Freedom of Information and the Tasmanian Ombudsman, 1993-1996

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The importance of the Tasmanian Ombudsman as external reviewer of agency decisions under the Tasmanian *Freedom of Information Act* 1991[1] cannot be underestimated. Rowat has argued that one of the most controversial questions about Freedom of Information (FOI) schemes has concerned the kind of body which should consider appeals against refusal of requests for government-held information.[2] Australian jurisdictions have chosen a wide range of review options (see Table 1). In Tasmania the Ombudsman forms the only independent and determinative administrative review mechanism for the Act. This model resulted from a mixture of cost considerations and the absence of any State level Administrative Appeals Tribunal (AAT). The dangers of such a model include the greater concentration of power and a greater possibility of bias. In addition, in Tasmania there is the need for clear and comprehensive FOI review precedents, as the number and frequency of FOI determinations by a State Ombudsman as compared to the Federal AAT will inevitably be small.[3] Furthermore, the pivotal role of this office in determining access to government held information is then subject to the constraints of staffing, resources and the mindset of the particular reviewer.

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1 Hereafter referred to as the FOI Act.

2 DC Rowat, 'Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand', (1993) 52 *Australian Journal of Public Administration*, 215-221.

3 See E Biganovsky, 'Reinventing Freedom of Information: A State Focus', 1994 National Administrative Law Forum, 'Are the States Overtaking the Commonwealth?' 7-8 July 1994, Brisbane, published in S Argument (ed) *Administrative Law: Are the States Overtaking the Commonwealth?* p 190.

Table 1: External Review Mechanisms in Australian Jurisdictions[4]

Jurisdiction	Internal Review	External Review
Commonwealth	s 54	Ombudsman, s 57; AAT, s 55.
Victoria	s 51	Ombudsman ss 27 and 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.

This paper concludes that a deliberate choice of informality linked with the pressures and limitations of reduced resources has damaged the effectiveness of the Ombudsman as the sole external review mechanism for the FOI Act. While this paper is highly critical of the quality of the Ombudsman's performance as the external reviewer of the Tasmanian FOI scheme during the 1993-1996 period, the handling of his case load has been exemplary. A heavy workload and staff cut-backs may have encouraged the Ombudsman to take a low key, informal approach to his review task under FOI. The central concern of this article is that the Ombudsman's discernible predisposition towards non-disclosure and a failure to seriously tackle openly and fully the issue of public interest deliberation has critically weakened any attempt to achieve the objectives of the legislation.

Research undertaken by students at the Law School, University of Tasmania since 1993 suggests that severe reductions in funding and

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

resources and the relocation of the Ombudsman to the Department of Justice's portfolio have caused serious problems for the Ombudsman in undertaking his duties under the Tasmanian FOI Act.[5] A number of recent research studies have concentrated on the problems facing the Ombudsman's Office in the areas of:

- Adequacy of reasons statements after weighing public interest considerations.
- Interpretation of the Cabinet exemption provision (section 24).

The research papers conclude that the Tasmanian Ombudsman produced reasons statements for decisions which, in comparison with those compiled by the Information Commissioners in Queensland and Western Australia, were significantly inferior in length and in treatment of public interest considerations. Further, the papers argue that the Ombudsman has interpreted section 24 of the FOI Act widely and expansively, resulting in an application of the section which strongly favours agencies seeking to restrict access to government-held information.

This apparent expansive interpretation of section 24 has taken on increased importance in light of the recent report by the Legislative Select Committee on the Freedom of Information Amendment Bill (1994). This report recommended significant reforms to the Cabinet exemption, and in particular the widening of the exemption to cover a greater number of documents. Significantly, should the proposed recommendations go ahead, and if the Ombudsman continues to endorse an expansive interpretation of section 24, the accessing of any remotely sensitive information will be virtually impossible in Tasmania.

5 See M Barry and C Hollingsworth 'The Effectiveness of the Ombudsman in Relation to Departmental Response', *1994 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; E Saramo and C Narasia 'The Tasmanian Ombudsman - a Critical Review', *1993 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; M Jarman 'The Tasmanian Ombudsman: the Problems of Resource Allocation', *1994 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; S Pennicott 'The Tasmanian Ombudsman Office - is it's Jurisdiction Shrinking? An Analysis of the Tasmanian Ombudsman's Jurisdiction in Relation to the Recent Phenomena of Government Business Enterprises, and the Role of the Auditor-General', *1995 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania; H Locke 'The Tasmanian Ombudsman: Out of Date or Out of Pocket? Ten Years in Review', *1996 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania.

During the period in which the Freedom of Information Amendment Bill was under review, the Ombudsman deliberately chose to adopt a relatively informal approach to the process of review under the FOI Act. In his 1996 Annual Report, the Ombudsman noted that 'the Act does not specify the method or process of review, and it is my practice to deal with them as informally as possible'.[6]

Resource restrictions, an expansive interpretation of section 24, and a pursuit of informality are further compounded by an approach to section 27, relating to internal working documents, which allows agencies to restrict access to a significant corpus of information concerning policy formulation. This approach unintentionally constructs a non-disclosure haven within which most agencies can weather the threat of access to policy information.

This article contends that whether it be by design, omission or lack of resources, the first three years of Ombudsman review in Tasmania have resulted in an access regime which is incapable of achieving the objectives of the *Freedom of Information Act* 1991. In a system where only a small number of external reviews are available for determination, an external reviewer, such as the Tasmanian Ombudsman, needs to use every review as a precedential foundation upon which the objectives of the legislation can be built. Failure to set high standards of review and to carefully restrict the potential exploitation of statutory loopholes by a public service and Government relatively hostile or at least indifferent to FOI is a very serious shortcoming of an external review body.

