FREEDOM OF INFORMATION: THE EXPERIENCE OF THE AUSTRALIAN STATES - AN EPIPHANY?

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INTRODUCTION

A Freedom of Information (FOI) barometer would indicate a significant shift in the prevailing attitudinal responses to access to government held information at the state level in Australia in recent years. The responses would vary between jurisdictions but only in terms of details not substance. What began as a few recitations of concern about delays, application of exemptions and fees has now metamorphosed into a strong phalanx of information commissioners, parliamentary committees, ombudsman and others seeking fundamental reforms. In 1994 Spencer Zifcak argued that the history of FOI in Victoria could be seen as proceeding through three phases - optimism, pessimism, revisionism. The Zifcak typology could be expanded Australia-wide with a fourth stage being added; namely, a return to fundamentals.

In the period up to December 1998 a number of factors had placed state FOI regimes under considerable stress. These factors included the advent of outsourcing and the persistence (or reflowering) of a culture of governmental secrecy, over use and abuse of exemption provisions, modifications to exemptions (like those to the cabinet exemption in Victoria and Queensland) and the failure to act on reports (the Australian Law Reform Commission Report at the Commonwealth level, Commission for Government in Western Australia and the reforms suggested by David Landa when he retired as NSW Ombudsman) which suggested urgent remedial action.

However today a number of indicators suggest a more optimistic assessment. In three jurisdictions, Western Australia, South Australia and Queensland, there has been the delivery or promise of conceptual blueprints which hold the promise of transforming the practice, principles and framework of FOI in Australia. Each blueprint, in its own way, bears the hallmarks of the epiphany in the title of this paper. The link between each vision is that the designers have gone back to first principles and then evaluated their own access to information regime in light of those preferred outcomes.

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On a legislative front most of the implemented amendments in the last two years have either returned the system closer to its original state, as in Victoria, or removed a major deficiency, as in Tasmania. In the area of external review the best performers, the Information Commissioners, have kept their ranking whilst New South Wales by transferring FOI jurisdiction to the Administrative Decisions Tribunal is starting to reap the benefits of a receptive, informed and more accessible external review model. The Ombudsman jurisdictions have started to apply some of the best administrative practices developed in Western Australia. In most of the state jurisdictions there appears to be a revival of a more active and committed FOI constituency. This revival has been manifested by strong attendances at public forums and more specifically by renewed activity by journalists and FOI coordinator networks.

STATE FOI—DEFECTIVE FOUNDATIONS

The decade following the enactment of the Freedom of Information Act 1989 (NSW) promised an exciting prospect of a fundamental transformation in the relationship between citizens and state decisionmakers. Every jurisdiction (except the Northern Territory) made available a statutory instrument which ideally would contribute to improving public understanding of the policy-making process and protecting citizens against arbitrary decisions by public bodies.

Using software design terminology the Australian state FOI statutes can be depicted as ranging from version 1.0, Victoria to version 1.3, Queensland and Western Australia. The design template of the Commonwealth and Victorian legislation was adopted by each state with a few key changes added to each succeeding version. Apart from Queensland, most of the states adopted the legislation on the basis of its perceived inherent capacity to combat official secrecy rather than a substantial consideration about the design elements which would achieve that purpose in each jurisdiction.

The Queensland process involved the circulation of an Issues Paper, publication of public submissions, a report by the Electoral and Administrative Review Committee and a final report by the Parliamentary Committee for Electoral and Administrative Review. However the basic operating premises appeared to be the adoption of a standard model of FOI legislation and the concession that many aspects of FOI operation would need to be configured to preserve certain fixed and fundamental

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3 South Australia, New South Wales and, in particular, Tasmania.
9 Electoral and Administrative Review Commission, above n 5, 9.
elements of the Australian Westminster system.\textsuperscript{10} The Information Commissioner model, introduced after the Issues Paper and later adopted in Western Australia, was the key upgrade to Australian FOI design introduced in Queensland.

