

THE KIWI PARADOX—A COMPARISON OF FREEDOM OF INFORMATION IN AUSTRALIA AND NEW ZEALAND

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INTRODUCTION

Australian freedom of information (FOI) specialists, on first encounter with New Zealand's Official Information Act 1982, tend to scratch their heads about this quaint and quixotic variant of access legislation. Viewed from a trans-Tasman perspective, the Official Information Act appears riddled with extremely flexible provisions which would offer hard-bitten bureaucrats easy escape routes to avoid providing requested information. An initial glance at the history of the Official Information Act merely confirms this observation. When it was launched, the Official Information Act was seen by many New Zealanders as a poor compromise between an Official Secrets Act and freedom of information legislation. Indeed, Sir Robert Muldoon referred to it as a "nine day wonder".¹ The final passage of the Australian FOI Act was accompanied by an initial belief in the creation of a nascent regime of openness, whereas the introduction of the Official Information Act was depicted by the Public Service Association as "Not a freedom of information law...nor a secrecy law...but an uneasy compromise between the two."² A cartoon had the following caption:

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¹ J Belgrave, "The Official Information Act and the Policy Process" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997) at 24.

² New Zealand Public Service Association, *Open Government? A users guide to the Official Information Act* (PSA Research Discussion Paper, 18 April 1983) at 2. Copy held by author.

The *Official Information Act* is complex and confusing. On the negative side, it contains so many reasons for and means of withholding information that it could be used to prevent the disclosure of all but the most routine information.³

This paper presents the argument that when the two access regimes are evaluated on several performance criteria, the Official Information Act has achieved a significantly higher level of openness in government than Australian FOI legislation. Hence the paradox. How did the two access regimes travel so far from their original receptions? The superior performance of the Official Information Act can be traced back to the original design principles associated with each legislative scheme. Buchanan notes that, whilst the New Zealand Official Information Act shares the same general objectives as its Australian and Canadian counterparts, it differs to a considerable extent in its design principles.⁴

This paper demonstrates how those design principles (see Table 1) with respect to the areas of Cabinet and policy documents, produced significantly different outcomes between Australia and New Zealand, especially at a national level.⁵ This difference in outcomes has become more marked over the years. In the first few years after their launch, observers of the Freedom of Information Act and Official Information Act were content to treat the differences as marginal and the general outcomes as similar.⁶ Yet that superior performance does not necessarily indicate that New Zealand is a paragon of openness. As former Prime Minister Sir Geoffrey Palmer noted:

There is a great deal of unpopularity about the Official Information Act in the eyes of decision-makers, because many of them do not like to share information. The Official Information Act is based on the theory that information is power, and in a democracy it ought to be shared. While the Act has changed the culture profoundly it is much less closely observed than it ought to be.⁷

The differences in performance are lessened when the comparison is made with the second generation of Australian FOI legislation (found at the State level) and the proposed third generation of suggested reforms. Many of the design principles incorporated in this second and potential third generation of Australian FOI legislation resemble, or are designed to achieve, the same outcomes as those in the Official Information Act. Nevertheless, Australian access laws have been seen in the following light:

It is my sad conclusion...that with few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.⁸

³ Ibid at 5.

⁴ R Buchanan, "Cabinet, policy documents and freedom of information: the New Zealand experience" (1991) 31 *FoI Rev* 1 at 2-6.

⁵ The original version of the design principles used in this paper were drawn from Buchanan's article and further refined during my research in New Zealand.

⁶ R Hazell, "Freedom of Information in Australia, Canada and New Zealand" (1989) 67 *Public Administration* 189.

⁷ G Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (1992) at 31-33.

⁸ M Paterson, Submission 94 quoted in Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982* (ALRC 77/ARC 40, 1995) at 35.

Table 1: Key points of design difference between the FOI Act and the Official Information Act

Key features	Australia	New Zealand
The target of access	Documents	Information
Interpretation	Narrow	Pro-disclosure
Withholding provisions	Categorical	Consequential
Public Interest	Specific	General
Internal Review	Yes	No
External Review	Legalistic	Informal
Administering the Act	Ad hoc and internal	Systematic and external for 5 years
Designer Expectations	Hostile reception	Evolutionary

Even in retrospect it cannot be argued that this difference in performance has meant that Australia took the wrong approach to achieving open government. Historical, cultural, institutional and attitudinal differences between Australia and New Zealand may have defeated any attempt to achieve the same performance results in Australia by using a replica of the Official Information Act. Grant Liddell puts forward the strongest case for the relative superiority of the Official Information Act over other FOI Acts:

New Zealand's *Official Information Act* suffers from fewer deficiencies than most if not all other freedom of information statutes. It is an Act concerned with information, not documents; it creates rights of process rather than rights of access to official information; its dispute resolution and enforcement mechanisms are relatively inexpensive, accessible and speedy; it requires decisions on access to be made on a time- and information-specific basis; and, most importantly, it states a guiding principle of availability, informed by the purposes of accountability and participation, as the foundation on which the Act is built. Unlike other freedom of information statutes, it does not categorise certain classes or categories of information, eg Cabinet papers, as beyond its reach. Its coverage is defined and, in most instances, easily ascertained. Thus disputes are principally disputes over matters of judgment: is information, properly subject to the Act, properly withheld or not? There are very few disputes about boundary issues, such as what is information?; is the body holding the information subject to the Act? And the cases that have progressed to the regular courts have emphasised the role of the decision-maker's judgment in determining access to information issues, thus emphasising that they have been genuinely difficult cases.⁹

This comparative undertaking was begun and completed with the trepidation of all such transnational studies. New Zealand readers need to forgive my clumsy and

⁹ G Liddell, "The Official Information Act 1982 and the Legislature: A Proposal" in Legal Research Foundation, above n 1.

misconceived renderings of the intricacies of their Official Information Act. A passing acquaintance with the massive tome by Eagles, Taggart and Liddell will suggest that I have only touched the surface of that jurisdiction.¹⁰ As an Australian I have learnt not only the extent of my own ignorance about freedom of information but I have learnt to pay far closer attention to its still unfolding history. A further complication was added to the study by comparing unitary and federal systems, where the States had in many cases significantly modified their versions of freedom of information. The experience of freedom of information at the State level in Australia has been used in this study to provide different examples or highlight aspects of freedom of information at the Commonwealth level.

In such a limited study it was not the intention to provide an exhaustive and definite statement about each of the points raised. Rather, the intention was to begin a typology of access legislation that would encourage and provide scope for further comparative studies by Australian and New Zealand academics. The taxonomy displayed in Table 1, and used throughout this paper, allows for a number of useful observations to be made about access regimes in the two countries. However, a simple twofold division by its very nature tends to distort analysis. The observer chooses polar extremes to give the analysis sharpness (legalistic versus informal, wide versus narrow, consequential versus categorical) yet loses the detail provided by shades of grey. The temptation is to omit information that does not seem to fit the category offered by the model rather than return to the drawing board to sketch a new classification scheme. This temptation has been consciously rejected but readers should be alert to the possibility of such a bias.

This study has only been a preliminary voyage in comparing FOI in Australia and New Zealand. Points worthy of future comparison would be an examination of more content-orientated exemptions (internal working documents, commercial in confidence, etc) and a focus on criteria such as release rates, processing times and types of users. Furthermore, there is a strong school of thought in Australia that elements of the New Administrative Law (NAL) package should not be evaluated in isolation. This study has not tried to assess whether other elements of the NAL package rectify or offset any of the perceived shortcomings of Australian FOI.

DIFFERENT ORIGINS AND AGENDAS

The history of freedom of information in Australia and New Zealand shares a surface similarity. This observation, however, obscures deep and important contrasts. The Australian experience began largely in response to an external reformist movement—albeit of few members—battling an entrenched and, with a few notable exceptions, non-receptive bureaucracy. In contrast, the New Zealand tale is one of informed insiders developing a model that was acceptable to the political and bureaucratic leadership. The presence of a high-level internal constituency in the New Zealand public service was to be a critical factor in shaping not only the initial design choices but in avoiding the Canadian (and Australian) experience of implementing

¹⁰ I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (1992).

legislation that was "guided by often hostile ministers and a foot-dragging bureaucracy".¹¹

The differences may have only been of degree rather than substance. The Australian campaign was relatively narrowly-based, organised around academics and public interest lawyers. If the New Zealand movement's public service veneer is removed it reveals a similar set of traits.¹² In both countries the goal was to escape the straitjacket of secrecy that threatened democratic values and to achieve a more participatory polity. It was the degree to which the New Zealanders, in contrast to their Australian counterparts, were prepared to depart from the imperatives of private, collective decision-making within a Westminster-style government which made all the difference. Sir Guy Powles wrote in 1980:

Legislation is necessary to ensure Freedom of Information. In New Zealand the habit of secrecy in government, which begins with Ministers and permeates through departments, is so deeply ingrained that nothing short of a positive commitment by the legislature to a policy of maximum freedom of information is likely to produce more than a minimum change.¹³

Australia

Australian FOI was born in part of the demands for greater accountability and participation by political and bureaucratic outsiders.¹⁴ The essence of these demands was reflected in Jim Spigelman's 1972 book *Secrecy: Political Censorship in Australia*.¹⁵ These early initiatives were then incorporated into the wider Australian administrative law reform movement, culminating in the NAL package of reforms implemented in the late 1970s and early 1980s at the Commonwealth level. In particular, the ten year debate over FOI was tortuous and the subject of a strong bureaucratic resistance campaign.¹⁶ As Whitlam noted, "The Government devoted many hours of discussion to freedom of information legislation but not sufficient to overcome the resistance of its most senior and respected public service advisers."¹⁷ In the end, the FOI Act remained a confrontational "in your face" attempt at participatory democracy.

Terrill, in a detailed examination of the evolution of Australian government communication, reveals a more complicated and interesting historiography of the development of Australian Freedom of Information legislation than that found in the

¹¹ R P Gillis, "Freedom of Information and Open Government in Canada" in A McDonald and G Terrill (eds), *Open Government: Freedom of Information and Privacy* (1999) at 151 quoting Canadian Information Commissioner John Grace.

¹² R Hazell, above n 6 at 201.

¹³ Sir Guy Powles, "Freedom of Information and the State", a discussion paper for the 1980 Conference on *Freedom of Information and the State* (Victoria University, Wellington, Dec 6-7) at 2.

¹⁴ G Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (2000) at 98-99. A brief summary of this material can be found in G Terrill, "The Rise and Decline of Freedom of Information in Australia" in A McDonald and G Terrill (eds), above n 11 at 90-95.

¹⁵ J Spigelman, *Secrecy: Political Censorship in Australia* (1972).

¹⁶ The initial bureaucratic gamesmanship over the reform initiative for open government promised by the Whitlam government is superbly told in G Terrill, above n 14 at 98-99.

¹⁷ G Whitlam, *The Whitlam Government 1972-75* (1985) at 621.

more orthodox outlines.¹⁸ Terrill produces evidence of how "Freedom of information was—ironically—to a large extent made possible in Australia because of negotiations and pressure that were little known publicly."¹⁹ He argues that between the mid 1960s and 1975, fundamental changes took place in the methods and modes by which government information in Australia was understood, communicated and used. Terrill suggests that areas like freedom of information, archival concerns and changes to what public servants were able to reveal to the public were the more visible parts of this transformation. In tracing that evolution of governmental communications, Terrill outlines the paucity of the antecedents of freedom of information before it appeared on the Whitlam Cabinet agenda in early 1973.

The eventual combination of individuals, policies and pressures that finally resulted in an Australian Freedom of Information Act was really a story of tangents and casual connections between a small cadre of activists both inside and outside of the Australian Labor Party (ALP). The arrival of open government into the holy writ of the "It's Time" policy platform in 1972 was not achieved by a long policy development process which utilised careful and detailed research. Rather, it was the influence of Spigelman, the support of Clyde Cameron (motivated in large part by the advocacy of Paul Munro) and the acceptance by Whitlam of a general loosely defined policy ideal. Terrill demonstrates how most of the leading ALP figures at the time had little knowledge or awareness of this new policy plank in the election platform.

Curtis, in his brief narrative about the workings of the Interdepartmental Committee assigned to deal with the Whitlam government's promised enactment of Freedom of Information legislation, reveals little of the isolated and meandering route this reform process took.²⁰ Terrill has now provided a comprehensive insight, noting ironically that much of his source material about the development of Australian freedom of information is still not accessible via freedom of information. At one point, in his study, Terrill remarks:

The most open freedom of information bill was, ironically, developed in secrecy. The manner in which Munro and McMillan drew up the FOI bill reflected the way the bureaucracy normally conducted consultation with the public.²¹

Whilst researching this paper the author uncovered a cache of material which adds to the—till now—secret official details of this early history.²² The period between the

¹⁸ These outlines include: ALRC/ARC, above n 8 at paras 3.1-3.7; Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information—Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill* (1979); *Freedom of Information Act 1982—Annual Report by the Attorney-General on the operations of the Act, for the period 1/12/82 to 30/6/83* (1983). See also K Harrison and A Cossins, *Documents, Dossiers and the Inside Dope—a practical guide to Freedom of Information law* (1993).

¹⁹ G Terrill, above n 14 at 93.