Background

The original design for the FOI regime in Tasmania did not include a review function for the Ombudsman. Appeals under the Freedom of Information Bill 1990, tabled in the Tasmanian Parliament by Independent Green member Bob Brown, were to be heard by the Supreme Court.[7] Advice from the Communications Law Centre resulted in the appeals process being transferred to the Ombudsman, in time for the tabling of the Freedom of Information Bill (No 2) 1990.[8] The Communications Law Centre recommended:

6 Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1996*, p 49.

7 Freedom of Information Bill 1990, ss 46-48.

8 Communications Law Centre, 'Tasmanian Freedom of Information Bill 1990', *A Report Prepared for the Green Independents in Tasmania*, 1990, p 7.

> That the Supreme Court should not be the first independent body to review decisions under the FOI Act, and that, at the same time as you introduce the FOI legislation, you introduce or foreshadow separate legislation to establish an Administrative Appeals Tribunal for Tasmania.[9]

Meanwhile, negotiations between the Greens and their Accord partners, the Australian Labor Party (ALP), revealed that cost factors and other considerations made the proposed role of the Supreme Court as a review body a non-viable option.[10] The Communications Law Centre warned that if the Ombudsman was expected to take on a wider review role, he would need adequate resources:

> The role of the Ombudsman in FOI can be significant only if he or she is given adequate resources. In practice the Commonwealth Ombudsman has not played a large role in the history of FOI so far. On several occasions the Ombudsman has complained that he was being denied the resources necessary to do his FOI tasks.[11]

During the first three years of FOI in Tasmania, the Ombudsman was bedevilled by inadequate resourcing of his general functions, let alone the added responsibilities assumed under the FOI Act. Rhetorical support given by the ALP Opposition and the Greens for FOI has failed to result in any extra resources or powers for the Ombudsman. This failure in support continued despite the ALP and Tasmanian Greens majority in the House of Assembly in 1996 and 1997.

Tasmania chose the Ombudsman model for FOI external review as it would keep review costs low and avoid the problems with a court supervised appeals process. Other Australian jurisdictions, in comparison, chose an Ombudsman model because it was 'argued that giving courts the power to order release of documents would interfere with ministerial responsibility in a parliamentary system'.[12]

The *Freedom of Information Amendment Act* 1992

In early December 1992, a few days before the commencement of the FOI Act on 1 January 1993, the Tasmanian Government pushed a series of amendments through the Tasmanian Parliament.[13] At the time the Government and its advisers proved extremely reticent in justify-

9 Id, at p 62.

10 Personal communication with Chris Harries, Green adviser on FOI, 12 March 1997.

11 Communications Law Centre, note 8 above, at p 65.

12 Rowat, note 2 above, at p 215.

13 H Townley, 'Recent Developments', (1992) 42 *FOI Review* pp 78-79.

ing the changes. A few months later the argument was advanced that the changes were to correct a series of anomalies in the principal Act.[14]

In retrospect, the *Freedom of Information Amendment Act* 1992 signalled the Government and bureaucracy's approach to information access over the next three years. Whether it was the Government's initial intention, or merely their reaction to the idea of open government, the Amendment Act helped the Government to neutralise the potential of the FOI Act. The changes to the FOI Act contained within the FOI Amendment Act were formulated in secrecy and introduced quickly into Parliament. The changes were accompanied by minimal explanation and were dubiously justified as 'finetuning.' The determination of the Government to render the FOI Act less effective was clear.

Supporters of the FOI Act were compelled to respond to these changes with no forewarning or consultation. The passage of the Bill through Parliament was uncharacteristically swift and left little opportunity to rationally evaluate the merits of the changes. The changes included:

- Removal of the Ombudsman's power to release exempt information (s 48(5)).
- Extension of the trade secrets exemption (ss 31 and 32).
- Amendment of personal information (s 37).
- Exemption of information communicated from other Governments (s 26).
- Exemption of information likely to threaten endangered species etc (s 35A).
- Change of official responsible for issuing conclusive certificates (s 24(3)).
- Minor amendments to wording of certain sections.

The deletion of section 48(5)(b), which conferred power on the Ombudsman to release exempt information, was probably the most significant of the amendments. At the time it was argued, especially by the Green Independents, that the amendment was excessive, because sections 51 and 48(7) already effectively prevented the Ombudsman from providing information to an applicant, other than indirectly

14 D Needham, 'Tasmania's Freedom of Information Amendment Act 1992', (1993) 43 *FOI Review* pp 7-8.

through the agency or Minister concerned. However, the actual power to recommend release of documents claimed as exempt was not curtailed by these limitations.

As there is no longer any provision conferring power on the Ombudsman to require the release of exempt information, release remains totally within the discretion of the agency concerned and is subject to no general public interest test. The controversial Legionnaires' Disease outbreak in 1989 at the Burnie Public Hospital,[15] and the subsequent handling of the matter by the Tasmanian Government, demonstrated the restriction that this amendment placed on the Ombudsman's ability to use FOI to hold successive governments accountable for their actions, inaction and attempts to dodge scrutiny.

The Government justified this amendment in December 1992 on the basis that it removed an extraordinary power from the hands of a non-elected official. Yet events such as the Legionnaires Outbreak demonstrate that there must be a counterbalance to the power of other unelected officials to use secrecy as a shield to hide shameful deeds or merely uncomfortable facts. The Victorian AAT and the NSW Ombudsman have the ability to use this safety valve mechanism to allow release of otherwise exempt information.[16] The exercise of this power has been circumspect and infrequent.[17] The Canadian Information Commissioner considered that this power should be expanded to require 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.[18]

'Less Money, Less Staff and Less Independence': an Ombudsman's Lament

The Tasmanian Office of the Ombudsman, after receiving responsibility for external reviews under the FOI Act, experienced a 37% reduction in its staffing establishment in 1992-93. This cut was made only a few months after the Government had committed itself to providing an extra staff member to the Ombudsman to deal exclu-

15 This is discussed below in the section headed 'Case Studies'.

16 *Freedom of Information Act* 1982 (Vic) s 50(4); *Freedom of Information Act* 1989 (NSW) s 52.