Australia lacks a comprehensive comparative historical study of the introduction of FOI at the state level. A similar lacuna at the Commonwealth level was partially rectified by Terrill's study on communication policy development.\textsuperscript{11} Nevertheless a few important commonalities can be gleaned from the scraps of available published information.\textsuperscript{12} Freedom of Information Acts, and their introduction at the state level in Australia, can be depicted as having four critical shared historical characteristics. First, as reforms externally generated, to the core agencies of government, or initiated. Secondly as reforms introduced with significant but limited political support. Third, reforms that were greeted by initial bureaucratic responses ranging from the lukewarm to the hostile. Finally, reforms that were subjected to a refinement process that would, if administrated in a neutral way, produce a significantly lower quantity and quality of information than the original proposals.

In those shared historical antecedents lurked the source of the majority of critical defects in FOI at state level which have been exposed or commented upon by the reform movement mentioned in the introduction to this paper. Much of the history remains to be researched and the precise interplay between these features and the deviation between jurisdictions is yet to be adequately explored. There is, however, enough for an initial thesis to be generated; namely, that several important elements surrounding the conception and initial adoption of FOI at state level produced heavily compromised laws which had limited prospects of achieving their perceived promise. The quest for the holy grail of open, accountable and responsible government at the state level needed too many miracles to succeed in its initial attempt. A Commonwealth model of FOI, reconfigured to various degrees in different states, has achieved only what critics of access laws like John Ralston Saul have depicted as carefully stage managed processes that are more illusory than real.\textsuperscript{13}

**A TROJAN HORSE TAKEN, TURNED AND TAMED**

Inspired by a combination of political hopes and democratic motives, FOI at the state level was formulated on the fringes of the state apparatus by law reform institutions\textsuperscript{14}.


\textsuperscript{13} J R Saul *The Unconscious Civilisation*, (1997), 46.

\textsuperscript{14} As in Queensland where the Electoral and Administrative Review Commission (EARC) took up the initial recommendation of the Fitzgerald Commission. See above n.7.
or agents of influence, or by those in opposition to the government including major political parties and/or reform movements. The purpose was to introduce into the governmental process a key transformational mechanism which, whilst not acting in isolation, would be the main contributor to a new process of informed and accountable decision-making.

Many cartoons, at the time of the inception of State FOI legislation and since, have visualised the process as those on the outside the citadel walls seeking entry, in a non-violent way, to the informational treasures held within. It is a sad commentary on the fate of this reform that a decade later the leitmotiv of cartoonists remains fixated on scaling the walls, gaining access to the locked cabinet, uncovering the deliberately buried treasure and too few, if any, cartoonists can conceive of the next stage in the process.

FOI legislation, like the original Trojan horse or the modern software equivalent, was designed to be absorbed into the system, and activated so as to remove entry barriers and gain access to a greater amount of restricted information. Yet, in contrast to what occurred in the ancient rendition of this story, our modern day citadel protectors knew and counteracted the intended mission of this unsolicited gift from these heralds of democracy. The modern day version would have our software hackers conceding final design details and activation passwords to the system administrators.

The historical exclusion of the bureaucratic leadership at state level, or at the very least the next generation of leadership, from the initial design stages delayed the opportunity for a constructive dialogue that might have broken the linkage between Westminster system and secrecy. After outlining the significant steps already made towards more open government in Australia, Zifcak concluded that:

"despite the achievements and despite its promise, the Victorian case demonstrates plainly how halting, contingent and fragile the fledgling movement towards more accountable and participatory administration can be. Constitutional, political and personal pressures can and still do coalesce to provide leaders of government of whatever ideological persuasion with powerful incentives to maintain the secret state."

The relationship between FOI and the Westminster system in Australia has already been extensively explored. Nevertheless the New Zealand and Irish experience indicates the opportunities which can be gained from the involvement of a bureaucratic leadership who can be persuaded to turn their minds to the shaping of future policy-making processes and away from a passionate preservation of an existing system that

15 The initial efforts of Professor Wilenski in NSW for example. For a more detailed coverage of Wilenski’s reforms see A Rath, Freedom of Information and Open Government, Background Paper No 3 2000, NSW Parliamentary Library Research Service, Sydney, September 2000, 7-10 or Cossins above n 12, 8-11.
17 S Zifcak, above n 1, 221.
accords secrecy a prime position. The Tasmanian Government submission to the Legislative Council Inquiry was a well crafted exposition of the view that FOI was not a critical means of transforming the Westminster system but a subordinate and secondary addition to the system. The Tasmanian Government argued:

that the foundation of Australian democratic institutions and their unique expression in Tasmania can continue to be found in the rich tradition, conventions and cultural underpinnings of Westminster style government. This is not a rigid or weak foundation but rather one which is able to accommodate change and diversity, a strength which arises in part from the federal elements of our democracy and in part for its long and hard fought for traditions. This understanding of the cultural foundations of our system of Government is critical to placing Freedom of Information legislation in context.