²⁰ L Curtis, "Freedom of Information in Australia" in N Marsh (ed) *Public Access to Government Held-Information* (1987) at 173-175. Lindsay Curtis was the original chair of that inter-departmental committee.

²¹ G Terrill, *Secrecy and Openness. Publicity and Propaganda: The Politics of Australian Federal Government Communication, c1960-1976* (dissertation submitted for the degree of Doctor of Philosophy at Queensland University of Technology, 1996) at 206-207.

²² The material included one of the Cabinet copies of Lionel Murphy's Cabinet submission plus other supporting papers and Cabinet documents dealing with the issue of FOI during 1973-1974.

incorporation of "Open Government" into the Labor Party platform just prior to the historic "It's Time" election in late 1972, and the commencement of the Interdepartmental Committee, chaired by Lindsay Curtis, in early 1973 has largely remained hidden behind the veil of Cabinet and official secrecy. The Australian Law Reform Commission and Administrative Review Council (ALRC/ARC) Report merely mentions that, after the election, the federal Attorney-General, Senator Lionel Murphy, "announced that the Government would enact FOI legislation and established an Interdepartmental Committee to report any modifications to the United States' Freedom of Information Act 1966 appropriate for legislation in Australia".²³ Curtis adds little to this thin detail.²⁴

Terrill mounts a case for the argument that "Freedom of Information had a remarkably slow start in Australia."²⁵ In amassing his evidence, Terrill points to the relatively few mentions of freedom of information in the 1960s in either Australian legal or political forums.²⁶ Furthermore, Terrill demonstrates how little was actually known about the United States position and comments: "Had more been known about the US situation there would have also been doubts about its utility."²⁷ In his policy speech, Whitlam clearly enunciated that an Act would be introduced in Australia that incorporated most of the key features of the United States legislation, including a legal right to challenge the withholding of public information by agencies or the government.²⁸

Most studies have assumed, but have been unable to prove, the unbroken lineage of the "US model". This lineage can be traced from Whitlam's policy commitment through to the Interdepartmental Committee's efforts to allegedly recast that model for Australian conditions. Terrill has shown how little critical knowledge lay behind the overnight adoption of the "US model" for Australia although work had begun in the Attorney-General's Department in December 1972 using the "US model".²⁹

The departmental activity had progressed to such an extent that Lionel Murphy, Attorney General in the new Labor Government, was able to put a submission to Cabinet on Freedom of Information dated 5 January 1973.³⁰ The key points of that submission included a recommendation for the introduction of legislation to make available classes of official documents and information for public access and to restrict to specified categories the classes of information protected by criminal sanctions from unauthorised disclosure. The submission advocated rejection of the Swedish model of open government and endorsement of the United States system, but having "regard to the differences of constitutional and administrative background the United States legislation cannot be adopted here without some modification and I propose that the details of the necessary modifications should be worked out by an Interdepartmental

²³ ALRC/ARC, above n 8 at para 3.2.

²⁴ L Curtis, above n 20 at 172-173.

²⁵ G Terrill, above n 21 at 167.

²⁶ G Terrill, above n 14 at 88-93.

²⁷ G Terrill, above n 21 at 167.

²⁸ Whitlam 1972 policy speech "It's Time," delivered 13/11/72, Sydney.

²⁹ G Terrill, above n 14 at 99 fn 58.

³⁰ Submission No 19 for Cabinet, from Lionel Murphy, Commonwealth Attorney General dated 5 January 1973, 11 pages. Copy held by author.

Committee."³¹ The submission further pointed out that both Swedish and US provisions protect internal working documents prepared during the process of making policy decisions, including giving advice to Ministers. "In my view, this class of document should not be released for public access in Australia."³² Murphy also proposed amendment to Crown copyright to allow easier access to government information,³³ revision of s 70 of the Crimes Act 1914 (Cth)³⁴ and submitted that effect be given to the recommendations of the Franks Committee.³⁵

On 10 January 1973, "famous in FOI circles for being the day that Cabinet approved Attorney-General Lionel Murphy to commence work on freedom of information legislation",³⁶ the Cabinet agreed with Murphy's submission except for the issue of the Interdepartmental Committee.³⁷ Terrill reports that Clyde Cameron had persuaded Cabinet to agree to sending the model to the Legislation Committee because he felt that public servants had a vested interest in seeing "that there was no such thing as open government."³⁸ The Cabinet minutes confirm that the Legislation Committee was given the task of examining what Australian modifications were needed to the US model.³⁹ As Terrill notes this "secret" decision of Cabinet was widely, and accurately, covered in the press the following day.⁴⁰ The remaining mystery is how (given the Cabinet decision to pass the matter on to the Legislation Committee) the now famous Interdepartmental Committee chaired by Lindsay Curtis was up and running a mere ten days later on 18 January 1973 with no sight of the Legislation Committee playing a supervisory role.⁴¹

The Australian experiment with FOI commenced with the casual networking and single issue advocacy of a number of individuals associated with the Labor opposition, and was constructed as a mechanism to attack a secretive bureaucratic state. These advocates adopted as a working model a little understood foreign scheme (the United States FOI Act) and thus were willing to accept that "Australian modifications" would be needed. Once in government, and after the initial edict "Let there be FOI" had been pronounced, the detail was left to a bureaucratic committee the members of which had "served their official careers in an atmosphere of official secrecy".⁴²

³¹ Ibid at para 5. The following Departments were to be on the Committee: Prime Minister and Cabinet, Public Service Board, Defence, Treasury, Special Minister for State and Attorney-General's (ibid at para 11).

³² Ibid at para 12. The justifications for this position included the protection of frank and impartial advice, the need to canvas all issues and to protect the occasional inclusion of immature or tentative material.

³³ Ibid at para 13.

³⁴ Ibid at para 14.

³⁵ Ibid at para 20. The Franks Committee had in 1972 reviewed the operation of the Official Secrets Act 1911 (UK), s 2.

³⁶ G Terrill, above n14 at 99.

³⁷ Cabinet Minute, Decision No 30—Freedom of Information, 10 January 1973. Copy held by author.

³⁸ G Terrill, above n 14 at 99.

³⁹ Cabinet Minute, above n 37 at 2, point (c).

⁴⁰ G Terrill, above n 21 at 180, footnotes 216 and 217.

⁴¹ G Terrill, above n 14 at 100 footnote 59.

⁴² L Curtis, above n 20 at 173.

New Zealand

In New Zealand a different approach was used. The Official Information Act was the unintended legacy of Robert Muldoon, who commissioned a Committee on Official Information and was presented with nascent freedom of information legislation.⁴³ A low-key law reform campaign had coincided with a "move within government circles to establish a committee to review both the system of classifying official information and the Official Secrets Act 1951".⁴⁴

Aitkens stresses, more so than other writers, the external pressures which, although comparatively weak, acted as pacemakers for those working on the committee.⁴⁵ In particular, she notes the pressure from a small and articulate environmental movement increasingly concerned with the lack of official information about major development projects.⁴⁶ In 1977, prior to the Danks Committee, a Labour MP, Richard Prebble, had introduced a private members Freedom of Information Bill.

These beginnings share a number of common threads with the picture painted by Terrill of the Australian evolution towards greater openness, with one significant difference. The Official Information Act was the work of an inner circle of bureaucratic and legal elites who carefully crafted a mechanism that would allow an evolution of bureaucratic and ministerial attitudes to the concept of open government. The Danks Committee was predominantly public service in composition but, as Eagles et al note, whilst this was initially a source of adverse comment, it became "an important factor in making the proposals acceptable to both politicians and the public service".⁴⁷ Harland, a member of the Committee, describes the committee composition in the following way:

This approach was reflected in the composition of the Committee. Sir Alan Danks, who was appointed Chairman, was a former Chairman of the (now extinct) University Grants Committee. The only other member who was not an official was Professor K.J. Keith—now Sir Kenneth—who was then teaching law at Victoria University. The rest of the members were senior officials in Departments that were directly concerned with the handling of sensitive information—the State Services Commission, Justice, Foreign Affairs, Defence, and the Cabinet Office. The Chief Parliamentary Counsel was co-opted at an early stage. None of the members was a politician, the media were not represented, and neither was any of the departments dealing with social policy, such as Education, Health and Social Welfare. Today such a group might not be regarded as sufficiently representative for the task in hand: even in the '70s it seemed very much an "In House" body—though arguably one not ill-equipped for the job it had to do. Some at least of the members might have been surprised if they could have foreseen that the outcome of their deliberations would be an Act later described by the President of the Court of Appeal as "constitutional".⁴⁸

⁴³ The early history of the OIA is well covered in I Eagles, M Taggart and G Liddell, above n 10 at 1-3. See also B Harland, "The Danks Report" in Legal Research Foundation, above n 1 at 1-5.

⁴⁴ I Eagles, M Taggart and G Liddell, above n 10 at 1.

⁴⁵ J Aitkens, "Open Government in New Zealand" in A McDonald and G Terrill (eds), above n 11 at 117-142.

⁴⁶ Ibid at 121.

⁴⁷ I Eagles, M Taggart and G Liddell, above n 10 at 1, footnote 4.

⁴⁸ B Harland, above n 43 at 2.

Harland emphasises how the composition of the Committee was instrumental in deciding to avoid at all costs the US approach of legal rights and the associated volume of litigation. Consequently, the Committee was compelled to find a middle road towards:

a way of overcoming inertial resistance to making information more freely available, without causing a flood of litigation and adding to the burdens of the judiciary. We wrestled for some months before coming up with a solution.⁴⁹

The key difference between the two jurisdictions appears to have been their response to the objective of greater openness in government. It is clear that the Australian reform proposals met a stiff resistance and were perceived as an unnecessary obstacle in the art of traditional administration. In New Zealand, the reforms were sponsored and designed by officials operating deep within the traditional secretive workings of Westminster government. The New Zealand officials were concerned with adapting governmental information handling to deal with policy development in an era of greater change. Australian officialdom looked to the paradigm of the past and grudgingly accepted a muted US model adapted for local conditions. The New Zealanders focused on information and policy trends and tried to create an access regime that could respond to future developments and needs. This difference in design beginnings was to prove critical.

The reception that greeted the final version of the Official Information Act, although later proven by the passage of time to be wildly misjudged, did not surprise the Danks Committee. The Committee knew that it had taken a calculated risk and that the final flexible legislative architecture had the potential "to create a bureaucratic monster fed by the unreasonable antics of those seeking information and those seeking to deny it".⁵⁰ Many were prepared, as Aitkens notes, to dismiss it as a "political hucksters trick—the same rotten deal [as the Official Secrets Act] in a bigger, brighter, more publicly acceptable package".⁵¹

FIRST POINT OF DESIGN DIVERGENCE—THE TARGET OF ACCESS

In making information (as opposed to documents) the subject matter of access, the New Zealand designers set in place an important differential from other freedom of information regimes. The Official Information Act contains no precise definition of official information but has allowed a very wide interpretation to be adopted by the review bodies and courts. In the seminal case *Commissioner of Police v Ombudsman*, Jeffries J declared:

Perhaps the most outstanding feature of the definition is that the word 'information' is used which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers, or organizations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities. The omission, undoubtedly deliberate, not [sic] to define the word 'information' serves to emphasise the intention of the Legislature to place few limits on relevant knowledge.⁵²

49 Ibid at 3.

50 J Aitkens, above n 45 at 125.

51 Ibid.

52 [1985] 1 NZLR 578 at 586.

New Zealand academics, practitioners, government officials and other key actors treat the use of "information" as the target of access as axiomatic. Liddell merely notes that it is an "Act concerned with information, not documents".⁵³ Harland skips over the decision to use "information" as the target of access and concentrates his attention on the vital role played by the Committee's decision to favour a presumption that information should be made available unless there was a good reason to withhold it.⁵⁴ Eagles et al only devote a very minor coverage to the role of information as the subject matter of access.⁵⁵

An examination of the Danks Report confirms that this important design divergence was more accidental than a calculated policy. In part this seems to stem from the actual terms of reference and focus of the Danks Committee. The Committee's terms of reference directed the Committee to focus on "the extent to which official information can be made readily available".⁵⁶ The Committee's report seems to indicate that the choice of "information" as a vehicle for access was incidental. It is only in the supplementary report that any direct consideration is given to the matter at paragraph 1.07:

One distinction between our proposals and the approach taken overseas lies in the concept of what constitutes official information. The term "information" is not used in other legislation, which is written in term of records—notably written documents, but also tapes and computer entries. This does not however accord with every day usage which we think it is generally preferable to follow. For the purpose of criminal sanctions moreover the concept of "information" rather than documents is necessarily used, and we seek a closer alignment of the two. We have therefore chosen to regard official information in the wider sense of knowledge held by departments and organisations in their official capacity. This has had a considerable effect on the detailed drafting of our Bill. Where there is a legal right of access, however, it will often be in terms of records.⁵⁷

For Australian practitioners, experienced in dealing with various definitions of document, the implications of the definition of information, used by the interpreters of the Official Information Act, are surprising. The Danks Committee's reasoning, judicial dicta and the consistent practice of the Ombudsman have led to the Ombudsman requiring, in the absence of formal notes or other records, to ask one "or more persons

⁵³ G Liddell, above n 9 at 6.

⁵⁴ B Harland above n 43 at 3.