17 See I Caldwell, 'Compelling Public Interest vs Public Curiosity', (1996) 61 *FOI Review* pp 5-7.

18 Canadian Information Commissioner, *Annual Report 1994*, pp 21-22.

sively with FOI matters.[19] This resource restriction on the Ombudsman placed an effective clamp on the nature and quality of response which the office could bring to the external review process for FOI applications. Over the first three years of operation of the FOI Act, this resource starvation ensured that FOI in Tasmania became a very poor piece of the institutional furniture of public administration. The emasculation of the Ombudsman, either intentionally or as a by-product of general cost cutting in the public service, seriously hampered the ability of that office to perform anything other than a limited reactive role. Similar, and more critical, observations have been made about the impact of these types of restrictions on the role and operations of the New South Wales Ombudsman in effective FOI supervision.[20]

The problems associated with this funding restriction have been highlighted in the Tasmanian Ombudsman's *1993 Annual Report.*

> Although every effort had been made and continues to be made to streamline procedures and resolve complaints by more creative and decisive means, I expressed some disquiet at our growing inability to address the larger questions of systemic deficiency. By restricting our activities to the resolution of immediate complaints, we were continuing to treat symptoms rather than causes and not, in my view, contributing, as I believe the Office of Ombudsman should and can, to the improvement of public administration in this State. With inadequate funding, we are in danger of being reduced to little more than what the Commonwealth Ombudsman referred to as a *'fly-swatting'* function.
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> ... The Ombudsman assumed responsibility under the Act (FOI) for hearing and determining appeals against decisions of agencies not to release information sought by members of the public. In accordance with advice given to the Parliament that the Ombudsman would be provided with an additional staff member to handle Freedom of Information matters, I have sought the provision of such an officer by the Secretary for the Department of Justice but, regrettably, he has been unable to meet that request ...
>
> The service I am offering now is necessarily inadequate in terms of the proper functions of an Ombudsman and falls far short of the potential provided for by the Ombudsman Act. I am simply unable to carry out any *'own motion'* inquiries or systemic investigations and am obliged to apply fairly harshly the provisions of the Act which allow me to decline complaints or require complainants to pursue other avenues of redress.[21]

19 'Comment', (1992) 40 *FOI Review* p 41.

20 B Smith, 'The Demise of FOI in New South Wales', (1994) 49 *FOI Review* pp 4-5.

21 Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1993*, p 7.

The Tasmanian Government justified its dramatic retreat from support of the FOI Act by pointing to similar cuts in all departments and programs. In 1990 the responsibility for the Ombudsman's Office was transferred to the Department of Justice. This transfer was problematic for the Ombudsman with his traditional watchdog functions. The Ombudsman, in his 1995 Report, observed:

> that means that as Ombudsman I am dependent upon the consent of a Department head, (who is within my complaint jurisdiction) as to whether and to what extent I will be supplied with the staff I need, with the same implication of compromise of the Ombudsman's independence.[22]

The Ombudsman, in being forced to operate under the tight economic control of the Justice Department, was effectively limited to investigating only individual cases rather than attacking systemic deficiencies in the Freedom of Information area. He was also limited in his ability to pursue generally the objects of the legislation. On many issues where a more financially independent and robust external review body could have undertaken rigorous investigation, the Tasmanian Ombudsman seemed to adopt a motto of 'valour in discretion'. The long term impact of restricted resources and a lack of financial independence on a small and over committed agency should not be underestimated. A separate authority, reporting directly to Parliament, would have been better positioned to demand that the Government quantify the level and strength of its support for Freedom of Information.

The hostile resource climate within which the Ombudsman had to operate increased the likelihood that Freedom of Information in Tasmania would more quickly become relegated to an institutional niche. Zifcak has argued that generally FOI in Australia:

> has developed into part of the accepted, albeit modified, fabric of administrative life. Welcomed in the community as the principal instrument with which to shed light on the caverns and crannies of bureaucratic organisation, it has laid bare important aspects of government deliberation but left the whole largely intact. In its ten years of life, the Freedom of Information Act has neither confirmed the worst fears of critics nor has it brought to fruition the idealistic vision of its supporters. Rather, the Act has become part of the institutional furniture providing

22 Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1995*, p 5.

distinct but limited benefits and creating ascertainable but limited discomforts.[23]

Performance Indicators

External reviews are crucial to genuine institutional accountability. On the surface, an overturn rate of 50% (agency decisions reversed in full or part) as shown in Table 2 indicates that the Tasmanian Ombudsman has been very effective in the first three years in providing a mechanism of external review of agency decisions. A deeper analysis reveals a number of less promising prospects for the longer term functioning of the FOI Act. These less promising indicators include a relatively low (and decreasing) number of review requests and minimal recourse to external review by key actors (journalists, members of parliament and lobby groups). Most jurisdictions show a well documented tendency on the part of government agencies to delay requests, and to blindly or determinedly resist release of sensitive material.[24] Fourteen years after the commencement of the Commonwealth FOI Act, the Commonwealth Ombudsman still claims that 'many government agencies still do not operate within the legal framework and certainly not the 'spirit' of the Act'.[25]

Justice 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

23 S Zifack, 'Freedom of Information: Torchlight Not Searchlight', 66 *Canberra Bulletin of Public Administration*, p 162.