LONE CRUSADERS AND RELUCTANT STEWARDS—POLITICAL LEADERSHIP ON FOI

An intriguing feature of FOI at the state level is the limited cohort of Ministers who could easily verify their proven and implemented commitment to FOI as opposed to tokenistic public pledges to the legislation. John Cain has claimed that [W]hen we came to implement the much-publicised party policy on freedom of information, I found myself virtually alone in Cabinet. His story is one that would find many echoes in the unwritten history of FOI in most other states.

In some states the political leadership was hostile to the concept and it required a binding election commitment and expressed support of the new Premier to bring the legislation into force. In others, like South Australia, it was the prospect of the opposition making the electoral and media running on FOI that finally converted a decade old issues paper into legislation. Political imperatives were also important in Tasmania where a commitment to introduce FOI was a central element in the Labor-Green Accord.

Justice Kirby has long promoted the view that FOI is the type of legislation that requires White Knights, both political and bureaucratic, to help the reform towards its

19 The Irish and New Zealand experience is outlined in R Snell 'Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand,' Freedom of Information - One Year On, Department of Finance and Department of Law, University College Cork, held at St Patrick’s Hall, Dublin Castle, 23 April 1999. Available at <http://www.ucc.ie/ucc/faculties/law/loi/conference/>

20 Tasmanian Government Submission to the Legislative Council Select Committee on Freedom of Information 1995, 5.

21 J Cain, above n 12, 265.

22 See Cossins on the views of Premier Wran in 1988 where he is quoted as stating 'what I found wrong about the FOI system is that it provides a plundering instrument for political opponents. I know the principles of FOI, but so much of the expenditure is on the basis of some ratbag backbencher in the Opposition who gets some bee in his bonnet and then wastes tens of thousands of public dollars.' Alaba, Inside Bureaucratic Power: The Wilenski Review of NSW Government, (1994) quoted in Cossins above n 12, 9.


final destination. Once the electoral dividend and entry of noble speeches into Hansard had been achieved by presiding over the passage of FOI in parliament, the championing of FOI at the State level was left to the whimsy of an occasional opposition member. The institutional championing, deemed so necessary by the Danks Committee in New Zealand, was left to an assortment of FOI education and training units which quickly dropped from the picture, and Ombudsmen and Information Commissioners. These latter institutions, especially Ombudsmen, were left to chart an uncertain course heavily constrained by limited resources and motivated by a decision to trumpet the positives and downplay the negatives.

Only the Western Australian Information Commissioner was in a position where a legislative mandate (to educate and promote) coincided with a reasonable budgetary allocation and a political stewardship which at the very least was non-hostile to FOI. The combination of these factors plus the prime importance allocated to conciliation of disputes over access saw a smooth introduction of FOI into Western Australia.

UNNECESSARY OR UNWANTED – THE BUREAUCRATIC RESPONSE

Apart from the partly documented internal bureaucratic response to FOI proposals in NSW, there is little direct solid evidence of wide scale state public service resistance to FOI. Cain points out that many of his ministers were cool towards the reform because their public servants were worried about the work involved and the mischief that public intrusion could create. Reflecting back on the introduction of FOI in other states, Cain observed that other State Premiers had relayed that their senior bureaucrats were very wary of implementing this legislation. Most of the publicly available information shows a public service willing to undertake the policy program of the government whilst highlighting that there was little pressing necessity for it. The joint response of the Queensland Directors-General of the Premier's and Attorney-General's Departments in 1990 captured this Sir Humphrey Appleby-like response:

It is noted, however, at the outset that it has always been possible to release documents on request. Departments will continue to do this, where appropriate, irrespective of the exemptions and other provisions of an FOI Act.