⁵⁵ I Eagles, M Taggart and G Liddell, above n 10 at 21-22.

⁵⁶ Committee on Official Information (Danks Committee), *Towards Open Government* (1980), vol 1, General Report, Appendix 1 at 40. In 1978 the terms of reference for the committee were:

1. The basic task of the Committee is to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public. With this end in view and having in mind the need to safeguard national security, the public interest and individual privacy, the Committee should, in particular:
 - (a) review the criteria for applying the classifications now in use and, if necessary, recommend the redefinition of the categories of information which should be protected; and
 - (b) examine the purpose and application of the Official Secrets Act 1951, in particular section 6, and any other relevant legislation, and recommend amending legislation.
2. In the light of the foregoing review the Committee should advance appropriate recommendations on changes in policies and procedures which would contribute to the aim of freedom of information.

⁵⁷ *Ibid*, Vol 2, Supplementary Report at 6.

involved in the decision-making process to provide a written account of what was said or the reasons expressed orally for reaching that decision".⁵⁸ This ability to extract information from the corporate memory, via an aide-mémoire, reduces the incentive or temptation for New Zealand agencies to engage in some of the documented practices of Australian agencies.⁵⁹ In 1997, the United Kingdom government in its policy development adopted the concept of information as the target of access precisely because it would allow access to previously unrecorded corporate memory.⁶⁰

The ALRC/ARC Report rejected the need to adopt the New Zealand approach to the subject matter of access. Most submissions to the ALRC/ARC rejected the concept of making information, as opposed to documents, the target of access as a reform which was too uncertain or too much of an imposition on agencies.

[T]he ATO...would not like to see an extra burden placed on agencies by legislative requirement to create additional documents...to provide information not already recorded.⁶¹

Tasmania has been the only state to experiment with the term "information", as opposed to documents, with less dramatic results than those achieved in New Zealand. The Tasmanian Ombudsman has not endorsed the creation of aide-mémoires or the creation of new documents that contain information requested by an applicant. Applicants under the Tasmanian Freedom of Information Act 1991 are entitled, on request, to be provided with information contained in a record held by the relevant body. This would theoretically allow a request to be made which would necessitate the creation of a new record either because the current record contains a lot of exempt information or because the information requested is contained in a large number of different records. This approach has been adopted in the United States where a court held that the situation where an agency has to

search numerous records to comply with the request and...the net result of complying with the request will be a document which the agency did not previously possess is not unusual in FOI Act cases...⁶²

However, in contrast to New Zealand, where an applicant is entitled to "official information held" by an agency, a Tasmanian applicant is only entitled to information contained in the records of an agency.⁶³ The definition of record in s 5 of the Tasmanian Act is very wide and extends to "anything in which information is embodied so as to be capable of being reproduced." Skills of statutory interpretation, however, would be tested to argue that a bureaucrat filled with corporate memory is such a "thing in which information is embodied".

⁵⁸ I Eagles, M Taggart and G Liddell, above n 10 at 21. See the discussion at 22-28 of the different judicial approach to the interpretation of information in relation to the criminal discovery process.

⁵⁹ R Snell, "Comment" (1993) 44 *FoI Rev* 13 where a summary is given of the Nash Report which detailed a series of information malpractices in relation to FOI procedure in Victoria in the 1980s. A copy of the Nash Report is held by the author.

⁶⁰ United Kingdom White Paper, *Your Right to Know* (11 December 1997) at para 2.10.

⁶¹ ALRC/ARC, *Freedom of Information* (DP 59, May 1995) para 4.2 ATO Submission 41.

⁶² United States District Court in *Disabled Officer's Association v Rumsfeld* 428 F Supp 454 at 456 (1977).

⁶³ Freedom of Information Act 1991 (Tas), s 7.

The prime importance of having information as the target of access has been reaffirmed in New Zealand. Several times in the first half of 1998 New Zealand organisations balked at providing information that had not been recorded in writing. The New Zealand Ombudsman, supported by Crown Law agreement, argued that applying Official Information to non-documentary information reflects the underlying rationale of the legislation. The view was expressed that:

in the ordinary course of the day-to-day work of government, there will often be no need for decision makers to record all detailed background information about advice, recommendations or decisions that is already known to them. In many cases, it is only when such information is requested by another party that there is any practical need to reduce such information to writing. However, the fact that information has not yet been reduced to writing does not mean that it does not exist and is not 'held' for the purposes of requests under the official information legislation.

*In these circumstances, if the official information were to apply only to information held in documentary form, the purposes of the legislation could be easily frustrated.*⁶⁴

SECOND POINT OF DESIGN DIVERGENCE—INTERPRETATION

The purpose of object sections in FOI legislation have been depicted by Liddell as stating "...a guiding principle of availability, informed by the purposes of accountability and participation, as the foundation on which the Act is built".⁶⁵ Whilst New Zealand seems to have little problem with enshrining a presumption of general availability of governmental information, and ensuring that the courts and other review bodies would facilitate that operating guideline, the experience in Australia has been one marked by frustration. Acting as unofficial gatekeepers to a Westminster system, the Australian judiciary has undermined the foundations of freedom of information. In part, this undermining has occurred because of the method most Australian judges have used to approach the interpretation of a categorical exemption system. A number of Australian authors have argued that Australian Freedom of Information legislation, at both State and Commonwealth levels, provides for a presumption in favour of disclosure,⁶⁶ this being either directly required via its object sections or by the intentions of its designers, as indicated in second reading speeches. This argument has generally been rejected by the judiciary,⁶⁷ with a few notable

⁶⁴ New Zealand Ombudsman, "Application of Official Information legislation to non-documentary information" (1998) 4(3) *Ombudsman Quarterly Review* at 1 (emphasis added).

⁶⁵ G Liddell, above n 9 at 6.

⁶⁶ R Snell, "The Torchlight starts to glow a little brighter: Interpretation of Freedom of Information Legislation Revisited" (1995) *AJAL* 197; R Snell, "Hitting the Wall: Does Freedom of Information Have Staying Power?" National Administrative Law Forum (7-8 July 1994, Brisbane) published in S Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (1996) *AIAL* at 153; A Cossins, "Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law" (1995) 23 *FL Rev* 226 at 263; S Zifcak, "Freedom of information: torchlight but not searchlight" paper presented at National Conference on Administrative Law (1991) 66 *Canberra Bulletin of Public Administration* 162.

⁶⁷ *News Corp Ltd v National Companies and Securities Commission* (1984) 52 ALR 277; *Arnold v Queensland* 13 ALD 195; *Searle v PIAC* (1992) 108 ALR 163.

exceptions,⁶⁸ and has only been fully accepted by non-judicial external review agencies.⁶⁹

The joint ALRC and ARC review of the Freedom of Information Act 1982 (Cth) recommended that agencies ought to approach a FOI request with a presumption that the document should be disclosed.⁷⁰ A further recommendation was that the object clause of the Act should be amended to make it clear to those interpreting it, at both agency and judicial level, that the Act ought to be construed so as to achieve maximum disclosure.⁷¹

Australian case law continues to demonstrate a reluctance by the majority of the judiciary and Administrative Appeals Tribunal (AAT) members to embrace a pro-disclosure interpretation towards FOI legislation. A series of AAT and State court decisions have declared that the Full Federal Court decision in *Searle* is correct and that there was no leaning in favour of disclosure.⁷² The prevailing judicial view has not drifted from the majority decision of the Federal Court in *News Corp Ltd v National Companies and Securities Commission*, where Bowen CJ and Fisher J said:

In construing our Act we do not favour the adoption of a leaning position. The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used bearing in mind the stated object of the Act.⁷³

Deputy President Gerber of the AAT in *Watermark v Australian Industrial Property Organisation*⁷⁴ made the following comments when rejecting the "presumption in favour" approach to FOI interpretation in Australia:

Mr Cavanough submitted that we should adopt a "leaning approach" to the interpretation and application of the exemption provisions of the FOI Act: i.e. that we should "lean" in favour of disclosure of the claimed papers, adding that there was a "trend" towards doing so. He referred to an article in the *Australian Journal of Administrative Law* No 2, August 1995 by Mr Rick Snell: *The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited*, and in particular to two cases cited therein—*Sobh v Police Force of Victoria* (1994) 1 VR 41, and *The Commissioner of Police v The District Court of NSW and Perrin* (1993) 31 NSWLR 606. His submission does not lack boldness and lends support for the "trend" not to rely on the writings of learned authors until they are well and truly dead.

⁶⁸ *Sobh v Police Force of Victoria* (1994) 1 VR 41 and Kirby P in *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606.

⁶⁹ Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1994) 1 QAR 60; *Re Read and Public Service Commission* Decision Office of the Information Commissioner (WA) Ref D00194, 16 February 1994, unreported; *NSW Ombudsman Guidelines* (December, 1994) at 3; *Snell v Tasmanian Development and Resources* Tasmanian Ombudsman, Decision 95030080, 10 April 1995.

⁷⁰ ALRC/ARC, above n 8 at para 4.2.

⁷¹ *Ibid* at paras 4.4-4.6.

⁷² *Re: Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 36 FCR 111 was followed in *Ipex Info Tech v Dept of Info Tech Services SA* (District Court South Australia, Lunn J, 16 June 1997, unreported) at 7-10. A view endorsed by *Sheppard v SA Minister for Health* (District Court South Australia, Trenorden J, 8 December 1997, unreported) at 4-5.

⁷³ (1984) 52 ALR 277 at 279.

⁷⁴ No V94/547 AAT No 10625.

In a previous article⁷⁵ I have argued that the position adopted in *Searle*⁷⁶ was a misconstrued application of the High Court's ruling in *Victorian Public Service Board v Wright*⁷⁷ where the High Court, in considering the Victorian FOI legislation, stated:

In light of s 3 (the objects clause) and s 16(1) (entitling agencies to exercise a discretion to permit access to exempt documents) it is proper to give the relevant provisions of the Act a construction which would further, rather than hinder, free access to information.⁷⁸

In New Zealand, the designers, implementers and judiciary have accepted a pro-disclosure approach. The Danks Committee based its whole design of the Official Information Act on the "presumption...that information is to be made available unless there is a good reason to withhold it".⁷⁹ The Committee argued that:

We believe that, if they are to be effective, rules for the handling of official information must be brought into line with current attitudes and practices. The law must be such that it commands respect.

We therefore consider that the system based on the Official Secrets Act should be replaced by a new set of arrangements. The Government should, in our view, reaffirm its responsibility to keep the public informed of its activities and to make official information available unless there is good reason to withhold it. Grounds for withholding information from the public should be set out clearly, along with the basic principle.

We do not think that an administrative directive to heads of departments and agencies would meet the need in New Zealand. The changes we propose are of such constitutional importance that they deserve to be given the force of law; in this way the Government and Parliament will provide an assurance to the public that no administrative directive could give.⁸⁰

The approach of the Danks Committee was to create a revolution in the handling of governmental information in New Zealand. The clear design was to move towards a more public discussion of options and advice in the formulation, debating of and implementation of policy.⁸¹ As Marie Shroff notes:

When the *Official Information Act* was passed 15 years ago, its impact was immediate and fundamental. Many politicians and public servants who had long nestled in the security of the Official Secrets Act reeled with shock as the presumption of access to official information was turned on its head. But this revolution was made by leading public servants and politicians themselves, including my own predecessor as Secretary of the Cabinet, Patrick Millen.⁸²

The New Zealand approach has ensured a shift from secrecy to a regime of information management.⁸³ In contrast, the Australian approach has fostered a culture

⁷⁵ R Snell, "The Torchlight starts to glow a little brighter: Interpretation of Freedom of Information Legislation Revisited" (1995) *AJAL* 197.

⁷⁶ (1992) 36 FCR 111 at 115.

⁷⁷ (1986) 160 CLR 145.

⁷⁸ *Ibid* at 153.

⁷⁹ B Harland, above n 43 at 3.

⁸⁰ Danks Committee, above n 56, vol 1 at 6.

⁸¹ *Ibid* at 22.

⁸² M Shroff, "Behind the Official Information Act: Politics, Power and Procedure" in Legal Research Foundation, above n 1 at 19.

⁸³ See *ibid* for a detailed analysis of how this system of information management now operates in New Zealand.

of secrecy and an access regime where the Commonwealth Ombudsman can still remark, fifteen years after the inception of the Act, that "many government agencies still do not operate within the legal framework and certainly not the 'spirit' of the...FOI Act."⁸⁴

Shroff argues that the approach in New Zealand is now focused on an "open style of government...[in] managing the dissemination of official information."⁸⁵ The New Zealand bureaucracy was confronted with a presumption in favour of release and a framework of access that was designed to ensure a progressive increase in the availability of information. It now sees its task as seeking to "manage the process of release of information".⁸⁶ This management includes a decision to release Cabinet Office circulars to all party leaders prior to acceding to an Official Information request from the media. In some cases it might be the releasing of the information to the whole press gallery instead of the original press applicant.⁸⁷

The restrictive approach adopted by the Australian Federal Court in *News Corp and Searle*, and blindly followed by Lunn J in *Ipex* and Deputy President Gerber in *Watermark*, has clearly left Australian FOI practice struggling on the starting block while New Zealanders concentrate on the objective of managing access to government held information. In part the designers of Australian FOI legislation can bear some of the responsibility, given their adoption of a categorical system to handle exemptions. However, Australian FOI practice has been far more hampered by judges and tribunal members who have lost sight of how access legislation needs to operate.