24 See Canadian Information Commissioner *Annual Report 1994-1996*; The Australian Law Reform Commission/Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (December 1995); R Snell, 'Hitting the Wall: Does Freedom of Information Have Staying Power?', 1994 National Administrative Law Forum, 'Are the States Overtaking the Commonwealth?', 7-8 July 1994, Brisbane, published in S Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* AIAL 1996, pp 153-184; R Snell, 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues From the Heart of Government', (1995) 57 *FOI Review* pp 34-37.

25 Commonwealth Ombudsman, *Annual Report 1994-95*, (AGPS, Canberra) p 33.

be corrected, to bring even the most obdurate official into line with the new policy'.[26]

In terms of having an educative impact, the Ombudsman, during the period under review, struggled with the combined problems of a low volume of cases and a limited spectrum of agencies being reviewed. These problems were compounded by the Ombudsman preferring to concentrate solely on the determination of section 48 review requests rather than responding to complaints about decision-making problems that occurred in the handling of original requests. These latter complaints include time delays, inadequate searches, blanket claims for exemptions and inadequate reasons statements.[27]

The Problems of Evaluation

The problem confronting any evaluation of the Ombudsman's performance is in determining precisely what that performance ought to be. The Tasmanian Ombudsman, given the contents of annual reports for the period, seems to have preferred a strict functional evaluation that focuses on the number and types of external reviews and the time taken to process those requests. The contention of this article is that the Ombudsman's evaluation net needs to be cast wider in order to focus on a number of qualitative factors. An evaluation should incorporate not only the results of finalised reviews and the types of applicants, but should also extend to a consideration of the adequacy of reasons statements and the handling of public interest factors.

The choice as to performance indicators depends on whether one sees an access regime as a purely technical framework which allows custodians of government information—gathered on behalf of, and funded by taxpayers—to deny or grant access, or whether it is to allow citizens to better judge their representatives. If the former is

26 Justice M Kirby, 'Information and Freedom', *The Housden Lecture*, Melbourne, 6 September 1983, p 11.

27 R Snell, 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues From the Heart of Government', (1995) 57 *FOI Review* pp 34-37; R Snell, 'The Walls of Jericho: Under Threat From Paper Swords?', *Submission to the Legislative Council Select Committee on Freedom of Information*, February 1995; N Apandy, 'FOI: The Adequacy of Statement of Reasons in Tasmania' *1993 Principles of Public Law Research Paper* held at the Law School, University of Tasmania; S Hollingsworth, 'Searching for an Answer? The Issue of "Sufficiency of Freedom of Information Searches" in the Light of Some Recent 1994 decisions', (1994) 53 *FOI Review*, pp 62-64.

chosen, then a functionally narrow evaluation is all that is required. If the latter goal is sought then the evaluation must be extended.

Results of External Reviews

The external review statistics in Table 2 for the period 1 January 1993 to June 1996 demonstrate that Agency decisions on non-disclosure are frequently altered, at least in part, by the Ombudsman. This 50% plus adjustment rate in favour of applicants in the first three years of the Act's operation is possibly a sad indictment on the nature and quality of decision-making at the Agency level. This quality control check by the Ombudsman takes place for the handful of applicants who are obstinate enough to pursue their rights to review. Many applicants will accept the exemptions claimed by Agencies and their inadequate reason statements as clear indicators that information will not be released, and so never seek internal or external review.[28] The case studies later discussed indicate that even in areas of high public interest the dropout rate for review applicants is often two out of every three requests.

28 See further N Clark 'FOI in Tasmania: Room for Improvement,' (1995) 60 *FOI Review*, p 97; N Smith and A Pless 'A Case Study Evaluating the Effectiveness of FOI Legislation in Several Tasmanian Controveries: Purity Shop Trading Hours, Clarence Tip and the Cable Car Dispute' *1995 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania.

Table 2: Results of External Reviews 1993-1996[29]

	1994	1995	1996
Agency decisions affirmed in full	11	14	10
Agency decisions affirmed in part	13	16	7
Agency decisions reversed in full	5	5	11
Deemed reviews referred to agency	2[30]	3	1
No jurisdiction	1	4	1
Lapsed or withdrawn[31]	2	6	5
TOTAL	34	48	35

Applicants for External Review 1993-1996

Those prepared to pay lip-service to the idea of Freedom of Information will use the pattern and use of FOI to justify attempts to curtail or severely modify access regimes. If very large numbers of ordinary citizens use the legislation, those paying lip-service to FOI will argue for a system of user-pays and for restrictions to be placed on the processing of the large volumes of requests—for example, increased time limits and greater discretion to refuse requests. On the other hand, in jurisdictions where only a small information elite (journalists, lawyers, politicians, lobbyists and the occasional academic) dominate the user statistics, then demands for amendments arise, because the wrong people are using legislation designed for the 'ordinary citi-

29 Statistics were taken from the Tasmanian Ombudsman, *Annual Reports for the Year Ended 30 June 1994, 1995*, and *1996*.

30 Within this category, the Ombudsman was involved, but without formal review proceeding; that is, the agency and applicant agreed to partial release, or the agency provided the documents requested in full after referral back to the agency after 'deemed decision' of refusal.