29 Cossins above n 12, 10. In addition Professor Wilenski in his Further Report: Unfinished Agenda, at 50 seemed to suggest a fairly vigorous internal opposition to FOI in NSW when he stated 'All this activity has had little effect on the New South Wales administration, except perhaps to reinforce the opposition to increased public scrutiny. The administration remains a bastion of secrecy ...' quoted in A Rath, above n 15, 9.
30 J Cain, above n 12, 265.
31 J Cain 'Some Reflections on FoI’s early years,' above n 12, 54.
32 Departments of Premier, Economic and Trade Development and Attorney-General's Department, Submission in Electoral and Administrative Review Commission, Review of
Yet the above, whilst inferring a fairly stiff resistance to the introduction of FOI at a bureaucratic and political leadership level, awaits a more comprehensive analysis of the history of state FOI to provide confirmation. In terms of ensuring a good compliance foundation the level and type of wariness towards FOI by senior bureaucrats would have been important but remains largely undocumented.

MAKING CHANGES – REDESIGNING FOI TO BE COMFORTABLE

In his 1997 London address Justice Kirby advanced the proposition that one of the lessons reformers in other countries needed to draw from the Australia experience was the real possibility of the strangling of FOI at birth. Cossins has documented the numerous design defects incorporated before the final passage of the NSW legislation. The Tasmanian legislation saw the loss of a number of important elements in a series of amendments supported by the ALP government and the Liberal opposition. Features lost at that stage and in the period immediately before its commencement in 1993 included:

- The requirement to keep a cabinet register,
- The requirement to publish an Agency statement of affairs
- The Ombudsman's ability to order release in the public interest
- The immediate introduction of the Act

These pre-implementation changes, and the plethora of amendments and attempted amendments after the passing of the legislation in most of the state jurisdictions resulted in heavily compromised FOI Acts. In a number of jurisdictions, especially Tasmania and Victoria, it can be argued that attempted amendments have weakened FOI legislation due to the negative impact upon administrative compliance. In some cases, as in Victoria certain promises were not delivered. In some jurisdictions major and negative changes were attempted after the legislation was passed or actually implemented. The one major exception towards this general trend away from the

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34 M Kirby, above n 26.
35 A Cossins, above n 12, para 1.3-1.3.12.
36 R Snell above n 33. Weakened because of the signals transmitted to the bureaucracy of the lack of support for the legislation and/or steps taken by the public service in anticipation of the amendments being carried.
37 S Zifcak, above n 1, 209 at n 6. An example was the failure to exclude factual material from the Cabinet exemption.
38 For details of the Victorian attempts see S Zifcak, above n 1, 210-215. For the Tasmanian experience see H Sheridan and R Snell, above n 16, 156-158.
principles of FOI were the significant amendments contained in the Freedom of Information (Amendment) Act 1992 (NSW). With the exception of the 1992 NSW reforms, the other changes in state FOI legislation in the period up to 1998 were designed to make FOI a more comfortable and less threatening device. Although the proposed Tasmanian amendments were ultimately abandoned, their design, nature and scope exemplify the process that Zifcak has labelled revisionism. They would have systematically overturned each major Ombudsman decision, which had resulted in the release of contested information and left an access regime that existed in name only.

By 1998, after a combined operating lifespan of almost 50 years at the state and territory level, it might have been expected that FOI would have produced notable increments in the level and type of information available to those interested in being involved in the policy process. Its impact ought to have been dramatic and measurable in both qualitative and quantitative terms. However, while there were important victories and landmark cases, in each jurisdiction they were often achieved only after a long and heavily contested adversarial struggle. This struggle more often than not resulted in the release of only fragments of information and left most requestors at the minimum uncertain about future recourse to FOI and generally disinclined to repeat the experience.

THE START OF THE FOURTH PHASE – VERSION 2.0 A RETURN TO THE FUNDAMENTALS?

A combination of legislative changes, administrative practices and a disappointing return on the anticipated democratic dividends from the faith invested in FOI had, by 1998, produced a well catalogued list of grievances, critiques and reform proposals. Zifcak’s first phase of optimism had faded into pessimism or been swamped by the appearance of revisionism, especially in Queensland and Victoria. Tasmania had emerged largely unscathed from a more determined and detailed attempt at revisionism. In many states a series of reforms were being advocated by law reform bodies like the Commission on Government in Western Australia, or being raised by key institutional players like Ombudsman, in South Australia and New South Wales, or Information Commissioners in Western Australia.