THIRD POINT IN DESIGN DIVERGENCE—EXEMPTIONS

The choice made about the scheme for exemptions is crucial for any access regime. The choices made demonstrate the relative commitment being made to, or tolerance of, open government. In New Zealand "the framers of the Official Information Act deliberately eschewed the loophole blocking defensiveness which characterizes the Canadian and Australian legislation".⁸⁸ This obsession with curtailing loopholes in Australia is both a legacy of the American approach to access and the bureaucratic ill ease that has greeted FOI in Australia. A consequence of that obsession is the creation of a complex set of exemption provisions that fail the tests of accessibility and intelligibility:

The exemption provisions in Part IV of the Commonwealth Act currently span 16 pages of the Act, with some individual exemptions covering one-and-a half pages. Many present passages in the text of the exemptions can be characterised as the antithesis of plain English.⁸⁹

Buchanan observes that the New Zealand and Australian approaches are easily contrasted. Australia's withholding provisions "are worded in categorical, or exemptive terms" whereas New Zealand's exemptions are "consequential ones".⁹⁰ This

84 ALRC/ARC, above n 8 at para 2.8.

85 M Shroff, above n 82 at 19.

86 Ibid at 20.

87 Ibid.

88 I Eagles, M Taggart and G Liddell, above n 10 at 109.

89 T Moe and J Lye, "Prospects for review of FOI: can the Commonwealth regain the initiative?" in S Argument (ed), above n 66 at 147.

90 R Buchanan, above n 4 at 2.

gives a completely different focus to the two access regimes. In Australia, the battle is predominantly fought by requesters on the grounds of demonstrating that documents are not covered by a particular exemption or that a public interest test for release is applicable. The Canadian Information Commissioner has categorised that system of access law as expressing

a single-request, often confrontational approach to providing information—an approach which is too slow and cumbersome for an information society.⁹¹

The Danks Committee carefully formulated an approach to access that avoided the confrontational and legalistic minefield of exemptions chosen by other countries like the United States, Canada and Australia. The Danks Committee explained:

We were faced early in our work, with the choice of trying to design a once and for all static mechanism, with a complex set of exceptions, or a more flexible mechanism, operating by reference to principles and competing criteria that reflect a continuing shift away from a presumption of secrecy. We opted for a flexible process.⁹²

The structure and design of the exemption provisions in the Freedom of Information Act 1982 has been the subject of much critical debate in Australia. Theoretically, the position has been that exemption provisions are included in the legislation for the purpose of balancing the objective of providing access to government information against legitimate claims for protection of sensitive material. Yet a by-product of this balancing act has been that the *prima facie* right of an applicant to information has often been replaced in practice by an agency presumption that it has the right to claim an exemption. The ALRC/ARC noted that it was recommending the removal of the reference from the object clause in the hope that such an action would:

provide sufficient reinforcement of what is already clear from the Act but not always acknowledged—that *prima facie*, the applicant has a right to obtain a requested document. Once that is clarified, the approach of agencies is chiefly a matter of education and attitude.⁹³

The exemption framework in Australian legislation provides a legalistic minefield for applicants where the struggle is rarely over the value or public interest in the release of documents, but descends into an intense Talmudic debate over twists in meaning. Agency staff, despite training seminars, seem mesmerised by the simplicity of chanting an exemption clause to ward off the evils of an unwanted request for information. Due to the relative success of that tactic, there is a general lack of expertise and comfort in applying public interest tests.

[T]here is a tendency for...FOI staff to concentrate on the particular terms of the exemptions which might apply. The objectives of the FOI Act tend to be ignored. This seems also to be the attitude of...other agencies who...might have an interest in the information not being made available. A simplification of the exemptions and a clearer statement of the relationship between the objectives and the exemptions would be useful.⁹⁴

⁹¹ Information Commissioner of Canada, *Annual Report Information Commissioner 1993-1994* at 7.

⁹² Danks Committee, above n 56, vol 1 at para 65.

⁹³ ALRC/ARC, above n 8 at para 8.2.

⁹⁴ ALRC/ARC (DP 59), Dept of Social Security Submission 39, para 5.2.

The New Zealand approach concentrates on the likely consequences of disclosure. This may explain why the Official Information Act exemptions are "framed in the most general of terms; a generality which verges at times on the cryptic".⁹⁵ This approach requires agencies (and, if required, the Ombudsman), to make a judgment based on the matrix of circumstances surrounding each request for information, namely, as to "whether the likely consequences of releasing the information would be such that withholding is necessary to protect certain specified interests and processes".⁹⁶ The exemptions in the Official Information Act are expressed as reasons for withholding and are thus viewed by the courts and the Ombudsman as being "permissive rather than mandatory".⁹⁷

The example of Cabinet papers

An examination of how the Freedom of Information Act and Official Information Act handle the question of Cabinet information, and access to advice and opinion relating to sensitive policy formulation by government, gives a clear insight into why the Official Information Act is far superior to the basic design of Australian legislation. The example of Cabinet papers demonstrates the clear difference in results produced by the exemption framework of the two systems of access legislation. In New Zealand the crucial question is "What is the consequence of revealing this Cabinet information?" as opposed to the Australian statement "This is a Cabinet document therefore it must be exempt!" Australian Cabinet papers are accorded automatic exemption. Once an agency demonstrates that information being requested by an applicant can be labelled "Cabinet papers" then the external review bodies are forced to uphold the exemption claim. It is immaterial that it can be established that the requested information is outdated, of little consequence, or only incidental or not even relevant to the deliberations of Cabinet. Australian legislation differs on what constitutes the necessary technical requirements for a document to be accorded "Cabinet" status for FOI, but the requirements are not onerous even in the jurisdictions which theoretically allow greater access.⁹⁸ Whilst this depiction of the Australian position is simplistic, nevertheless there is a marked contrast to the New Zealand position.

The Danks Committee deliberately set out the operating principles for their proposed access regime before eventually touching on the question of Cabinet information. It is not until paragraph 51 of its report that the Danks Committee directly touches on the question of Cabinet information. The Committee noted:

It is implicit in what we say that much of the business conducted within the Cabinet system does not need blanket protection as a special category of exempted information

⁹⁵ I Eagles, M Taggart and G Liddell, above n 10 at 109.

⁹⁶ R Buchanan, above n 4 at 2.

⁹⁷ I Eagles, M Taggart and G Liddell, above n 10 at 110.

⁹⁸ In addition to the discussion of the Commonwealth Cabinet exemption (s 34) in ALRC/ARC, above n 8 paras 9.7-9.13 see R Snell and H Townley, "The Cabinet Information Exemption: Theoretical Safeguards Exposed by a Tasmanian Case Study" (1993) 46 *FoI Rev* 42; A Cossins, "Uranium mining, Cabinet notebooks and redundant amendments to the Commonwealth FoI Act" (1994) 52 *FoI Rev* 42; A Cossins "Paving the way for less open government in Victoria: Amendments to the Cabinet documents exemption" (1993) 45 *FoI Rev* 27.

because it will be safeguarded by the above criterion or because the subject matter involves one or more of the various interests mentioned earlier.⁹⁹

The placement of Cabinet secrecy on the reform agenda is a salient difference between the Australian and New Zealand experiences. In New Zealand, the bureaucratic stewards of the Cabinet domain dismissed the automatic exclusion of the heart of Westminster government from the idea of open government. In Australia, Lionel Murphy's Cabinet submission immediately conceded that Cabinet (and internal working documents) would be reinforced as a den of secrecy.

The Australian approach allows the Cabinet exemption to operate like an access buffer zone around the central core of government policy development and execution.¹⁰⁰ The exemption for Cabinet information has been taken as *a priori* in Australia and rarely debated or challenged. The "Cabinet oyster" is viewed as fundamental to the Australian Westminster system. The ALRC/ARC Review, even after fifteen years of operating with FOI, stated that:

Given the fundamental role of Cabinet in the Westminster system of government it is appropriate that the ultimate responsibility for exemption of Cabinet documents lies with Ministers.¹⁰¹

The various Australian jurisdictions differ in the extent and sensitivity of the buffer zone. Legislative amendments in Victoria and Queensland, and attempts at amendment in Tasmania,¹⁰² have dramatically increased either the catchment area of that buffer zone or reflected, in the case of Tasmania, the perceived legitimacy of an increased zone.¹⁰³ In the aftermath of the Tasmanian Government's failure to amend the legislation, there was a clear perception that their claim for a wider Cabinet exemption was justified and necessary. These amendments have been justified either on the basis of preserving Westminster government or alternatively as accommodating developments in modern executive government:

The amendments are an express recognition of the importance of the conventions of collective and Ministerial responsibility and the intention of the Government to state clearly that all Cabinet and Executive Council matter is exempt under the provisions of the Act. (*Freedom of Information Amendment Bill 1995* (Qld)).¹⁰⁴

The realities of modern Executive Government are that ministerial involvement in a record tendered for Cabinet consideration may not arise until the proposal to which the record relates has been developed to the stage that it is ready for the Minister's detailed consideration and his immediate signature if he accepts the proposal. Good administration of a government agency involves far more than simply reacting to a Minister's proposals. Initiative is encouraged in the identification of ideas which might valuably be advanced in the interests of good government and of problems which should be remedied. Once identification takes place, those proposals and remedies can be and are often worked through and developed to a stage that a submission is prepared in a

⁹⁹ Danks Committee, above n 56 vol 1 at para 51.

¹⁰⁰ H Sheridan and R Snell, "Freedom of Information and the Tasmanian Ombudsman: 1993-1996" (1997) 16 *UTasLR* 107 present a detailed analysis of how this "buffer zone" impacts upon the administration and efficacy of FOI in one Australian jurisdiction.

¹⁰¹ ALRC/ARC, above n 8 para 9.7.

¹⁰² H Sheridan and R Snell, above n 100 at 156-158.

¹⁰³ K Rubenstein, "The Extended Reach of Cabinet Documents: Lessons From Victoria and Queensland" (1996) 3 *AJAL* 134.

¹⁰⁴ Western Australia Commission on Government, *Report No 1* (August 1995) at 141.

form ready to go to Cabinet with the Minister's sanction. Only then is the Minister involved. If he accepts the recommendation and endorses such a submission it would, under the present provisions, not be exempt under S.24. That, in my view, is ridiculous.¹⁰⁵

The Australian debate about the nature of the Cabinet exemption is, however, not all in one direction.¹⁰⁶ Reforms have been suggested by the Queensland Information Commissioner in his 4th Annual Report to Parliament (1995/1996) and the Western Australia's Commission on Government Report (1995). The Queensland Information Commissioner stated that the Cabinet exemption (as amended in 1995) in the Queensland FOI Act was so wide that it could no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information.¹⁰⁷ Indeed, the Information Commissioner stated that:

they (the amendments) exceed the bounds of what is necessary to protect traditional concepts of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the professed objects of the FOI Act in promoting openness, accountability and informed public participation in the processes of government.¹⁰⁸

The Western Australian Commission stated that, while it appreciated that there are competing considerations that must be assessed when considering the justification for Cabinet secrecy, it nevertheless favoured greater openness in the Cabinet process. In so doing it noted that any body that operates in secret has the potential to engage in improper, illegal, or corrupt conduct.¹⁰⁹ The Commission found it incongruous that Cabinet should be exempt from any form of public disclosure of its operations, while corporations must face a most stringent and onerous disclosure regime.¹¹⁰ The Commission stated that:

it was clear that the heavy veil of secrecy under which Cabinet operates does not always serve the public interest and that the current accountability mechanisms need to be supplemented without materially affecting the proper functioning of Cabinet and its role within our system of responsible government.¹¹¹

A further problem is caused when most of the Australian external review bodies, with the notable exception of the Queensland Information Commissioner, hesitate to trespass upon the sacred soil of Cabinet secrecy. The ALRC/ARC noted a series of Australian cases which, contrary to the clear wording of the requirements of s 34(1)(a), had allowed documents presented to Cabinet but not created for that purpose to be claimed as exempt.¹¹² This takes place because the Australian approach to exemptions

105 Advice from the Tasmanian Solicitor-General justifying widening s 24 (Cabinet Exemption) of the Freedom of Information Act 1991 (Tas) to the Legislative Council Select Committee on Freedom of Information 1997 at 47.

106 The text in the next two paragraphs has been used unaltered in H Sheridan and R Snell, above n 100 at 141.

107 The Queensland Information Commissioner, *4th Annual Report* (1995-1996) at 31.

108 *Ibid* at 32.

109 Western Australia Commission on Government, above n 104 at 114.

110 *Ibid*.

111 *Ibid*.

