in others. Part a(iv) for example, clearly has implications in the records disposal area, for if effective means of redress are to exist for persons disadvantaged by the actions of such agencies either through the courts or by other means, then this presupposes that records concerning them shall be preserved. In comparative terms, appreciation of the nexus in the case of Part a(iii)A is a more subtle business.

In this context, two propositions are critical. They are, firstly, that Government may be seen to be most accountable to Parliament, and in a wider public sense, when it promotes maximum public disclosure of its activities. That is to say, the maximum commensurate with the 'national' or 'public' interest, whatever they might mean. Excessive government secrecy is seldom conducive to good government, an observation best summed up in the old adage that democracy and secrecy make strange bedfellows. Secondly, it seems that the principle of executive accountability in a more limited sense, expressed through either Ministers or ultimately through the Courts, imposes some code of conduct in matters of disposal of public records. Specifically, it suggests that disposal of public records shall be systematic, rather than arbitrary or subject to caprice. In essence, the argument above concerning Part a(iv) of the Terms of Reference proceeds straightforwardly from this second more general proposition.

Precisely how, then, do these propositions relate to disposal of Security and Intelligence Agency records? In the case of the former we are essentially asking the question of what mechanisms exist for making

information publicly available about Security and Intelligence Agency activities. Typical examples of such mechanisms in the case of government agenices generally might be the requirement to produce publicly available annual reports[5], or release information in pursuance of a legal obligation defined under Statute law. Two such laws spring readily to mind — a Freedom of Information Act establishing right of public access to certain categories of current or semi-current records, and an Archives Act establishing right of public access to all or most non-current records which have achieved some nominal age, e.g., thirty years. In concise terms the task in relation to the former may then be seen to be one of examining the relationship between Security and Intelligence Agencies and those parts of the Commonwealth Archives Act[6] that relate to access. Ideally, to put the results of such an exercise in perspective, a comprehensive survey of other archives acts and disposal practices in other liberal democracies would be in order.

Turning to the second proposition, namely that which concerns executive accountability in the more limited sense, it is plain that statutory sanctions against arbitrary destruction and corruption of Commonwealth records are necessary if their evidential value is to be preserved. The significance of this, is simply that if government is to be held responsible for its mistakes, then crown documents should be protected from corruption or destruction. Unfortunately, in practice, such protection tends to be nominal, rather than actual. Furthermore, even if the physical integrity of records has been protected, their potential to be used in a court of law as evidence of wrongdoing on the part of the executive is greatly diminished by the ability of the executive to claim privilege and, by so doing, prevent crown records from being tabled as evidence. Nonetheless, the relationship between executive accountability and public records is demonstrable, and in some instances, dramatically so. Consider for instance, the spectacular fall of Richard M. Nixon, who resigned from the United States Presidency in 1974, largely as a consequence of incriminating evidence contained in the so called Watergate tapes.

As an example of executive hostility to the idea of 'public' records, an antipathy displayed not only by officialdom but also by holders of the highest ministerial office, the Watergate conspiracy is something of a gem. Acutely aware of the damaging nature of the tapes, which recorded conversations between himself and subordinates concerning Watergate break-in, Nixon toyed with the idea of destroying them after their existence had been revealed on 13 July 1973 to a Senate Select Committee appointed to investigate the affair. According to Sam J. Ervin, who was Chairman of the Committee, Nixon eventually decided against this course of action because he considered that a claim of executive privilege with respect to the tapes could not be successfully challenged.[7] Events were, of course, to prove him wrong. On 12 October 1973, after considerable legal argument, the Court of Appeals in a 5-2 decision against Nixon, ruled that

subpoenas already issued by the District Court, District of Columbia, would have to be obeyed.[8] This spelt doom for Nixon, who was eventually compelled to resign by the fact of imminent impeachment.