Generally the reforms could be classified as maintenance or procedural, although nevertheless important changes which covered matters such as time limits, fees, exemption wordings and consideration of different methods of external review. The Commission on Government (WA) entered two wild cards into the mix by suggesting...
reforms to the cabinet exemption and highlighting a necessity to restrict the use of commercial in confidence provisions.

The Australian Law Reform Commission/Administrative Review Council (ALRC/ARC) recommendations were radical in terms of Commonwealth experience and practice. Yet from a state perspective they merely brought the Commonwealth in line with various best practices at the state level. So in the main the ALRC/ARC proposals were a few, albeit important, evolutionary steps but nothing revolutionary. One of the great mysteries of the 1990s is how such a modest reform agenda disappeared totally from any active consideration by the Commonwealth government.

At the state level most of the suggested positive reform modifications had similarly failed to register on the policy agenda of Government parties or state bureaucracies. Whilst it would be nigh on impossible to find a senior official, or even government backbencher, to publicly endorse the abolition of FOI there were many content with the status quo - a contentment that was associated with the removal of a serious need to consider abolition or major legislative changes. State FOI laws had settled into Zifack's comfortable institutional niche. At a state level there appeared to be a mix of largely dysfunctional statutory frameworks, a general benign neglect in terms of administration and the significant withdrawal of active repeat users.

Greg Terrill has provided a partial explanation of this state of play by highlighting two features which affect the efficacy of FOI. First, the strategic weakness caused by relying on individual access as the critical element in a system managing secrecy. Second Terrill argues that advocates for FOI, by ignoring or downplaying the structural advantage that governments enjoy in the legislative architecture and the administrative control of requests for information, underestimate the weakness of FOI. Terrill concluded:

FOI does not currently function as a mechanism for the redistribution of information, as it does not systematically alter the availability of information. Rather, its present architecture and application is atomised and individualised, both for applicants and for documents. Wholesale change to this structure is likely to be difficult to achieve within a political system that celebrates individualism while finding that same individualism a convenient strategy to limit openness, and that facilitates access by powerful conglomerations to inside government information through lobbying and other means while restricting the rights to know of individuals.

Furthermore, the academic and user group concentration on making FOI effective, by case analysis and test cases, had started to broaden into closer consideration of legislative architecture, policy choices and administrative compliance. In particular the

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47 Ibid.
48 Ibid.
development of compliance analysis (and performance assessment studies) by Roberts had allowed a sharper differentiation and depiction of the variable ways in which FOI was administered.\(^{49}\) When coupled with the earlier work of Ardagh\(^{50}\) and the empirical studies of Allars\(^{51}\) some of the more troublesome, persistent and enduring defects in legislation, practice, procedures and compliance started to emerge.

All the elements for a start on developing a new access regime were in place. Operating problems had been logged and verified. The earlier version (the Commonwealth) was displaying the hallmarks of a system in entropy and foreshadowing the likely condition of State FOI in the next decade. Key administrators (judges, Ombudsman and Information Commissioners) were expressing dissatisfaction. Finally a key user group, the media, were starting to see some remaining potential in a previously neglected tool.\(^{52}\)

**REFORGING THE TOOLS OF OPENNESS**

Four conceptual contributions have been made to Australian FOI at the state level over the past two years. Two have been made by parliamentary committees (Queensland and South Australia) and the other contributions by the Information Commissioners (Western Australia and Queensland). Whilst commencing from different starting points the parliamentary committees seemed to have the same direction in mind. The two Information Commissioners have started from different working environments and pin their hopes in different visions of the future.