112 *Re Fewster and Dept of the Prime Minister and Cabinet (No.2)* (1987) 13 ALD 139; *Re Porter and the Dept of Community Services and Health* (1988) 14 ALD 403; *Re Reith and Minister of*

requires the primary focus to be on the category of documents, with concern about content rarely pursued. The ALRC/ARC considered that disclosure of documents not brought into existence for the purpose of consideration by Cabinet could not be considered detrimental to the Cabinet process.¹¹³ There are clear indications in State jurisdictions that from time to time agencies have abused the Cabinet exemption by attaching documents to Cabinet submissions merely to avoid disclosure.¹¹⁴

The Tasmanian Government in the mid-1990s demonstrated how simple it is to create administrative arrangements which exploit the indiscriminating categorical shield of exemption offered by the Cabinet provision in Australian FOI legislation.¹¹⁵ For documents to come within the exemption in Tasmania it is only necessary for the document to be initiated, signed or created by a Minister, for submission to Cabinet and then at some stage to be considered by Cabinet. Prior to April 1996, the personnel of government agencies prepared information briefings for Ministers on current issues or in the expectation of questions by the media or opposition members in Parliament. These information briefings fell outside the coverage of the Cabinet exemption because they had not been initiated, created or prepared by Ministers. After April 1996 until late 1998 the process operated in the following way. The Minister's private secretary wrote to the Secretary of the Department as follows: "The Minister has requested that briefs be prepared on the following subjects for consideration of Cabinet." Thereafter follows a list of topics. The memo would conclude along the lines "completed briefs should be sent to the Cabinet Office and a copy to the Minister". At some time in the future these briefs were eventually tabled as attachments in Cabinet and the Secretary of the Department of Premier and Cabinet then issued a memo that stated "Cabinet today considered and approved the Information Briefings listed in the attachment to this decision."

The Tasmanian government was able to paint this process as a simple rearrangement of administrative practices:

The current requirement is that all information briefings prepared at Ministerial request be submitted to Cabinet for consideration. This is simply a codification of an aspect of administration that has previously been dealt with in a more ad hoc fashion.¹¹⁶

This practice was able to be implemented because Australian FOI legislation has no test to evaluate information once it has met the specifications required by an exemption category like Cabinet documents, assuming there is no public interest provision.¹¹⁷ Reforms have been passed by parliaments in Tasmania and Victoria to partly address this problem. The Tasmanian Parliament has removed the ability to issue conclusive certificates in relation to Cabinet documents and the Victorian

State for Aboriginal Affairs (1988) 16 ALD 709; *Re Aldred and Dept of Foreign Affairs and Trade* (1990) 20 ALD 264; cf *Re Anderson and Dept of Special Minister of State (No 2)* (1986) 11 ALN N239.

113 ALRC/ARC, above n 8 at para 9.9.

114 H Sheridan and R Snell, above n 100 at 151-155.

115 M Rogers, "Appeal over Cabinet secrecy as FOI shield" *The Mercury* 13 February 1998 at 9.

116 Letter to author dated 3 February 1998 from Mr S Haines, Secretary Tasmanian Department of Premier and Cabinet at 2.

117 This practice has officially ceased with the coming to power of the Bacon Labor Government which gave an undertaking to voluntarily return to conventional practice.

Parliament has returned to the position prior to the Kennett Government amendments.¹¹⁸

In New Zealand, the Cabinet exemption is not treated as a class or category exemption but agencies are forced to demonstrate what the consequences would be of releasing the particular Cabinet information in question, as opposed to the consequences of releasing Cabinet information per se.

The convention of collective ministerial responsibility is undermined only by disclosure of documents that reveal Ministers' individual views or votes expressed in Cabinet. Documents not prepared for the purpose of submission to Cabinet do not, by definition, disclose such options.¹¹⁹

Buchanan has outlined the steps that have to be undertaken in the process before a New Zealand bureaucrat or Minister can thwart a request for access:¹²⁰

- Step 1. The request is viewed in terms of the purposes of the Act set out in s 4.
- Step 2. The principle of availability (s 5) is applied, namely, that information requested under the Act shall be made available unless there is a good reason to withhold it.
- Step 3. Can the information be withheld under s 9(2)(f) or s 9(2)(g)? These sections contain balancing public interest tests.

From the perspective of an Australian bureaucrat who has operated with the warm assurance of being able to play, with only a few restrictions, their Cabinet trump card, the New Zealand process is foolishly designed to produce access to a significant amount of Cabinet information. A case study will illustrate the key difference the New Zealand approach makes even if it is only in relation to access to information after a Cabinet decision is made. In 1994, a request was made to the New Zealand Prime Minister's Department in relation to the Cabinet papers dealing with Crown Policy on Treaty of Waitangi Claims to Natural Resources (better known as the Crowns Fiscal Envelope Settlement proposal).¹²¹ A summary of a similar case in 1989 has been outlined by Buchanan.¹²²

118 M Paterson, "Victoria's new FoI Bill: some long overdue reforms but still room for improvement" (1999) 84 *FoI Rev* 90.

119 D C Pearce (ed), *Australian Administrative Law* (1995) at 2220.

120 R Buchanan, above n 4 at 5.

121 Application from C Wickliffe to Prime Minister's Dept (NZ) dated 16 May 1994. Copies of correspondence and papers released held by the author.

122 R Buchanan, above n 4 at 5.

Table 2: Accessing Cabinet Documents

Steps	New Zealand	Australia (hypothetical)
Application for access	Requesting information Response from Agency—No Public interest test claimed to have been applied. ¹²³	Requesting documents Response from Agency documents would reveal decision or deliberation of Cabinet—therefore exempt.
Internal review	Not available	Original decision upheld
Review request	Ombudsman enters into extensive consultations with the Dept of Prime Minister. Dept forced to justify public interest in non-release. Ombudsman gets Dept to agree to supply bulk of material after final Cabinet decision on the topic.	Unlikely that applicant would seek review if documents are clearly Cabinet papers. No public interest to be considered.
After Cabinet decision	A significant amount of information released	No information released

To an Australian interested in freedom of information this type of case study clearly differentiates New Zealand from Australian practice. The Australian approach, as set out in Table 2, would have made the request for information a futile exercise completely devoid of any consideration of the public interest. Whereas in the New Zealand example, a degree of transparency, especially after the actual decision-making process, is seen as a critical ingredient of the implementation of the Cabinet decision. The New Zealand Ombudsman in his review went through each of the three steps listed by Buchanan. In addition, the Ombudsman persuaded the Government that it ought to release the requested information, and much more, after the final decision had been made by Cabinet:

My discussions and correspondence with the DPMC and the Minister of Justice have centred largely on what I consider to be the very strong public interest considerations associated with your complaint. As a result of these discussions the DPMC and Minister

¹²³ Not all things are different between Australia and New Zealand. The Chief Executive of the PM's Dept responded on 30 May 1994 with a brief reply "After considering your request, and the public interest considerations required by the Act s 9(1), I have decided to withhold the information sought under the first two categories of your request. This information is withheld pursuant to s 9(f)(iv) and s 9(j) of the Act."

of Justice have agreed to announce a comprehensive 'package' of proposals for public consultation once the Government has developed them, and it is important that they have agreed to initiate an appropriate consultative process with Maori and the wider public on the whole package. I have been advised that you will shortly receive a letter from the Chief Executive of the DPMC advising you of the details of this consultative process.¹²⁴

Buchanan contends that the New Zealand experience with Cabinet documents and freedom of information has been one of balancing openness with a careful exploration of the need for protection of constitutional convention and practice. He argues that:

The unique characteristics of the New Zealand Act, which involve considering the nature of the information and the likely consequences of its disclosure rather than asking in what form it is held, enable this to be done in a very real way. The Act achieves accountability, and enables better participation, by ensuring that information will be withheld only when it is necessary and appropriate—in the public interest—to do so. It has not, as yet, shown any signs of undermining the foundations of the Cabinet style of government in the process, because it itself acknowledges the need to protect those foundations. Yet there is room for evolution, as the Act itself acknowledges. Indeed the Act, like the *Ombudsman Act* before it, has made its own contribution to the evolution of constitutional convention and practice.¹²⁵

Performance ratings

At the heart of the way exemption provisions are designed are the type, quantity and quality of information that is either accessible or withheld. It has been strongly argued in Australia that freedom of information systems should be evaluated in terms of release of non-personal information.¹²⁶ If that type of evaluation is the basis for a comparison of Australian and New Zealand legislation, the Official Information Act emerges a clear winner by several degrees of magnitude. Ardagh has argued there is a more accurate test of the success of freedom of information, which is more in keeping with the original goals and legislative object. That is, the ease and degree of access granted to non-personal information at the sensitive end of the bureaucratic and political scale.¹²⁷ As Zifcak observed:

By contrast, however, rates of refusal climb significantly in agencies whose records consist mainly of policy, administrative or law enforcement documents. Even in these, however, the majority of requests are granted although in law enforcement agencies, not surprisingly, access to documents is granted much less frequently. The higher rate of refusal reflects the not unsurprising fact that the closer an applicant comes to the political heart of government, the more likely it is that access to documents will be contested.¹²⁸

The WA Information Commissioner has made similar observations:

Information held by State and local government may, therefore, be viewed as a continuum with personal information at one end of that continuum and critical "policy"

¹²⁴ Letter from Sir John Robertson, Chief Ombudsman to C Wickliffe, dated 5 September 1994 at 4.

¹²⁵ R Buchanan, above n 4 at 5.

¹²⁶ R Snell, "Hitting the Wall: Does Freedom of Information have staying power?" in S Argument (ed), above n 66.

¹²⁷ A Ardagh, "Freedom of Information in Australia: a Comparative and Critical Assessment" paper delivered at ALTA Conference, Western Australia 1991 reprinted in R Douglas and M Jones, *Administrative Law: Cases and Materials* (1993) 137 at 145.

¹²⁸ S Zifcak, above n 66 at 162.

type information at the other. The key to assessing the accountability of government agencies and, hence, the success of the legislation, is in the type and quantity of "policy" information that is released or withheld from the public.¹²⁹

The evaluation of the effectiveness or otherwise of an FOI Act should be aimed at determining the extent to which the public is allowed to approach the political heart of government. In an important threshold paper, Madeline Campbell, a key promoter of FOI within Australian bureaucratic circles, set two simple tests for Commonwealth and State FOI schemes in Australia.¹³⁰ The tests were:

1. To what extent did the relevant information access regime allow an ordinary citizen access to pre-decisional deliberative policy documents prior to the finalisation of the policy concerned?
2. To what extent did the relevant information access regime allow an ordinary citizen access, after the event, to pre-decisional deliberative policy documents which were used to finalise the policy concerned?¹³¹

Campbell derived the first test from a series of sources, including the array of quotes used by the government ministers introducing FOI regimes, expressions of undying commitment by parliamentary opposition parties to those access schemes, press accounts heralding the advent of those schemes and general pro-democratic sentiments which have frequently appeared in discussions about open government.

Freedom of information was largely sold in Australia as a mechanism that would allow the average citizen to become aware of, and, if motivated, involved in, the policy formulation process before the executive or bureaucracy had determined their final and often non-negotiable positions.

Campbell formulated the second test upon the proposition that an essential ingredient in a liberal-democratic representative democracy is access to information that enables an ex post facto auditing of the actions of the Executive branch of government. In the words of a United States observer of FOI:

A further public interest promoted by the FOI Act is the citizen's right to monitor the activities of the government...Citizens enjoy the benefits or suffer the consequences of public policy so they should be able to draw their own conclusions regarding the effectiveness of that policy. Access under FOI Act allows them to undertake this independent evaluation.¹³²

This after-the-event access to pre-decisional policy information in isolation may make no intrinsic difference in this review or monitoring process. Terrill observes that documents "record certain moments, but often not the reason they took the shape they did".¹³³ Geoffrey Palmer has argued:

¹²⁹ *First Annual Report of the Office of the Information Commissioner WA 1993-1994* at 26.

¹³⁰ M Campbell and H Arduca, "Public Interest, FOI and the Democratic Principle—A Litmus Test" paper presented at *INFO 2*, 2nd Australian National Conference on Freedom of Information, Gold Coast, March 1996.

¹³¹ This discussion about the Campbell tests has been largely repeated from an analysis published in H Sheridan and R Snell, above n 100 at 145-147. The analysis and text were developed in an earlier draft of this paper but first published in that earlier article.

¹³² G Dickinson, "The Public Interest Served by the FOI Act" (1990) 59 *Cincinnati LR* 191 at 192 quoted by M Campbell and H Arduca, above n 130.

¹³³ G Terrill, above n 21 at 212.

the notion that one can read documents obtained under the *Official Information Act 1982* and understand the dynamics of the development of government policy is flawed. The Ministers decide the policy but they hardly ever write the documents.¹³⁴

However, access to a significant proportion of these pre-decisional documents will equip the citizens or agents of citizenry (media, academics, lobby organisations, political parties) with enough information to interrogate the Executive or to partially verify the adequacy of a particular policy program. As Hazell noted in a slightly different context:

With the wisdom of hindsight it was naive to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices.¹³⁵

Terrill takes a far more negative stance in his thesis. He argues that, given the debates (largely internal to the administration) and the way freedom of information was developed in Australia, it was never going to be the radical device presented in the first of Campbell's tests. At best, freedom of information would only offer the public a limited ad hoc involvement in decisions.¹³⁶

Clear differences in performance

In her brief survey of cases, Campbell sadly concluded that, at the Commonwealth level, access to information on the "deliberative processes short of Cabinet, on policy making or even policies already made" was virtually non-existent. The results of the Campbell tests applied at State level were less definitive. Where jurisdictions (Western Australia and Queensland) had adopted a return to the objectives of FOI demonstrated in the Queensland Information Commissioner's decision in *Re Eccleston*, access under the second test has been significantly improved.¹³⁷

The application of Campbell's tests in New Zealand produces a far different result from the Australian experience. The Crown's Fiscal Envelope Settlement proposal, referred to earlier in this paper, emphasises that difference. Table 3 reveals the range of information released in that case study. The difference between Australian and New Zealand outcomes is stark. A typical Australian response to the same material would have been to successfully deny access to the vast majority, if not all, of the information shown in the Table. The aide-mémoire of 18 May 1992 shown in Table 3 was written by the Secretary to the Treasury and recorded the general conclusions of a Cabinet meeting on the 12 May 1992.¹³⁸ Australian FOI legislation could not be used to create such an aide-mémoire nor enable its release if it had been created.