Following his resignation on 9 August 1974, Nixon endeavoured to regain control over all the records of his presidency, including the highly damaging tapes. The basis of Nixon's strategy here was that the records of the presidency constituted private, rather than public, records. These efforts culminated in the so called Nixon-Sampson agreement, by virtue of which the United States Government assured Nixon legal title and all literary property rights to the records created by the Office of the President during the period of his presidency.[9] By the terms of his agreement 'Nixon could begin to destroy the tape recordings on or after 1 September 1979, so that all of them would be destroyed by 1 September 1984, or following the death of the former President, whichever occurred first.'[10]

Opposition to the Nixon-Sampson agreement was instant, widespread and vocal. Succumbing to pressure from historians (but apparently not archivists), Congress and the Watergate Special Prosecutor himself, on 11 October 1974, the Ford Administration withdrew its support for the agreement and invoked legal processes aimed at setting it aside.[11] In spite of vociferous claims on the part of Nixon's lawyers that halting the agreement amounted to a violation of Nixon's constitutional rights, a restraining order was issued delaying implementation of the agreement.[12] In January 1975, Judge Richey of the U.S. District Court, Washington, D.C. ruled that almost all of the records produced by the Nixon administration belonged to the government.[13]

Sanctions against arbitrary or capricious destruction of public records are frequently contained in public records or archives acts, though they may also appear elsewhere. Normally, they require that an agency wishing to destroy public records should first obtain approval from an external authority, usually an archival agency, before destruction may proceed. There are often significant penalties for non-compliance. For the purposes of executive accountability in the more limited sense then, it is reasonable to suggest that the records of all Commonwealth agencies, including Security and Intelligence agencies, should be extended this nominal statutory protection. An integral task in preparing the submission, therefore, was a further examination of the Archives Act, this time to determine whether the records of Security and Intelligence are indeed protected.

On the basis that executive accountability could be shown to have implications in terms of records disposal practices, it was therefore possible to argue a case for systematic records disposal in relation to a particular category of agencies, namely the Security and Intelligence agencies. Accordingly, the Submission was developed in the first instance along these lines. In the process, as far as the terms of reference were

concerned, an important foothold was established. However, it would be both misleading and substantially incorrect to explain the existence of Archives Acts wholly in this way. After all, their *raison d'etre* lies elswhere, with another, perhaps equally pious, hope. Namely, that public records with some permanent value in a cultural and informational, as well as legal or evidentiary sense, shall be preserved as national archives for eventual public use.

In a broader sense, what cultural or informational value may be attached to Security and Intelligence agency records that warrants their permanent preservation as archives? Could they ever be used as a valid source for the purposes of historical research for example? Whilst some archivists and probably most historians would answer this question resoundingly in the affirmative, opinion in the real world is divided. As the implications of this become more apparent with the passing of time, it is likely that historians in particular will view this situation with regret. I use the term regret, because failure to discern such a cultural value, coupled with anxiety about such issues as privacy and confidence, have so far resulted in massive and at times indiscriminate destruction of non-current Security and Intelligence agency records, an activity in which Australia may not be said to be dragging its feet.

It was in this context that the importance of existing enquiries and precedents was most clearly defined. Two such enquiries, one in the United Kingdom and the other home-grown, were selected for discussion in the submission. Each contains very different notions about the permanent value of Security and Intelligence agency records, albeit in relation to different disposal classes, and arrives at very different disposal recommendations.

In the absence of any comparable Federal investigation, the principle Australian source on the matter of disposal of Security and Intelligence agency records is Mr. Acting Justice White's enquiry into the records of the South Australian Police Special Branch.[14] The particular circumstances which gave rise to this enquiry concerned the alleged misconduct and subsequent dismissal in 1977 of the then S.A. Police Commissioner, Mr. Harold Salisbury. The case against Salisbury rested largely on the allegation that he had knowingly misled the Premier and Parliament of South Australia about the nature and function of the South Australian Police Special Branch. By virtue of White's analysis of Special Branch records, this allegation was subsequently upheld during the course of a Royal Commission into Salisbury's dismissal. In his survey of the Branch's records, White concluded that information contained in dossiers and related indexes

- intruded on the privacy of individuals,
- had, in some instances, been gathered illegally,
- demonstrated an incorrect view of what might be legitimately

described as subversive activity in a democratic society,
- was frequently obsolete, erroneous and defamatory.