In the three other jurisdictions there has been a greater mixture of results and a generally less revolutionary consideration of the future. In Victoria, the Bracks Government acted 'quickly to give effect to its election commitment to strengthen freedom of information'\(^{53}\) by passing the *Freedom of Information (Miscellaneous Amendments) Act 2000* (Vic). Whilst the Act has reversed most of the major changes, made by the Kennett Government over the previous seven years, 'it arguably needs to go somewhat further if it is to produce an Act which achieves proper public accountability and full public confidence in respect of the government's operations, especially in its commercial dealings.'\(^{54}\)

The Tasmanian Parliament has removed the provisions that allowed for a conclusive certificate for the Cabinet exemption.\(^{55}\) This legislation, introduced by the sole Green member, passed with Labor, Liberal and Green support in the Lower House and without dissent by the Legislative Council. Despite giving pledges at the last

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54 Ibid.

election to consider a range of positive FOI reforms, the Bacon ALP Government has stated that it considers that there is no need for any further changes.

The position in NSW over the last two years has been well covered by the NSW Ombudsman Reports\(^5^6\) and compliance audits\(^5^7\). The background paper by Rath extensively canvasses the arguments for and against the reform or a review of the NSW FOI Act\(^5^8\). Indeed the NSW Ombudsman has outlined a long and comprehensive list of issues needed to be addressed to ensure the continuing relevance of FOI in NSW\(^5^9\).

**Parliamentary Committee 1—South Australia**

The South Australian Legislative Review Committee tabled in September 2000 the most radical version of FOI contemplated in Australia. The Committee started its review from the standpoint of a limited array of concerns about processing times, exemption applications and disquiet about a particular set of local outsourcing issues\(^6^0\). The Committee, after being formed in October 1997, approached its task apparently indifferent to short term schedules as it commenced oral hearings in February 1998 and completed its final report in September 2000. The Committee received 16 written submissions and took evidence from a limited number of witnesses.

Three major concerns with the operation of FOI in South Australia were identified by the Committee. These concerns involved the uncertainty of the Act, the culture within the public service and finally the procedures associated with applications\(^6^1\). The solutions proposed by the Committee included a streamlined public interest test, a centrally coordinated program of public service education, training and accreditation and thirdly the removal of internal review processes and a greater role for the Ombudsman in the external review process\(^6^2\). A draft bill, based on the New Zealand model of FOI, was also included in the Committee’s report. The Committee considered a vast collection of legislative alternatives but settled for the best features of the New Zealand approach ‘while fully representing the particular needs of South Australia’\(^6^3\).

Three basic premises outlined when the legislation was introduced in the South Australian Parliament were used by the Committee to evaluate the continued efficacy of FOI in South Australia. The premises included; first, the right of access to an individual’s own details was paramount, second, that an open government is more accountable and thirdly a better informed public should lead to a higher and more effective involvement in policy making and government\(^6^4\). In only the first of these premises could the Committee find a measure of success for FOI. When the other two

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\(^{58}\) A Rath, above n 15, 53-77.  
\(^{62}\) Ibid 3.  
\(^{63}\) Ibid 55.  
\(^{64}\) Ibid 2.
premises were examined the Committee's epiphany was produced by [T]he overwhelming impact of the evidence and examination by the Committee of all Australian and many international models of the operation of freedom of information legislation reveals that the Act is not working and stands in need of a complete overhaul.65

The Committee's findings seemed to reflect a departure from the usual tolerance which Australian law reform organisations and review bodies such as Ombudsmen and Information Commissioners have extended to previous poor report cards. Most responses tend to be optimistic that next time the outcomes will have changed for the positive. There is the perception that reforms or recommendations will filter down and, depending on whether you are an optimist or pessimist, either keep the flame of open government alight or at least reignite the spark. The South Australian Committee considered that the legislative architecture, the operating premises and the approach to administration all had to be reforged into a better adapted model for South Australia.

In an unexpected turn of events the South Australian Government introduced the majority of the Select Committee's recommendations in the Freedom of Information (Miscellaneous) Amendment Bill.66 These amendments had been preceded by the Government's publication in March 2001 of 'A New Dimension in Contracting with the South Australian Government.'67 Both these reforms marked a major turnaround in the South Australian government's attitude and approach to freedom of information issues.68

Parliamentary Committee 2—Queensland

The Queensland Parliament, in March 1999, referred a review of the Freedom of Information Act 1992 (Qld) to its Legal Constitutional and Administrative Review Committee. The terms of reference were wide ranging but a number of the terms seemed to indicate the desirability of altering exemption wording and application, fees, time limits and external review in favour of agencies especially to minimise resource allocations.