134 G Palmer, above n 7 at 95.

135 R Hazell, above n 6 at 201.

136 G Terrill, above n 21 at 212.

137 This has also been the case where the reasoning in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 has been adopted, in part, in other jurisdictions, including Tasmania and New South Wales. See H Sheridan and R Snell, above n 100 at 145-147.

138 Copies of the aide-mémoire and a letter dated 26 May 1992 from the Secretary of Treasury to the Minister of Finance outlining these facts is held by the author. Released under the OIA to C Wickliffe.

Table 3: Examples of "sensitive" information released under the Official Information Act

18 May 1992	Memo	Aide-mémoire
26 May 1992	T92/1558	Treaty of Waitangi issues
18 September 1992	T92/2890	Permanent legislative authority payments and CPI adjustments—comparison to payment for settlement claims
17 November 1992	T92/3506	Compensation for the clearance of Railcorp's Auckland properties. Relationship with the principles for settlement of claims
22 November 1992	Briefing Note	Compensation for the clearance of Railcorp's Auckland properties: further issues
3 March 1993	Aide-mémoire	Treaty of Waitangi claim settlement fund: size of the fund
3 May 1993	GD/24/4	Treaty settlement fund: Crown law opinion
11 May 1993	Memo to CSC	Treaty claim strategy
1 July 1993	Memo	Treaty settlement fund options
23 July 1993	T93/1922	Treaty of Waitangi settlement fund: relationship between appropriations for land-banks and the fund
8 December 1993	T93/2870	Update on the resolution of Treaty of Waitangi claims
26 January 1994	T94/70	Treaty issues—meeting with the Prime Minister
April 1994		Briefing Minister of Finance on settlement fund
15 April 1994	T94/821	Treaty of Waitangi settlement fund—issues raised in meeting with the Minister of Justice
17 April 1994	Memo	Comments on fund report
29 April 1994	T94/976	Treaty of Waitangi settlement fund
20 May 1994	Memo to Senior Mgrs	Accounting for the Treaty of Waitangi claim settlement envelope
31 May 1994	T94/1295	Treaty of Waitangi settlement envelope—accounting treatment. Fiscal reporting and management of the fiscal risks

14 June 1994	T94/1410	Accounting implications of Treaty settlements
13 July 1994	T94/1746	Fiscal envelope—Waitangi Tribunal claims
16 August 1994	T94/2114	Update and overview on Treaty issues
25 August 1994	Aide-mémoire	Issues in the Treaty over the next six months
31 August 1994	T94/2321	Treaty settlement envelope accounting and presentation issues
17 November 1994	T94/3162	Treaty settlement: baseline issues and communications
7 December 1994	T94/3413	Treaty settlement envelope—media reports of \$2.2 billion Treasury advice

THE FOURTH POINT OF DESIGN DIVERGENCE—PUBLIC INTEREST

The role allocated to public interest in a FOI regime will be a crucial determinant in its effectiveness in allowing access to official information. A statutory scheme that overflows with loosely worded exemption provisions will not necessarily restrict access to information. This is particularly so where all the exemptions are subject to a liberally interpreted general public interest test where the onus is on those attempting to withhold information to justify their claim. The New Zealand Official Information Act imposes a simple two-tier test on those officials seeking to withhold information under the Act. The agency seeking to withhold information must either claim and prove a conclusive reason for withholding information under s 6¹³⁹ or qualify under the framework set out in s 9.¹⁴⁰ In relation to the s 9 process, Eagles et al note that the withholders must first demonstrate that they satisfy one or more of the criteria set out in s 9(2).¹⁴¹ Once they have established a factual basis for an exemption claim,

the withholding Department or organisation must then by virtue of section 9(1) identify countervailing policy factors which favour disclosure and weigh them against the section 9(2) criteria.¹⁴²

The operation and application of the public interest test in s 9 was designed by the Danks Committee to take place within an evolving framework where the central elements would contribute towards an ongoing process of opening up the deliberative processes of government. The essential elements of this process would be, firstly, a legislative base that would provide a substantial advance on the present framework of policy and practice; commit government and administration to principles; remove unjustified barriers; and set up mechanisms for the ongoing process. Secondly, there

¹³⁹ Preventing harm to the nation, to the national economy, to the maintenance of the law or to the safety of any person.

¹⁴⁰ For a more detailed discussion of how this works in relation to information concerning the policy process, see Legal Research Foundation, above n 1 at 24-29.

¹⁴¹ I Eagles, M Taggart and G Liddell, above n 10 at 209.

¹⁴² Ibid.

would be in place mechanisms to enlarge progressively the areas of information declared to be publicly available; establish a channel for the public to test individual decisions on availability; and ensure that general progress towards the larger aim is appropriately monitored and reviewed.¹⁴³

Australian FOI users are confronted with a variety of public interest provisions that vary between jurisdictions. The Commonwealth Freedom of Information Act retains the most complicated arrangement whereby users are confronted by three forms of public interest test and a plethora of exemptions to which no public interest test applies. The variety of public interest tests have been viewed as both difficult for decision-makers and applicants. The 1988 Senate Standing Committee noted that the confusing and piecemeal public interest test arrangement meant that many agencies were not considering the countervailing public interest in releasing information. Thus they were failing to undertake a proper assessment of the balance of the public interest.¹⁴⁴ The ALRC/ARC review outlined these three forms of the public interest test.¹⁴⁵ The Canadian Information Commissioner went further than this recommendation and argued that:

Government institutions be required to disclose any information, with or without a formal request, whenever the public interest in disclosure clearly outweighs any of the interests protected by the exemptions.¹⁴⁶

Australian FOI legislation has used the public interest as an ad hoc, limited and non-interchangeable set of tools to be used as a last resort for a limited series of tasks. In comparison, New Zealand used "sparse, open-textured drafting"¹⁴⁷ to ensure that the public interest would be continually used to keep the objective of greater open government in motion. Liddell argues:

The enduring strengths of the *Official Information Act* is in its insistence on case-by-case consideration, its refusal to allow judgments based on category, its use of a public interest balancing test, and the overarching framework of purposes and principles directed towards better government.¹⁴⁸

In many ways, the design of the New Zealand Act achieved a configuration that guided, encouraged and continually reminded FOI officers of their duty to promote and encourage discretionary disclosure. Hammit points out that discretion in FOI legislation ought not be considered as a "two-way street that allows agencies to use their discretion to either disclose or withhold".¹⁴⁹

FIFTH POINT OF DESIGN DIVERGENCE—INTERNAL REVIEW

Design decisions by those creating FOI legislation about the review of decisions made by agencies in refusing access to information are critical. An effective, inexpensive and

¹⁴³ Danks Committee, above n 56, vol 1 at para 68.

¹⁴⁴ Senate Standing Committee on Constitutional and Legal Affairs, above n 18 at para 9.36

¹⁴⁵ ALRC/ARC, Issues Paper 12, *Freedom of Information* (1994) at para 5.12.

¹⁴⁶ Information Commissioner (Canada), *Annual Report* at 21-22.

¹⁴⁷ R Buchanan, above n 4 at 3.

¹⁴⁸ G Liddell, "The Interests of Effective Government: New Zealand's Official Information Act in an MMP Era," paper presented at *INFO 2*, Second National Conference on Freedom of Information, Gold Coast, Australia, March 1996 at 23.

¹⁴⁹ H Hammit, "The Better Part of Discretion—US Style" (1998) 77 *FoI Rev* 67 at 68.

timely mechanism for reviewing decisions refusing access lies at the heart of a successful FOI regime.

The whole question of review and appeal loomed large throughout our inquiry. Most witnesses either made or acknowledged the point that it could not be assumed that the new legislation would always be applied with proper sensitivity at first instance; resort to inexpensive appellate machinery would be a necessary condition of its effective implementation.¹⁵⁰

On the question of internal review of FOI decisions, Australia has chosen to follow a very different path. Canada and New Zealand deliberately rejected the internal review option. The Danks Committee Report is silent on why it chose not to follow the Australian approach. Rowat, after discussing the matter of internal review with those involved in the design of the Official Information Act, reported:

When I asked New Zealanders why they had not copied Australia's requirement, they said: "We don't think a formal stage is necessary. It simply complicates the appeal process and makes it more cumbersome, slow and costly." Another argument against internal review is that junior officials are likely to play it safe and give a restrictive decision if they know that their decision can be liberalised later by senior official.¹⁵¹

The orthodox view in Australia is that internal review provides a cheap, inexpensive and largely successful way of dealing with the mechanism sought by the Danks Committee. The ALRC/ARC Issues Paper considered that an indicator of success for internal review was the number of original decisions overturned on internal review (33 per cent in 1990-91 to 24 per cent in 1992-93).¹⁵² The ALRC/ARC review received a number of submissions highlighting the advantages and disadvantages of internal review (see Table 4).

Table 4: Views presented to ALRC/ARC on Internal Review

Arguments against ¹⁵³	Arguments for ¹⁵⁴
Complicates appeal process	Enables management to monitor decision making and allows an opportunity to correct original errors
Unnecessary	Educative role for agency staff
Junior officers likely to play safe and give a restrictive decision, leaving it to be reviewed by a senior officer	Conducive to developing cultural change within agencies
Original decision only varied in 25per cent of cases	Cost effectiveness for both agency and applicant
Increases overall costs of administration	Minimising number of appeals
Should be optional allowing applicant to go straight to external review	Provides opportunity for agency and applicant to revisit the decision

¹⁵⁰ Senate Standing Committee on Constitutional and Legal Affairs, above n 18 at para 27.2.

¹⁵¹ D C Rowat, "Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand" (1993) 52 *AJPA* at 218-219.

¹⁵² ALRC/ARC, Issues Paper 12, *Freedom of Information* (1994) at para 8.4.

¹⁵³ These arguments are raised in *ibid.*

¹⁵⁴ These arguments are raised mainly in ALRC/ARC DP 59 at para 9.3.

The strong support within Australia for internal review is closely connected to the position of merits review within the NAL package.¹⁵⁵ The dogma within Australian administrative law ranks is that the overall objective of a merits review system is to ensure that administrative decisions are correct and preferable.¹⁵⁶ Therefore any system that incorporates a merits review component will also ensure greater fairness, accessibility, timeliness, informality and openness of decision making.¹⁵⁷

The ALRC/ARC review finally expressed its preference for internal review but also opted to allow applicants the option to proceed directly to external review. This suggestion was strongly opposed by a number of agencies including Defence, Treasury, Finance, Prime Minister and Cabinet and Immigration. The Public Interest Advocacy Centre submission outlines the reasoning for this proposed reform:

[It would] assist in improving the original decision making process within the agency to ensure that judgments are made within the terms of the legislation. Agencies would know that potentially they would be immediately accountable to external review...Such a course would also benefit applicants in that costs and delay could be minimised if the issue appeared to be one that was so contentious it was heading for an external review in any case.¹⁵⁸

The Australian preference for internal review of decisions has added an important dimension to the way the legislation operates. The ALRC/ARC recommendation on internal review is a partial recognition of the compliance problems caused by forcing all applicants who have been refused access to request an internal review. In addition, the associated costs and time delays have been critical in deterring many potential users of the legislation, especially journalists.

SIXTH POINT OF DESIGN DIVERGENCE—EXTERNAL REVIEW

Rowat has argued that one of the most controversial questions about freedom of information schemes concerns the kind of body which should consider appeals against refusal of requests for government held information.¹⁵⁹ Australian jurisdictions have chosen a wide range of review options (see Table 5). In an extensive, but single jurisdiction study, the conclusion was reached that it was not only the choice of appeals body that was important but of even greater significance was how that external review body approached its task.¹⁶⁰

In the choices made about external review models, the Australian and New Zealand designer expectations and subsequent experience could not have been more different. The Australian choice was prompted by a desire to curtail the procedural impediments that had characterised the American experience.¹⁶¹ Since that time, the Australian experience has been one of experimentation by various jurisdictions and law reformers (see Table 5). The New Zealand model deliberately eschewed the judicial battleground created by the United States model and opted for a more genteel

¹⁵⁵ See discussion about this package in the conclusion to this paper.

¹⁵⁶ Administrative Review Council, *Better Decisions: review of Commonwealth merits review tribunals*, (Report No 39, 1995) at 11.

¹⁵⁷ ALRC/ARC, above n 8 at para 13.2.

¹⁵⁸ *Ibid* at para 13.4. (submission 34).

¹⁵⁹ D C Rowat, above n 151 at 215-221.