31 Various other requests were withdrawn or dealt with outside the parameters of the Act. For example, a wrong decision conveyed to an applicant due to clerical error. See Tasmanian Ombudsman, *Annual Report for the Year Ended 30 June 1993*, Case FOI 10 at p 14.

zen'.[32] The Tasmanian Government took out full page newspaper advertisements justifying the Freedom of Information Amendment Bill 1994 on the grounds that 'members of the public accounted for relatively few FOI applications ... more than half the applications came from lawyers, politicians and academics'.[33] Similar sentiments can be found in the Government's submission to the Legislative Council Select Committee on Freedom of Information.[34] The Select Committee concluded:

> While some witnesses felt that the Act was not being sufficiently promoted throughout the State, it is the Committee's opinion that the Act is being used effectively by the limited number of people with a need to access government information and that it is unlikely that a large number of Tasmanians have a need to use the Act. It appears that the general public do not have a high need to utilise the provisions of the FOI Act to access information. This may be explained by the fact that many agencies adopt a pro-disclosure philosophy towards the provision of information to the public, and provide information without the need for an FOI request.[35]

Yet, as the Canadian Information Commissioner has pointed out, it is the agents of citizens (journalists, politicians etc) who keep the public better informed and allow access to the contents of primary documents and 'not press releases, not bland pre-digested official statements'.[36] As Hazell noted:

> 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.[37]

The general use of FOI by Tasmanian journalists and politicians has been problematic and the application for review by the Ombudsman

32 See for example *Age* (15, 19 and 20 September 1997) which documents the use of FOI in Victoria by Opposition Health Spokesperson John Thwaites in relation to requests on the Metropolitan Ambulance Service and the Department of Health.

33 Full page advertisement entitled 'Freedom of Information Amendment Bill 1994: Striking a Balance', *Mercury* (21 October 1994) p 6.

34 See Tasmanian Government, *Submission to the Legislative Council Select Committee on Freedom of Information*, 1995, p 20.

35 Tasmanian Legislative Council Select Committee Report, *Freedom of Information*, February 1997, p 34.

36 Canadian Information Commissioner, *Annual Report 1996*, p 7.

37 R Hazell, 'Freedom of Information in Australia, Canada and New Zealand', (1989) 67 *Public Administration*, 201.

from these potentially key users has been disappointing (See Table 3). In part, the low number of requests for review by journalists is indicative of a far wider problem that Tasmanian journalists have with Freedom of Information.[38] In particular, one Tasmanian journalist has defined the situation in which 'the Tasmanian FOI Act has reached the stage where the perseverance required to respond to deliberate delays is making the Act unworkable, more notably so for the journalist'.[39]

It has been argued that the experiences of media use of FOI in Tasmania and Queensland 'throws considerable doubt on the current ability of the media to perform either educative, publicity or accountability functions in conjunction with FOI'.[40] The low-level usage by politicians in this period is explained by several factors. Firstly, a very low usage of FOI by the 19 members of the Upper House. Secondly, a glaring lack of familiarity on the part of politicians with the mechanics of the Act. Thirdly a lack of organisation by either the ALP opposition or the Greens in coordinating and pursuing their requests.

Table 3: Applicants for External Review 1994-1996[41]

	1994/1995	1995/1996
Private citizens	15	14
Solicitors on behalf of clients	13	10
Academics	8	1
Members of Parliament	6	3
Business associations / community groups	3	2
Journalists	2	0
Business	1	1

38 See H Townley, 'Keeping the Bastards Honest - the Tasmanian Media and FOI', *1993 Advanced Administrative Law Research Paper*, held at the Law School, University of Tasmania; W Lacey, 'Fair Facts or Political rhetoric? A study on the Tasmanian Media, Democracy and FOI', *1993 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania.

39 N Clark 'FOI in Tasmania: Room for Improvement', (1995) 60 *FOI Review*, p 97.

40 R Snell, 'Hitting the Wall: Does Freedom of Information Have Staying Power?' note 24 above, p 177.

41 Statistics were taken from the Tasmanian Ombudsman's *Annual Report for the Year Ended 30 June 1994, 1995*. Statistics for FOI operation are only available from 1994 onwards, as it appears that it was only from this time that the Department of Premier and Cabinet began releasing FOI statistics in greater detail.

TOTAL	48	31

Educating Agencies and Citizens About FOI

Most FOI external review bodies have an explicit, or self-proclaimed, educative function. In some jurisdictions this is clearly set out in the statute, while in other jurisdictions, such as Tasmania, this is left to the initiative of the particular body. The Tasmanian Act, apart from Section 55 which directs the responsible Agency to publish details of the Act and notify people of their rights under the legislation, leaves education about and promotion of the Act to the players involved in the review process.

For the three year period under review, the promotion and education about the FOI Act was left largely to the FOI Unit. This small unit, generally one officer but at times two, was originally located in the Department of Premier and Cabinet.[42] From the beginning of 1994 to early 1995 a significant core of its activities related to facilitating the introduction of the Freedom of Information Amendment Bill 1994, and subsequently preparing the Government's submission to the Legislative Council Select Committee on Freedom of Information. In June 1996 the Unit was incorporated into the Ombudsman's Office.[43]

The FOI Unit has followed largely the same pattern as the experience in New South Wales but with far more limited support and facilities. Within its restrictions of staff and funds the Unit was required to conduct seminars, and publish Guidelines and leaflets about the Act. Apart from its last member who took office in September 1994, the Unit has had a steady rotation of staff from other areas of the Department of Premier and Cabinet. The success story of the Unit was the formulation and production of the Freedom of Information Guidelines. This extensive but easy to use guide was invaluable to FOI officers and the limited number of applicants made aware of their existence. During the planning for the Freedom of Information Amendment Bill 1994, the Guidelines were withdrawn from sale in the anticipation of incorporating the proposed changes. Despite the

42 To trace the history of the FOI Unit see *Freedom of Information Annual Report* 1 July 1993 to 30 June 1994, p 1; and *Freedom of Information Annual Report* 1 July 1994 to 30 June 1995, p 1.

43 *Administrative Arrangements Order* (No 2) of 1996.

passage of two years, with no changes, the Guidelines have failed to return to the Government Bookshop shelves.