Unlike its counterpart in South Australia, the Queensland Committee decided to start its inquiry by returning to the basic purposes and principles of the FOI Act and determining whether any or all needed modification or replacement. An extensive Discussion Paper was released, after receiving a total of 110 submissions and the completion of a fact finding trip to New Zealand, which started from the foundations of an access regime and canvassed a wide range of possible options.69 In particular, it explored the compatibility between the purposes of FOI and the principles of a Westminster system of government.70 The Committee delayed its final report to deal

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65 Ibid 3.
69 Ibid 4-5.
with other referrals judged to have been more pressing. The subsequent Queensland state election meant that the Committee never delivered a final report.

An examination of the submissions to the Committee reveals interesting divisions between individuals, non-government organizations and agencies who made submissions. The majority of agencies expressed a general satisfaction with the Act but strongly advocated a series of modifications (specific and general). Modifications, required by these agencies, were usually in terms of increased fees and time limits, at all stages, the ability to deter particular types of applicants and quicker determination of external review decisions. The general impression from these submissions was that FOI was now part of the institutional landscape and that therefore the most appropriate strategy was to limit its interference in the core activities of agencies. The structural advantage for governments and their agencies, which Terrill argues is a critical impediment to effective FOI, is seen by these agencies as still too little a safety margin in protecting their operations from unnecessary interference.

A small handful of agencies considered that the objectives of the legislation were still not being fulfilled and the hallmark of their submissions were the absence of demands for extensions in time limits, fees or exemption widening. The submissions of these agencies were strongly in favour of more support, training and resources being diverted to the administration of FOI and improvements in records management practices in agencies.

Most non-agency submitters, and the Information Commissioner of Queensland considered that the basic principles of FOI were not being satisfied, especially in the area of providing access to information relating to policy and government decision-making. The Queensland Information Commissioner argued that the legislation in Queensland had been effective but not as effective as it could be.

The Committee appeared to be searching for a model which would lead to more openness in public sector policy processes and allow an environment of positive compliance to operate in conjunction with an access to information regime. A speech by the Chief Ombudsman of New Zealand, Sir Brian Elwood, in Melbourne in 1999 would have captured the essence of their search when he stated:

> it is realistic to conclude that New Zealand has now received across the total public sector as open a process of governance as any yet devised, which has established a right to access to official information whilst preserving the capacity for a government to operate effectively. The right balance between apparently irreconcilable objectives, openness and secrecy has been found, and shown to work.

Sir Elwood's claims for the outcomes in New Zealand are contestable but there would be few Australians in his position willing to try and defend such assertions about their

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71 Ibid 6.
72 G Terrill, above n 46, 30.
73 Legal, Constitutional and Administrative Review Committee, above n 69, 6.
74 Information Commissioner Queensland, Submission No. 56 to Legal, Constitutional and Administrative Review Committee Review of Freedom of Information in Queensland, para 36.
own jurisdictions. It is the vision that needs to be captured by the Queensland committee and not necessarily the importation of the New Zealand model.

**Information Commissioner 1—Western Australia**

FOI in Western Australia has on most criteria appeared to have stayed within Zifcak's optimism phase for the longest of any of the state jurisdictions. As a version 1.3 regime the legislation had adopted most of the major upgrades suggested by the early experiences of other jurisdictions. In particular, it commenced operation with a comparatively well funded and resourced Information Commissioner who was also empowered, by statute and resources, to undertake a far more pro-active role within the public service and in co-operation with the wider community. In part this smooth introduction was assisted by a comparative absence of more contentious types of FOI applications which might have had the potential to move FOI in Western Australia from a comfortable institutional niche. Recent developments in Canada demonstrate how quickly that comfort zone can disappear if an Information Commissioner starts to practice a policy of zero tolerance on processing delays, blanket exemption claims and administrative practices out of kilter with the objectives of the legislation.76

The Information Commissioner of Western Australia was able to report in her 1999 Annual Report that there had been:

- An increase in the requests for information.
- A steady increase in the number of applications involving non-personal information.
- Average time taken by agencies to deal with requests had dropped to 21 days.
- Average charges imposed for access had declined from $46 in 1994/95 to $14 in 1999.
- The rate of access, either in full or part, had increased.77