White's principle recommendation with respect to disposal of Special Branch records was that they should be culled in accordance with paragraph 2 of his terms of reference.[15] Subsequently, he was authorised to supervise culling and destruction of irrelevant, inaccurate and obsolete data contained in the dossiers, dating back to establishment of the Branch in 1939. On 10 January 1979 and 30 July 1980, respectively, White reported to the Government that he had audited the files and records of the Special Branch, and moreover, certified that those files and records were in conformity with paragraph 2 of his terms of reference.[16] White's initial report is particularly noteworthy for the following assertion

> Even if most of these often biased and useless records were now to be sealed up and never used, they would be preserved for no purpose. They could never be used for valid historical research, except research into the history of folly.[17]

Whilst it would be no less an exercise in presumption to assert that White's judgement on the historical value of these records would justify the epithet of 'minority' in the context of academic opinion, it nonetheless could be expected to be the subject of considerable dissension in both historical and archival circles. The report may also be criticised on other, and arguably more substantial grounds. On p.45 of the report, for instance, appears the following statement

> In the course of 28 years, a great mass of irrelevant material (*often potentially harmful, sometimes actually harmful*) has accumulated. Most of it of a non-security nature.

Precisely what is meant by the expression 'often potentially harmful, sometimes actually harmful' is not revealed. The implication, however, seems to be that information contained in Special Branch records has been used to the detriment of individuals, possibly in connection with the practice of 'security vetting' referred to elsewhere in the report. Returning to a point made earlier, if this interpretation is correct, it would seem to imply that if persons so affected are to have means of redress, then Special Branch records concerning them should be preserved. Alas, turning to part 19 of the report which sets down criteria to be employed in the culling-out process, no reference to this can be found.

In hindsight, it seems somewhat ironical that the 'evidential' nature of Special Branch records, expressed in such terms, did not occur to Acting Justice White. But if the Report is to be fairly criticised, it is incumbent upon its critics to suggest an alternative disposal plan compatible with the very substantial issues of privacy, confidentiality and propriety, which weighed so heavily on the Acting Justice's mind and which must be taken into account. Well, is there a formula enabling permanent preservation of such records compatible with both the privacy of individuals and the good

reputation of the State? It is unlikely that this question could ever be answered to everyone's satisfaction. Subject to this qualification, an archival solution involving transfer of non-current Security and Intelligence agency records to archival custody is worth considering. If circumstances required it, this solution might also be extended to other records objectionable in the sense described by White. Of course there would need to be stringent safeguards. Such safeguards might entail

- a 50 or 75 year restricted access period,
- judicial review of all requests for access, including requests emanating from official sources, according to established and publicly available criteria.

Prima facie, as an alternative to destruction on the one hand, and preservation in the controlling agency's custody on the other, this plan is attractive. It is conceivable that if Acting Justice White had been made aware of such a possibility, massive and indiscriminate destruction of Special Branch records might have been avoided. Speculation of this sort, however, amounts to little more than an exercise in wishful thinking. On two occasions, one in 1979 and the other in 1980, apparently large quantities of Special Branch records were destroyed. While the desirability of this precedent is a matter for debate, its significance cannot be doubted. Similar destructions of Special Branch records have occurred since in Western Australia and Victoria. The possibility that such action will be taken federally is real.