The Unit appeared to adopt a low-key strategy toward integration of the FOI Act into the normal working practices of the bureaucracy. There was little publicity generated from the commencement date of the Act, in stark contrast to the eager promotion in Queensland. In the first Queensland Freedom of Information Annual Report it was stated that:

> The communications media play a vital role in maintenance of our democratic system, one of which the media themselves are self consciously aware. FOI offers the media a powerful investigative tool to open government to public scrutiny, to criticise the rationale for decisions rather than simply reporting the fact of decisions being made, and to expose incompetence, malice and wrongdoing in public administration. In the hands of a skilled journalist, FOI can expose the thought processes of government; it can fill in the background; it can lay bare underlying assumptions and values .... Every story beginning 'Material revealed under FOI today...' will be a minor victory for the legislation.[44]

The Tasmanian FOI Unit seemed content to see FOI use slowly evolve in Tasmania without the need to actively promote the Act to apparently uninterested media and professional groups, such as lawyers, who showed little inclination to actively use or promote the Act. Given a maximum staff of two and the necessity to run training programs for agencies, the awareness-raising talks given to 29 groups in 1994 was a notable achievement.

Adequacy of Reasons Statements

By virtue of section 22(2)(d) of the Act, the Ombudsman is required to supply 'public interest' reasons statements for a significant number of exemptions claimed under the Act.

> The statutory requirement to provide reasons statements is an institutional safeguard by which it is hoped that decision makers will be encouraged to consider the broader public interest, when contemplating their own, or their Minister's interest in evading public scrutiny.[45]

While there exists no concrete or exhaustive list of the requirements of an adequate statement of reasons, the Tasmania FOI Guidelines offer the following advice:

44 *Freedom of Information Annual Report 1992-93*, Queensland, p 24.

45 A Collins, 'FOI External Review: the Ombudsman and the Public Interest', *1996 Advanced Administrative Law Research Paper*, held at the Law School, University of Tasmania, p 3.

> Statements of reasons should contain all the steps of reasoning linking the facts to the ultimate decision necessary for a person affected to understand how the decision was reached. The criteria relevant to the decision, the weight to be attached to each criterion and the conclusion reached on the criteria should be stated. A statement of reasons should not state conclusions without explaining how they were reached.

The research study conducted by Collins raised some questions with regard to the Tasmanian Ombudsman's adequacy of reasons statements. Collins provided a comparative study of variables—overall length of decisions, number of pages dealing with public interest considerations and number of paragraphs dealing with public interest considerations—for FOI review decisions in Queensland, Western Australia and Tasmania. It was argued by Collins that both decision length and the proportion of the statement devoted to public interest considerations were plausible determinants in the assessment as to whether or not a statement was adequate. The results highlighted a number of disparities between Tasmania and other jurisdictions.

Table 4 : Public Interest Considerations in Statements of Reasons

Averages	Tasmania	Queensland	Western Australia
Total number of pages	4.5 Range (1-9)	21.2 Range (5-63)	14 Range (5-30)
Number of pages (PI)	1.4	8.1	2.6
Number of paragraphs (PI)	4.6	25.4	10.7
PI Pages as % of Total Pages	32%	26%	5.3%

A simple comparison between reasons for decisions issued by the Information Commissioners in Western Australia and Queensland and those issued by the Tasmanian Ombudsman suggests how funding restrictions may have reduced the standard of the Tasmanian Ombudsman's statement of reasons. In relation to section 33 (confidential information) alone, a direct comparison between the standard and quality of reasons for decisions of the Western Australian Information Commissioner and the Tasmanian Ombudsman has led to the following conclusion:

> Contrary to the expectations of many, the Ombudsman's practices in the construction of s 33 of the FOI Act have been far from desirable in the light of the Act's scope for allowing access to information and the development of a state-citizen relation. In a number of FOI reviews made in 1993, the interpretation of s 33 has been limited to quoting the section of the Act followed by an 'off-handed' covering comment indicating whether the information falls within the exemption or not.[46]

On the other hand, the comparison showed the WA Information Commissioner's decisions on this particular exemption to be informative, carefully considered and lengthy, and the 'decisions explained to both parties the reasoning behind the conclusion'.[47] While vast staffing differences between the two institutions can justify some discrepancy in performance, there is a minimum threshold below which the objectives of the Freedom of Information Act can no longer be met, and may even be unintentionally subverted.

The criteria used by Collins and Nguyen can be contested. These studies place significant weight on relatively arbitrary measures such as word length. Verbosity should be no substitute for succinct and pertinent judgment. However, both studies stress that they found a causal link between quantity and quality. A serious consideration of public interest and a clear, thorough weighing of contesting arguments requires more than brief mentions. Since the Collins and Nguyen studies were conducted, the Western Australian and Queensland Information Commissioners have been issuing generally shorter decisions, but they still remain longer than in Tasmania.

Length of Decisions

The average length of the Tasmanian decisions was three times shorter than the average decision of the three jurisdictions, and indeed four times shorter than the Queensland average.[48] Given that the Tasmanian decisions were significantly shorter than the Western Australian and Queensland jurisdictions, the question arose as to whether or not their quality and content were nevertheless adequate. While it is obvious that the standard of reasons statements will vary

46 T Nguyen, 'Section 33 *Freedom of Information Act* 1991 (Tas) and the Tasmanian Ombudsman', *Undergraduate Research Paper, Advanced Administrative Law*, University of Wollongong 1994-1995, held at the Law School, University of Tasmania, p 11.