Despite the comparative success story of FOI in Western Australia, the Information Commissioner in previous reports78 and speeches79 has advocated a fundamental reformulation of the design principles associated with access laws. The basic policy question for the Information Commissioner is whether 'FOI in its current form is an appropriate access regime to serve the information needs of an increasingly informed and educated public.'80

77 Office of the Information Commissioner, *Annual Report 1999*, 2. In addition there had been a perceptible difference in frequency and types of usage of the FOI Act by journalists in WA during this period than in other jurisdictions. Findings of an unpublished undergraduate research project by Alistair McKenzie and Fiona Goodman, 'Freedom of Information and the Print Media: A Comparative analysis of Tasmania, Western Australia and Queensland, October 2000 held at the Law School, University of Tasmania.
Information Commissioner 2—Queensland
In terms of approach, style of decisionmaking and relationship to government agencies there would be few stronger contrasts than that between the Information Commissioners of Queensland and Western Australia. In his submission to the Queensland Parliamentary review of FOI the Queensland Information Commissioner lodged an impressive manifesto. The submission linked the basic purposes of freedom of information legislation to achieve the democratic imperative of open government as a critical feature of representative democracy, with the necessity to implement cultural change within government administration.81

Totalling 127 pages with numerous attachments, the Information Commissioner’s submission is a classical study of an attempt to make running repairs to an operating system ill-suited to its surrounding environment. In particular, the Information Commissioner argued that the FOI Act’s potential to be a truly effective accountability mechanism have been drastically reduced by successive amendments which have excluded more and more information from potential disclosure, thus limiting the Act’s effectiveness.82

THE NEED FOR AN EPIPHANY OR JUST TIME FOR A TUNE UP?
Does FOI at the state level in Australia have the capacity to deliver dividends on the hopes and faith that have been invested in it for the last twenty years? In many jurisdictions including South Australia, New South Wales and Tasmania it was often a decade or more before the promise became a reality on the statute books. The long wait was expected to lead to a transformation in the timing, quality and substance of information available to a citizen as of right. Many, myself included, marvel at how the New Zealand Official Information Act has ascended to be treated by courts, parliamentarians and Ombudsman as an act of constitutional significance.83 Thus the Official Information Act in New Zealand delivered, in a way that has not happened in Australia, on at least a nominal basis the democratic promise inherent in the legislation.

Consider the counterattack provoked by the Canadian Information Commissioner because he decided that a policy of zero tolerance would apply to ‘late responses to access requests; a new pro-openness approach to the administration of the Access Law… and that the full weight of the Commissioner’s investigative powers would be brought to bear to achieve these goals.’84 Would the same response occur in Australia if an Ombudsman or Information Commissioner turned away from an attitude of parental tolerance and complete faith in the ‘filter down’ effect of recommendations? Would the next annual report relate threats to future careers of staff85 and report that

81 Submission by the Information Commissioner (Qld) to the Legal, Constitutional and Administrative Review Committee on The Review of the Freedom of Information Act 1992 Qld, Submission No 56, 1-12.
82 Ibid 12.
85 Ibid 11.
'When the Commissioner’s subpoenas, searches, and questions come too insistently or too close to the top, the mandarins circle the wagons.'

If we could conjure up an epiphany of our ideal State information access regime would we really only be poking a stick into a bull ant’s nest if we tried to implement it? Maybe the Northern Territory divined the pure essence of a political and bureaucratic acceptable access regime in Australia. In early 2000 the Northern Territory Government circulated a discussion paper on FOI that proposed a simple two fold exemption system namely the completely exempt and the most likely exempt.

In comparison to the information access available prior to FOI legislation, there have been changes which have made important and significant differences. Those of us who seek change too often and too readily discount the transformation that has occurred in access to and the ability to correct information held about us that rests in the hands of government. Developments over the last two years at the state level have seen Zilcak’s revisionism phase terminated and much of the damage repaired. The question, for us as citizens, is whether we are comfortable in relying on a ‘patched up’ system or whether we are interested instead in trying to envisage the next generation of access legislation?

86 Ibid 9.