¹⁶⁰ H Sheridan and R Snell, above n 100.

¹⁶¹ G Terrill, above n 21 at 204-205 for comments on the 1976 McMillan draft.

experimental usage of the Ombudsman. This was an understandable choice. The whole New Zealand experiment was based on the expectation that the Act and the administration needed to evolve. Many saw in the dignified and respected performance of the previous Ombudsman, Sir Guy Powles, and his successor Sir George Laking, an institutional nurturer beyond reproach.

The Australian designers knew that the choice of an effective and inexpensive mechanism for reviewing FOI decisions was fundamental to the success of any access legislation.¹⁶² In the end, Australia chose an overlapping array of review mechanisms for its Commonwealth jurisdiction—internal review by the agency that made the decision; investigation by the Ombudsman; merits review; review by the Administrative Appeals Tribunal (AAT) with a right of appeal to the Federal Court on a question of law; and judicial review by the courts.

In 1995, the ALRC/ARC review into freedom of information decided to continue, albeit with some suggested modifications, with this overlapping array of mechanisms. However, as can be seen from the choices made at the State level in Australia, this approach has not been widely endorsed. A number of submissions to the ALRC/ARC review were highly critical of the Commonwealth model, especially the performance of the AAT:

The AAT has had a poor track record as the sole determinative external review body for FOI decisions. The AAT has demonstrated a determination to do better but this appears to be a fairly late reaction to long term criticisms...The procedural changes at the AAT have improved the handling of FOI cases. Nevertheless its institutional history ranks it as a distant third place as a determinative external review body in comparison to State Ombudsman and first and foremost in comparison to the Information Commissioner model used in Qld, WA and Canada.¹⁶³

The proposal for a new independent "monitor" or FOI Commissioner by the ALRC/ARC review was an attempt to overcome the lack of an independent, constant monitor of agencies' administration of, and compliance with, the Act, which is a major deficiency in the administration of Australian FOI.¹⁶⁴

The New Zealand designers agreed with Rowat that decisions about disclosure (or non-disclosure) of information by agencies ought to be subject to testing by an independent arbiter.¹⁶⁵ Yet, after a great degree of consideration, the Committee wanted to remove the courts from having a central role in the release of information:

The criteria to be applied are very broadly stated and the resulting political judgments are, in the end, for ministers who are elected and accountable to Parliament rather than for the courts who are not elected and are not accountable.¹⁶⁶

Unlike Australia in the early 1970s, the Danks Committee had an alternative to the courts which had been operating effectively since 1962, namely the Ombudsman. As Harland noted, by the time of the Danks Committee Report in 1980 the Ombudsman

¹⁶² ALRC/ARC, Issues Paper 12, *Freedom of Information* (1994) makes this point at para 8.1. See also Senate Standing Committee on Constitutional and Legal Affairs, above n 18 at para 27.2.

¹⁶³ H Sheridan and R Snell, submission 58 to ALRC/ARC cited at para 13.8.

¹⁶⁴ ALRC/ARC, above n 8 ch 6.

¹⁶⁵ Danks Committee, above n 56, vol 1 at para 98.

¹⁶⁶ B Harland, above n 43 at 4.

was a well-established institution "and one which commanded general respect".¹⁶⁷ Harland argues that the Ombudsman already had a long history of dealing with information questions and:

In the New Zealand context it made sense to give him the key task of dealing with complaints made when requests for specific information were turned down by officials.¹⁶⁸

It is hard to glean from the official accounts how important a role, in the final choice of external review mechanism, was played by the fact that Sir Guy Powles, Ombudsman between 1962 and 1977, had laid such solid foundations for the general acceptance of, and faith in, the institution to handle the task of independent information arbitrator. Laking notes how quickly Sir Guy Powles had chalked up a series of notable achievements:

In a relatively short time, public service opposition was defused, the fears expressed by members of Parliament that their relations with their constituents would be interfered with proved to be groundless and public support for the office was reflected in the large number of complaints brought to the Ombudsman. That endorsement was sufficient in the early years of the office's existence to induce the government of the day to pay considerable deference to the Ombudsman's recommendations.¹⁶⁹

Shelton has pointed out that, in choosing the Ombudsman to be the external reviewer, the Danks Committee had picked a body with eighteen years' experience of accessing, using, reviewing and judging official information held by government agencies in New Zealand.¹⁷⁰ In an early commentary of the Ombudsman Office, Aikman considered that access to agency files was the key characteristic of the institution.¹⁷¹ The Committee noted in its General Report that:

the Ombudsmen already can and do handle cases in the information field, in accordance with their well established procedures and with the mana [sic] that the office has acquired over two decades.¹⁷²

Buchanan has shown how skilfully the Ombudsmen have approached the interpretation and application of the Official Information Act. When confronted with controversial cases, the Ombudsmen have been "able to retain credibility with Ministers by seeking to acknowledge the requirements of the Cabinet process and explaining carefully the basis of their approach to the Act".¹⁷³ In many ways, the Ombudsman approach has been to "conceive of, and, as far as possible, to operate, Official Information Act dispute resolution within the classical paradigm of that office".¹⁷⁴ From an Australian perspective, the efficacy of this approach is demonstrated by the amount and types of information that are released within that paradigm. However, other critics see that such an approach distorts dispute resolution

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Sir George Laking, "The Ombudsman in transition" (1987) 17 *Victoria University of Wellington LR* 309.

¹⁷⁰ D J Shelton, "The Ombudsman and information" (1987) 12 *Victoria University of Wellington LR* 309.

¹⁷¹ C C Aikman, "The New Zealand Ombudsman" (1964) 42 *Can Bar Rev* 399 at 407.

¹⁷² Danks Committee, above n 56, vol 1 at para 99.

¹⁷³ R Buchanan, above n 4 at 5.

¹⁷⁴ I Eagles, M Taggart and G Liddell, above n 10 at 547.

and hinders the function of the Ombudsman as a final determinative arbitrator under the Official Information Act:

Nevertheless, it is clear to us that the classical Ombudsman model holds powerful sway over the occupants of this 'unusual and important' office, and that this distorts the reality of the *Official Information Act* dispute resolution and thereby misleads...It is important to note that the Ombudsmen were chosen over the courts to perform the primary role of dispute resolution under the *Official Information Act*.¹⁷⁵

The operations of the Ombudsman and the Information Authority (see next section) had been designed by the Danks Committee to facilitate the objective of a slow evolutionary process towards a more open system of government. The strategy was to slowly whittle down the amount and types of information that would be kept from the citizen. The Ombudsman's role was to achieve—by interpretation, negotiation and facilitation—bureaucratic acceptance of this objective. As Belgrave observes:

Sir George Laking...in his investigations and recommendations as Ombudsman, succeeded in minimising the seemingly large grounds for withholding information.¹⁷⁶

With no homegrown success story in 1973 (like an Ombudsman who had balanced fairness, wisdom and a subtle reform agenda) the Australian designers opted for the quick fix of the "US model" with adjustments. By choosing a purely legalistic structure, the Australian designers were only addressing part of a wider need to reform government information handling, including at the bureaucratic, legal and political levels. In part the attraction of the US litigation model was that many of the less defensible claims for exemption, by agencies unwilling to embrace the new legislation, would be subject to scrutiny in the open and public forum of the courts. Increasing exposure to the limitations of the judicial model of external review led each new version of FOI at the State level in Australia towards an alternative solution (see Table 5). The adoption of the Information Commissioner model at a national level in Australia received very strong support during the ALRC/ARC review process.¹⁷⁷ However these limitations of the judicial review model and the now more apparent achievements of the Ombudsman/Information Commissioner model were largely unknown factors for the Australian designers.

¹⁷⁵ Ibid at 547-548.

¹⁷⁶ J Belgrave, above n 1 at 24.

¹⁷⁷ D James, "A Federal Freedom of Information Commissioner: Looking behind the ALRC/ARC Final Report" (1998) 76 *FoI Rev* 50.

Table 5: External Review Mechanisms in Australian Jurisdictions¹⁷⁸

Jurisdiction	Internal Review	External Review
Commonwealth	s 54	Ombudsman, s 57; AAT s 55
Victoria	s 51	Ombudsman, s 27, s 57; AAT, s 50
Australian Capital Territory	s 59	Ombudsman, s 54; AAT, s 60
New South Wales	s 34	Ombudsman, s 52; District Court, s 53
South Australia	s 38	Ombudsman, s 39; District Court, s 40.
Tasmania	s 47	Ombudsman, s 48
Queensland	s 52	Information Commissioner, s 71
Western Australia	s 39	Information Commissioner, s 54

SEVENTH POINT OF DESIGN DIVERGENCE—ADMINISTERING THE ACT: KIRBY'S NOBLE DEFENDER

Justice Michael Kirby has forcefully argued that FOI needs a strong and independent advocate who will also constantly monitor the performance of agencies in the area of FOI:

It is vital that someone or some agency...should be more closely monitoring the experience under the FOI Act...Otherwise, the preventative value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it. For example, a persistently recalcitrant government agency...continuously reversed on appeal, should have its attitude drawn to political and public attention so that they can be corrected, to bring even the most obdurate official into line with the new policy.¹⁷⁹

The Danks Committee felt that the administrative and review mechanisms for their proposed access legislation could be provided within existing institutions such as the Ombudsman. However, the Committee determined that:

The main elements of the legislation as we have proposed them (para 68) could not be satisfied, however, without some independent body of sufficient status to undertake

¹⁷⁸ Based on information in M Campbell, "Freedom of Information Legislation in Australia: A Comparison" in J McMillan, *Administrative Law: Does the Public Benefit?* (proceedings of the Australian Institute of Administrative Law Forum, 1992).

¹⁷⁹ Justice M Kirby, "Information and freedom" *The Housden Lecture*, Melbourne, 6 September 1983 at 11.

continuing inquiry into and definition of categories of information, and formulation of rules moderating conditions of access.¹⁸⁰

The New Zealand Information Authority was given both regulatory and monitoring functions by the Danks Committee¹⁸¹ and the Official Information Act made it subject to a five-year sunset clause. The Committee made no attempt to prescribe staffing or resources for the composition of the Authority but left that to be determined by the government. However, the Committee noted:

If Parliament and the Government wish for a more measured approach, or believe that the work generated at the beginning of the Act's operation need not take up the greater part of the members' time they may well decide in favour of part-time appointments. We do no more than reiterate our judgment that the task the Authority must perform is a large one, and that the speed with which it is accomplished will depend on the time that the chairman, in particular can give it.¹⁸²

Eventually, the New Zealand Government appointed three part time members (Sir Alan Danks as chairman) and a staff of three, of whom two were part time.¹⁸³ The Information Authority was perceived as performing a very useful function¹⁸⁴ and successful in undertaking a massive programme of work.¹⁸⁵ However, public interest in the Authority's activity appears to have been minimal.¹⁸⁶ The size and scope of the Information Authority's task can be ascertained by the functions allocated to it by Part 6 of the Official Information Act. These are: to review the secrecy provisions in other enactments; to review categories of official information with a view to enlarging those categories to which access is given as a matter of right, and defining such categories in regulations; to consider whether the Act should be extended to other bodies; to review the means by which individuals can find out what personal information is held on them and how they can correct it; to review the powers of Government to require people to supply personal information; and to recommend means of preventing the improper use of personal information, including its use for purposes other than those for which it was acquired.

An institution largely staffed by part timers, allocated such a multifarious set of herculean tasks, and given a deadline of only five years could be forgiven for achieving a mixed bag of results. The range and high quality of its written output was impressive. The Information Authority provided a series of very informative Discussion and Background Papers on aspects of the Official Information Act, setting down guidelines on various topics, including remission of charges, criminal sanctions, third party rights, etc.¹⁸⁷ In addition, the Information Authority circulated its Official Information Bulletin to a wide range of organisations and individuals (See Table 6).

180 Danks Committee, above n 56 vol 1 at para 107.

181 Ibid, vol 2, Supplementary Report at para 3.03.

182 Ibid.

183 Noted by R Hazell in *Report to the Cabinet Office (MPO) on the Operation of the Official Information Act in New Zealand*, Wellington, March 1987 (unpublished copy held by the author) at para 7.1.