47 Id, at p 15.

48 For example, the length of a Tasmanian decision averaged 4.5 pages, with 9 pages being the longest of the decisions reviewed. Conversely, the statements provided in the Western Australian and Queensland jurisdictions averaged 14 pages and 21.2 pages respectively. See Table 4.

considerably according to the nature of each review case, certain minimum requirements have been suggested. The New South Wales Ombudsman considers that in relation to any decision to refuse access to information 'there are certain mandatory reporting requirements which are essential and of vital importance'.[49] He states that the reasons given for refusing access to documents should be comprehensive and the fact that substantial work may be involved is no excuse for failing to provide them. He states a number of minimum considerations which should be covered, including:

- What consequences could be reasonably expected as a result of disclosure and why it is reasonable to expect those consequences to flow from disclosure;
- Why these consequences are so substantially adverse that the exemption of the documents is reasonably necessary for the proper administration of government;
- The public interest issues for and against disclosure and why those against disclosure outweigh those for disclosure in the particular case.[50]

The Tasmanian Ombudsman's reasons statements fall well short of achieving this minimum level of information. Indeed, it is doubtful that discussion of the above listed criteria could be achieved in only one and a half pages. Clearly, adequate reasons ensure that the agency and the applicant are able to assess the matters taken into account by the Ombudsman in reaching the decision. They enable the applicant to determine if there has been an error of law, and to assess whether the Ombudsman has properly discharged his functions.[51] Furthermore, according to Snell and Townley:

> adequate statements of reasons also enable members of the public to understand why action affecting them has been taken, increasing respect for administrative decisions.[52]

The research undertaken by Van den Heuvel further suggests that there appeared to be a correlation between the length of the FOI decision and the employment background of the applicant. Those applicants who were solicitors, or politicians or possessed a legal

49 NSW Ombudsman's *FOI Annual Report 1993-1994*, para 4.1.1.

50 Id, para 4.1.27.

51 H Van den Heuvel, 'Public Interest? The Tasmanian Ombudsman and Freedom of Information', *1995 Advanced Administrative Law Research Paper*, held at the Law School, University of Tasmania, p 13.

52 R Snell & H Townley, 'Reasons for Decisions', (1992) 40 *FOI Review* 42 at p 43.

background received decisions which documented more case law, and were greater in detail and length than other applicants. While this phenomenon could be viewed as evidence that the Ombudsman has allowed the qualifications or position of the applicant to influence the manner in which the decision is made, it is feasible that the length of the decisions reflected the nature of the applicant's submission, in that those submissions lodged by persons with a legal background relied on greater case law in the formulation of their argument, thus requiring a more detailed response from the Ombudsman.[53] In any case, Van den Heuvel argues that non-legal personnel should receive the same quality of response, as benefits flowing from the receipt of detailed decisions include the ability to draw upon an increased understanding of the Ombudsman's decision-making process for future submissions.

In defence of the Tasmanian Ombudsman, it could be argued that the greater funding and staffing of the Information Commissioners makes this comparison an unfair one. However, it remains unclear whether the package offered to Tasmanian users of FOI was designed to achieve the same aims as those proposed by the NSW Ombudsman, or whether it was merely the unfortunate outcome of savage budget restrictions. The decisions of the Queensland and Western Australian Information Commissioners are clearly designed not only to explain their decisions to the applicant and particular agency concerned, but to serve an educative purpose for all agencies. Given the length and relative informality of the Tasmanian Ombudsman decisions, this second objective appears absent from the review process in Tasmania.[54]

Length and Quality of Public Interest Considerations

When Collins' study considered the number of pages of public interest factors as a percentage of the total number of pages of a reasons statement, the Tasmanian Ombudsman, compared with its interstate rivals, fared surprisingly well (see Table 3). However, this purely statistical achievement fades in significance when the actual consideration of public interest by the NSW Ombudsman is examined.

A disappointing result to emerge from Collins' study was the high proportion of decisions which either failed to contain arguments in

53 Van den Heuvel, note 51 above, p 17.

54 There was an abortive attempt in 1994 to circulate decisions of the Ombudsman to all agencies. After the initial circulation of a bundle of the first 40 or so decisions, the effort faltered.

favour of disclosure[55] or which relied on arguments of a 'pro forma' nature. Arguments were defined as pro forma when they merely stated broad generalised propositions and failed to apply such propositions to the facts of the case at hand.[56] Over 36% of statements contained pro forma propositions, while 36% of statements failed to contain any pro disclosure arguments. Indeed, many decisions appeared to reject the FOI request outright without listing or adequately considering any public interest arguments in favour of disclosure.

The quality of the Tasmanian Ombudsman's statements of reasons also came under fire in Van den Heuvel's study. Analysis of the Ombudsman's reasons statements revealed, according to Van den Heuvel, distinct lack of legal authority to support the decisions. In addition, the discussion of public interest considerations was perfunctory and/or shed no light on the reasoning or evidence taken into account. Examples include:

> I do not accept that its release would be contrary to the public interest.[57]
>
> Its disclosure would be contrary to the public interest in that such disclosure would be reasonably likely to impair the ability of the agency to obtain similar information in the future.[58]
>
> I consider that disclosure of the information would reactivate issues that are now in the past, thereby diverting the resources and efforts of the Department from the positive changes of the past months ... that disclosure would inhibit frankness and candour in future communications of that nature and hence would be contrary to the public interest.[59]

Van den Heuvel argues that the absence of case law provides the applicant with no foundation upon which to assess the legal validity of the decision made. The applicant is also unable to understand the factors taken into consideration or the relative weighting that each has been given. Applicants are therefore unable to ascertain the extent to which their arguments have been understood, considered and/or accepted. This limited approach would be problematic if, under the

55 Collins notes that this conflicts with the Tasmanian FOI Guidelines (1992) which contain numerous references to the invariable need to balance competing interests.

56 The *Tasmanian FOI Guidelines* (1992) state that an agency should be able to state the specific detriment which would occur on disclosure. See para 5.2.4

57 *F and the Tasmania Police*, FOI 9, Tas, 27 May 1993, at p 3.

58 *R and the Department of Education and the Arts*, FOI 15, Tas, 23 July 1993.