The second enquiry discussed at length in the submission was that of the so-called Wilson committee, which reported to the British Government on the matter of criteria for selection and access to modern public records in 1981.[18] In contrast to White, the Wilson Committee displayed an acute awareness of the evidential and cultural significance of Security and Intelligence agency records. Reflecting concerns expressed by British historians, it sought assurance that Security and Intelligence agency records were being selected for permanent preservation. It expressed this concern and the assurance it had received in the following terms

> We attach great importance to sound arrangements for the selection for permanent preservation of such records of high security sensitivity, even though it may not be possible to foresee when access to them might be possible. We have therefore discussed this matter with the Secretary of the Cabinet who is ultimately responsible for arrangements under which they are handled. On the basis of these inquiries, we can give categoric assurance that the records of the Security and Intelligence agencies are being carefully selected for preservation according to established criteria on lines which broadly follow the Grigg principle and are held and kept in such a way as to ensure that they will be available and in suitable condition for transfer to the PRO if and when a decision is taken that they should be transferred.[19]

The emphasis here is on selection rather than access, and generally

speaking this is true of the Wilson Committee Report as a whole. However, whilst the Committee may be said to have been reticent on the issue of access, it was not prepared to let the matter pass entirely without comment, even in relation to this most sensitive category of records. Specifically, the Committee was confident that ultimately

> the government of the day will find it possible to release these records — say by the time they are 75 years old — although we recognise that in some cases retention may continue to be necessary for 100 years, or possibly even longer. However this may be, we believe that the word 'never' cannot justifiably be used in connection with the release of any public records, whatever their category of security. We therefore recommend that the word 'never' should never be used in this connection.[20]

On the issues of preservation and access then, the findings of the Wilson Committee may be seen to be at odds with those of White. Taken as a whole, the Wilson Committee Enquiry and official British Government response one year later[21] suggest that in the United Kingdom non-current Security and Intelligence agency records

- are no longer being seen as a class wholly distinct from other public records, but liable to be selected, preserved and made accessible as national archives in the sense of other public records. This process of selection is to be systematic according to established criteria, and public assurances are being given to this effect;
- will not be retained by creating or controlling agencies after they have become thirty years old, rather than transferred to the PRO, unless ministerial approval has been obtained to this effect. More information about records retained when they have become thirty years old is to be made available to readers at the PRO. More information is also to be made available about records held by the PRO, but exempted from the normal thirty year rule;
- will be preserved as national archives in a manner compatible with the interests of national security, privacy and confidentiality.

Confirmation that the Wilson Committee approach had the potential to be applied in a real-world situation was supplied by the Archives and Records Association of New Zealand in response to a written enquiry.[22] The reply received from New Zealand was notable for

- a commitment made to the Director: National Archives by the Director: Security Intelligence Service not to 'dispose' of Special Branch files acquired by the Security Intelligence Service at its creation in 1957 (though SIS was not prepared as yet to transfer them to the National Archives)
- the assertion that in the eyes of the Association such records constitute archives and 'should become such at an agreed time, with conditions regarding access which are acceptable to the Minister and the Director: National Archives'

- recognition that means exist to preserve such records compatible with the interests of national security, confidentiality and privacy.

Concerned as it was with existing precedents involving indiscriminate destruction, and influenced by notions of executive accountability and the cultural significance of Security and Intelligence agency records, the submission advocated a solution to the problem of disposal along the lines suggested by Wilson and the New Zealand approach. The principal recommendations of the submission fell broadly into two categories — those which concerned that class of records created as a consequence of Security agency surveillance of Australian citizens and residents, and those which concerned application of the Australian Archives Act to the records of Security and Intelligence agencies generally. In relation to the former it was recommended that

- no further destructions be undertaken,
- such records should be accorded the status of national archives and permanently preserved subject to appropriate access restrictions,
- a process of judicial review apply to *all* requests for access to such records within the restricted access period, including those emanating from creating or controlling agencies.

Based upon an analysis of provisions of the Australian Archives Act concerned specifically with, or applicable by implication to, Security and Intelligence agencies, several amendments were proposed. Foremost among these was the proposal that subclause 29(8) be deleted in its entirety. It was argued that such an amendment would have three beneficial consequences. Briefly, these were

- records more than 25 years old would be liable to be transferred to the Australian Archives unless exempted under subclause 29(2),
- normal processes of survey and appraisal by Archives staff for the purposes of the Act would apply unless ministerial exemption were to be granted under subclause 34(1),
- ambiguity surrounding application of subclause 24(1) (which concerns unauthorised destruction, damage or alteration of a Commonwealth record) would be removed.