184 J Belgrave, above n 1 at 24.

185 R Hazell, above n 183 at para 7.1.

186 Ibid.

187 Information Authority, Discussion and Background Papers D 16, B12, B8 respectively. Copies held by the author.

Over the five year period before it ceased to exist, the Information Authority concentrated on completing its major functions as allocated by the Danks Committee. The Information Authority undertook a review of over 220 secrecy provisions (affecting commercial and personal information), developed a set of privacy principles, recommended extension of the Official Information Act to cover schools, colleges, universities, hospitals and local government (achieved by the Local Government Official Information and Meetings Act 1987) and regularly visited heads of government departments (twenty-five in 1985-1986) to monitor implementation of the Act.¹⁸⁸

In the opinion of the Danks Committee, the functions allocated to the Information Authority could be bifurcated into regulatory and monitoring roles. The Committee considered the regulating function as the Information Authority's prime responsibility, with monitoring duties able, if necessary, to be shunted to other areas. The Committee envisaged (paradoxically, given its *laissez faire* attitude to staffing and resourcing) that the Information Authority would be able to systematically enlarge the area of information available to the public:

Second, we repeat our conviction that the Information Authority should not simply select areas and categories of information for examination in response to the immediate pressure of enthusiasts or crusading groups. Dispassionate decisions are difficult in such an atmosphere...Indeed we hope that the Authority's work may be able to anticipate areas of contention. We have it in mind that the initiative for a good deal of the Authority's regulatory work will come from departments and from organisations to which the Act applies.¹⁸⁹

At the end of its sunset period, in July 1988, the Information Authority failed to gain a reprieve despite some recognition of the need for ongoing supervision of the type contemplated originally by the Danks Committee and more recently by the Law Commission.¹⁹⁰ Instead, the Government decided that the oversight function, previously exercised by the Information Authority, would be taken up by the Department of Justice and an Information Unit was established within the Department for this purpose. The activities of this Unit appeared to have been low key. At around the same period, responsibility for administration of the Official Information Act moved from the State Services Commission to the Department of Justice. When the Department of Justice was restructured in 1995, the Information Unit was not carried over into the new structure (now called the Ministry of Justice). The responsibility for administration of the Official Information Act and the policy advice function was given to the Public Law Group of the new Ministry where it currently remains.¹⁹¹

In 1997, the Law Commission completed a review into the Official Information Act.¹⁹² The Commission recommended that the Ministry of Justice should be given responsibility for ensuring a more coordinated and systematic approach to the functions of oversight, compliance, policy review and education in relation to the

¹⁸⁸ This range of activity is extensively covered in R Hazell, above n 183 at paras 7.2-7.11.

¹⁸⁹ Danks Committee, above n 56, vol 2 at para 3.09.

¹⁹⁰ Law Commission (NZ), *Review of the Official Information Act 1982* (Report No 40, 1997) at paras 37-50.

¹⁹¹ The factual information in this paragraph was extracted from an e-mail message from Richard Buchanan, Director of the Law Commission (NZ) to the author dated 23 March 1998.

¹⁹² Law Commission (NZ), above n 190.

Act.¹⁹³ The Commission also argued that adequate resources ought to be provided to both the Ministry and the Ombudsman, particularly for the latter's work in publishing guidelines and holding seminars and training sessions.¹⁹⁴

The demise of the Information Authority and the subsequent neglect of the Information Unit mirrors the fate of other such bodies in Australia. Allars¹⁹⁵ and Cossins¹⁹⁶ have indicated how the rise and fall of the FOI Unit in New South Wales affected the efficacy of access to government. A similar lament has been made for the Tasmanian FOI Unit.¹⁹⁷ After a glowing testimonial in the ALRC/ARC review, the Commonwealth Attorney-General's FOI Unit has lost staff and been moved into the same administrative coverage as intelligence and security issues in the Department.

Table 6 : Distribution of Information Authority Official Information Bulletin¹⁹⁸

Official Information Act	Departments	40
	Statutory organisations	180
	Hospital boards	35
	Tertiary institutions and schools	500
Local Government Official Information and Meetings Act	Municipalities	240
	Counties	110
	Electrical supply authorities	75
	Harbour boards	15
	Catchment authorities	30
	Interested Parties	
	Members of Parliament	100
	Media	75
	Groups and individuals	50
	Overseas agencies and individuals	35
	TOTAL	1485

¹⁹³ Ibid at 49-50.

¹⁹⁴ For an analysis of the Law Commission's Report, see H Sheridan and R Snell, "A few more pieces in the puzzle of Freedom of Information in New Zealand" (1997) 72 *FoI Rev* 78.

¹⁹⁵ M Allars, "Interim results of a study of the impact of the NSW FOI Act" (1995) 56 *FoI Rev* 18.

¹⁹⁶ A Cossins, *Annotated Freedom of Information Act New South Wales* (1997) at paras 1.7.1-1.7.7.

¹⁹⁷ H Sheridan and R Snell, above n 100 at 122-123.

¹⁹⁸ Information Authority, *Official Information Bulletin 5* (undated) at 3.

EIGHTH POINT OF DESIGN DIVERGENCE—DESIGNER EXPECTATIONS

Within and outside Australian public administration, it was thought that freedom of information would "profoundly change public administration in Australia".¹⁹⁹ However, as Peter Bayne noted, "the system functions pretty much as it always has".²⁰⁰ Terrill argues that:

The legislative format of FOI was certain to neuter some of its redistributive promises, even in the progressive Bill drafted by the RCAGA (Royal Commission on Australian Government Administration). The model proposed contests between unconnected individuals with little knowledge of the process, and departments which had the advantage of familiarity of the system and contact with similar players. It was a scheme to extract documents in certain circumstances, not to facilitate general rights to know. It was far from being an access policy, as it did not concern a great deal of government information, such as that pertaining to oral culture.²⁰¹

The early optimistic fanfare for Australian freedom of information seems to have disintegrated into a cacophony of user grievances. Given the virulent strain of Westminster governance that took hold in Australia, it is probably, in retrospect, not surprising that the Terrill thesis resonates more accurately than the optimistic forecasts made about the legislation. Yet the promised land of the original designers still strikes such a powerful chord that, while acknowledging the persistence of an official culture of secrecy, the ALRC/ARC review can still commence its final report by arguing:

The FOI Act is now accepted as a part of the legislative landscape of Australia. There has been no suggestion from any person or sector during this review that the Act ought to be abolished. Australian society and politics have clearly moved a long way since those tentative years leading to the introduction of the Act. The FOI Act is now an integral part of Australia's democratic framework. That is not to say that the Act is working perfectly or that it is not susceptible to attack or weakening.²⁰²

Behind that tentative ten year saga, from Spigelman's book in 1972 to the final passage of the Freedom of Information Act 1982 (Cth), lies the reason for the weak foundations of Australian FOI. It was largely designed and advocated for in private or within a narrow bandwidth of interested bureaucrats, academics and lawyers. The intention may have been to transform Australian public administration, but it was an intention fuelled by little accurate understanding of what was being transformed. As Moira Rayner so eloquently stated:

A significant cultural change is required if Australian government agencies are to reconceptualise themselves as part of a democratic process rather than as an elite body in possession of occult wisdom. This change can only be achieved if the public service's opposition to 'open government' is resisted, and if agencies are encouraged to develop new ways of working that take the principles of openness and accountability to heart.

¹⁹⁹ Communication between two senior Australian public servants cited in G Terrill, above n 21 at 210, fn 320.

²⁰⁰ P Bayne, "Freedom of Information: Democracy and the Protection of the Processes of Government" (1988) 62 *ALJ* 538.

²⁰¹ G Terrill, above n 21 at 211.

²⁰² ALRC/ARC, above n 8 at para 1.3.

Left to their own devices, governments will not do the job; as the experience of the past decades has shown, they have been among the prime movers in hobbling FOI.²⁰³

There was little in the original design of Australian freedom of information that recognised the need for such a significant cultural change and there were few measures deliberately taken to produce or ensure that such a change took place. It is little wonder that the desires of the designers and the actions of the bureaucracy were so quickly thwarted. Armed by a sketchy understanding of the United States experience (an article by Enid Campbell,²⁰⁴ a flying visit by Nader²⁰⁵ and the brief input of the General Counsel for the United States Civil Service Commission in 1974)²⁰⁶ and a desire to withstand the bureaucratic backsliding and resistance evident throughout the 1970s, the Australian progenitors of FOI had few options when choosing the framework and elements for their legislative reform.

The New Zealand experiment commenced life in a more routine and mundane fashion. It reflected the work of a coherent and co-operative committee that envisaged an achievable future and tried to construct a legislative framework that would allow New Zealand public administration to evolve towards that vision. Within eight years, Buchanan was highlighting how Cabinet information, albeit in limited amounts, could be made available under the Official Information Act.²⁰⁷ In 1997, the Law Commission, in dramatic contrast to its Australian counterparts, was only recommending slight modifications to the access regime in New Zealand. Such an outcome reflected the choices made by designers who intimately understood the administrative terrain of the present, had the cognisance of future information trends, and, in terms of openness, were tendentious in their design features.

From an outsider's perspective, the Official Information Act does resemble a melange the salient features of which are designed to encourage a continuation of secrecy. The Kiwi designers were probably overly sanguine in their belief of Ministerial and agency embracement of the redemption offered by openness. However, the incentives for openness were in-built, the looseness of terminology and the comforting presence of a familiar Ombudsman paradigm were in place so that retreat could be made at any time. In contrast, the Australian regime assumed that a confrontational, but heavily regulated, battlefield would eventually be replaced in a spirit of conversion by the harmony of educated acceptance.

CONCLUSION

The corpus of knowledge about Australian freedom of information legislation, Federal and State, and the Official Information Act in New Zealand has largely been gathered by legal academics fossicking through the entrails of court and tribunal decisions. It has been an impressive process of hunting and gathering leading to attempts to understand the divine talisman which will call up the magic of open government. Those studies have left us with comprehensive legal maps of each jurisdiction but have left some wondering how much closer we are to the promised land of openness.

²⁰³ M Rayner, *Rooting Democracy: Growing the Society We Want* (1997) at 240.

²⁰⁴ E Campbell, "Public Access to Government Documents" (1967) 41 *ALJ* 73.

²⁰⁵ Mentioned in ALRC/ARC, above n 8 at para 3.2 and covered in more detail in G Terrill, above n 14 at 91-92.

²⁰⁶ L Curtis, above n 20 at 173.

²⁰⁷ R Buchanan, above n 4 at 2.

Access legislation must be put to the test or attempts made to evaluate it in terms other than ad hoc collections of reminiscences about the bad pre-reform times. The marking of milestones is important to symbolise how far our journeys have taken us from the heart of secret government. As Curtis noted:

Those of us who are immersed in the changes which are taking place can do little more than mark significant points along the pathway of change and perhaps discern some signposts for future direction.²⁰⁸

This study has applied the Campbell tests to both jurisdictions and reached the conclusion that in a number of performance areas the Official Information Act is superior. That performance superiority can be traced to a number of significant differences in design features of the two legislative frameworks. This paper has presented the argument that the New Zealand approach was successful in arriving closer to the promise of open government than its Australian counterpart. That proximity to a culture of government openness may nevertheless be significantly short of the ideal. Shroff argues that it has produced a transition from secrecy to information management.²⁰⁹ For some, such as Morrison, that information management has produced a number of techniques to reduce the accountability objectives of access legislation.²¹⁰ Palmer notes that the Official Information Act is

studied in some detail in the corridors of power in Wellington, but it is studied from a somewhat different point of view. It is studied as to how it can be avoided or evaded.²¹¹

Yet we should question whether such evaluation takes place in too narrow a framework. Terrill argues that in Australia (and his thesis can be extended to New Zealand) there are three dimensions of openness—political, bureaucratic and legal.²¹² A study of any one of these dimensions offers a different perspective upon government-citizen communication with distinctive dynamics and solutions. In Australia, this legal dimension would embrace the NAL package: the Commonwealth Administrative Appeals Act 1975, Ombudsman Act 1976, Administrative Decisions (Judicial Review) Act 1977 and the Freedom of Information Act 1982. Terrill maintains that the first three of these reforms conceptualised openness in terms of ensuring that secrecy did not impede the administration of justice. The fourth and most delayed reform, freedom of information, had a broader intent—providing regulated access to documents as a citizenship right. Indeed, the dissonance caused by freedom of information may be traced to its greater and more confrontational interaction with the other two strands—political and bureaucratic. Terrill argues that freedom of information and the rest of the NAL reforms:

conceptualise openness as interactions between government and disconnected individuals. In this respect the legal dimension has been-political, tending to individualise systemic problems. It has focused on, and was inspired by, individual rights.²¹³

208 L J Curtis, "Freedom of Information in Australia" (1983) 14 *FL Rev* 5.

209 M Shroff, above n 82.

210 A Morrison, "The Games People Play: Journalism and the Official Information Act" in Legal Research Foundation, above n 1 at 30-38.

211 G Palmer, above n 7 at 35.

212 G Terrill, above n 14 at 232.

213 *Ibid* at 233.

Taking the Terrill analysis, as a starting point, it is possible to see the differences between Australia and New Zealand from the perspective that the New Zealand reforms were able to interact to a greater degree with each of the three dimensions—legal, bureaucratic and political. The Australian solution was conceived of, designed for, and largely operated within, the legal strand. Very little is written about freedom of information in Australia that is not by lawyers and legal academics for the consumption of their own peer group. Occasionally attempts are made to reach out from behind that enchanted law circle but those forays are rare and limited. The most interesting of these forays was at the commencement of the Freedom of Information Act in 1983. The Australian National University Law School conducted a seminar on *Access to Government Information*.²¹⁴ The seminar also saw one of the rare appearances, albeit only as a short commentary, of a predominantly political science view on FOI.²¹⁵ It is to be hoped there will be more multi- and cross-disciplinary studies of access legislation in the future.

²¹⁴ The papers are published in (1983) 14 *FL Rev* 1-198. The title of that seminar, *Access to Government Information* encouraged the speakers—lawyers, academics, bureaucrats and combinations of all three—to explore the developments, the prevailing and countering forces and the issues about access to government information after the first six months of FOI at the Commonwealth level in Australia.

²¹⁵ C Hughes, "Commentaries", *ibid* at 27-31.