To facilitate proper ministerial supervision of applications for extended closure, it was recommended that subclause 34(8) be similarly deleted in its entirety. Again on the issue of extended closure, and in line with a recommendation of the Wilson Committee, it was recommended that provision be made for the Advisory Council to be briefed on such cases. Taking up another point of Wilson, amendments were proposed with the object of increasing information available to Archives readers about

records which are the subject of further restriction or exemption from transfer. These amendments concerned parts 29(1), 29(2), 39 and 66 of the Act.

It was mentioned above that the search for a formula enabling permanent preservation of Security and Intelligence agency records is unlikely to yield a result acceptable to all. It remains to be seen whether Mr. Justice Hope will be influenced by arguments of the sort described here, or will choose to endorse the precedent of Mr. Acting Justice White. On the basis of what is politic, it seems intuitively likely that we will see something of a mix involving some destruction (a process euphemistically referred to as 'audit'), andf some preservation. This may or may not add up to what might be described as systematic records disposal. Whatever the case, his task is an unenviable one, not least of all because of the passions this issue arouses.

Suspicion and anxiety about the activities of Security and Intelligence agencies spanning the period from Petrov to Ivanov lie at the heart of vociferous calls for the destruction of their records. Whether they have been guilty of genuine misconduct or otherwise is a question which can ony be answered through careful examination of documentary, as well as other, sources. Indiscriminate destruction of Security and Intelligence agency records, therefore, even when done in the name of such a noble cause as privacy, is not only archivally unsound but self-defeating. Rather than to promote accountability, the effect of such action is to further diminish it. Without wishing to be unduly cynical, it is possible that the call to destroy is being greeted with a wry smile where it is least expected, i.e., in the Security and Intelligence agencies themselves. Notwithstanding this irony, there is another perspective worth considering. Namely, that if it is Orwellian to compile such information in the first place, is it really the antithesis to promote its unregulated destruction as is fondly supposed, or does this adjective apply equally as well here?

Acknowledgement: The author thanks Pam Mathews and Robert Thornton who assisted the preparation of the submission.

FOOTNOTES

1. *The Australian*, 13 May 1983., p.1.
2. *ibid.*, 29 October 1983., p.8.
3. *ibid.*
4. *ibid.*
5. On 9 May 1984, the Attorney General Senator Evans, tabled in Federal Parliament for the first time an Annual Report of the Australian Security and Intelligence Organisation. *vide The Australian*, 10 May 1984., p.3.
6. Archives Act no.79 of 1983.
7. *Ervin, S.J., The Whole Truth: The Watergate Conspiracy.*, New York, Random House, 1980., p.188.

8. *ibid.*, p.223.
9. Cook, J.F., 'Private Papers' of Public Officials., *American Archivist.*, July 1975., p.314.
10. *ibid.*
11. *ibid., p.316.*
12. *ibid.*
13. *ibid., p.302.*
14. White, J.M., 'Special Branch Security Records: Initial Report to the Premier of the State of South Australia.,' Parliamentary Paper no.145, Adelaide, Government Printer, 1978.
15. *ibid., p.43.*
16. *Submission of the State of South Australia to the Royal Commission on Australia's Intelligence and Security Agencies.*, Adelaide, Government Printer, December 1983., pp.8-9.
17. White, J.M., *op. cit.*, p.36.
18. *Modern Public Records: Selection and Access: Report of a Committee Appointed by the Lord Chancellor*, Cmnd 8204, 1981.
19. *ibid.*, para. 199.
20. *ibid.*, para. 200.
21. *Modern Public Records: The Government response to the Report of the Wilson Committee.*, Cmnd 8531, 1982.
22. Brogan, M., *Disposal of Security and Intelligence Agency Records: A Submission to the Royal Commission on Australia's Security and Intelligence Agencies.*, December 1983., Appendix.