59 *P and the Department of Community and Health Services*, FOI 37, Tas, 23 December 1993, at p 3.

Act, the Ombudsman only had a duty to determine a particular request on its merits. However, in a small jurisdiction like Tasmania, the Ombudsman clearly also has an educative role to play on behalf of both the public and agency staff. With their present length, content and standard, the Ombudsman's decisions will rarely be useful for future reference for the agency directly concerned with a particular review decision, let alone for future guidance generally.

Interpretation of the Cabinet Exemption Provision

Exemptions for Cabinet documents are a common feature of all Australian FOI legislation.[60] Stated objectives of the exemption include the preservation of the Westminster system of government, through the protection of Cabinet's collective responsibility and confidentiality. The approach that an external review body takes in the interpretation of the Cabinet exemption is crucial in terms of evaluation of the effectiveness of a FOI regime. The key to an evaluation scheme is the treatment of information access as along a continuum. At the lower end of the scale is the release of personal affairs information, which in any modern democratic society should necessarily be made available to citizens, and can never justifiably be considered a valid measure of FOI effectiveness. At the upper end of the information access scale exists potentially sensitive information such as Cabinet or other policy or politically sensitive documents. The degree of access granted to this information is the true measure of FOI effectiveness. Rowat argues:

> I am primarily interested in the general rather than personal right of access to documents because of the importance in a democracy of the public's right to know what the government is doing.[61]

It has been strongly argued in Australia that Freedom of Information systems should be evaluated in terms of release of non-personal information.[62] Ardagh has argued that the more accurate test of the success of freedom of information, and closer in keeping with the original goals and legislative object, is the ease and degree of access

60 Freedom of Information Legislation: s 34 (Commonwealth); Schedule 1.1 (Western Australia); s 34 (Queensland); Schedule 1.1 (New South Wales); s 28 (Victoria); Schedule 1.1 (South Australia); s 24 (Tasmania).

61 D C Rowat, 'Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand', (1993) 52 *Australian Journal of Public Administration*, p 216.

62 R Snell 'Hitting the Wall: Does Freedom of Information have staying power?' in S Argument (ed) *Administrative Law: Are The States Overtaking the Commonwealth?* AIAL 1996.

granted to non-personal information at the sensitive end of the bureaucratic and political scale.[63] 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.[64]

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' 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.[65]

The evaluation of the effectiveness or otherwise of a FOI Act should be aimed at determining the extent to which the public is allowed to approach the political heart of government. In Tasmania, it is the Ombudsman who has the duty of ensuring that the public has access to the upper reaches of this information spectrum. Empirical evidence, as well as a close examination of the Ombudsman's interpretation of the Cabinet exemption provision in review decisions, appears to demonstrate that he may be falling well short of this objective.

In Australia, Cabinet papers are afforded an automatic exemption once the agency demonstrates that the information being requested resides within documents which can be labelled Cabinet papers. External review bodies are forced to uphold this exemption claim. Clearly this approach creates a 'no-go zone' or informational buffer with respect to applicants, the decision to release information being primarily an open and shut case with no opportunity to consider the issue of public interest.

63 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*, (The Federation Press, 1993) pp 137-147 at p 145.

64 S Zifcak, 'Freedom of Information: Torchlight but Not Searchlight', paper presented at the National Conference on Administrative Law, (1991) 66 *Canberra Bulletin of Public Administration*, p 162.

65 *First Annual Report of the Office of the Information Commissioner WA 1993-1994*, p 26.

As long as this need to protect the 'Cabinet oyster' continues to be considered paramount, the Tasmanian Ombudsman's importance with respect to achieving the objectives of FOI will lie in his limiting the extent of the Cabinet buffer zone.

Arguably, the Tasmanian Ombudsman's interpretation of the Cabinet exemption provision has been so deficient that the reach and extent of the exemption buffer threatens the whole rationale of the FOI Act. The Ombudsman's overly broad interpretation is demonstrated by an analysis of decisions relating to sections 24(1)(b), 24(1)(d) and 24(3). A series of case studies, discussed below in the section headed 'Case Studies', establish how the concurrent operation of this broad interpretation of section 24, and a failure to use the public interest test to limit the scope of section 27 (internal working documents), produces a tremendous safety zone for those wishing to restrict access to government information.

This failure of the Tasmanian Ombudsman, and to a certain extent the failure of Australian FOI legislation generally, is amplified when the particular nature of the Cabinet exemption is compared with the New Zealand alternative. In New Zealand, the crucial question is 'what is the consequence of revealing this Cabinet information?' as opposed to the Australian blanket approach of 'this is a Cabinet document and therefore it must be exempt'. In New Zealand, the Cabinet exemption is not treated as a class or category exemption. Rather, 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.

Section 24(1)(b): Record Proposed by a Minister for the Purpose of Being Submitted to Cabinet

Section 24(1)(b) exempts information contained within a record proposed by a Minister for the purpose of being submitted to Cabinet for consideration, provided that the Minister has contributed to the origin, subject or content of the record.

In interpreting this provision the Ombudsman has laid down a fairly technical test, which centres primarily around the need to ascertain the relevant intention of the Minister in relation to the document. Firstly, he has noted that it is irrelevant for release as to whether the record is actually submitted to Cabinet. Rather, the Ombudsman has stated 'the clear words of the Act require me simply to determine

whether the Minister did or did not require the report to be prepared specifically for presentation to Cabinet'.[66]

Interestingly, the Western Australian Information Commissioner has categorically rejected such an interpretation of the equivalent provision in the WA FOI Act,[67] while the Australian Law Reform Commission has recommended that the Commonwealth equivalent be amended so as to stop application of the exemption to documents not actually submitted to Cabinet.[68] Pearce has stated:

> The convention of collective ministerial responsibility is undermined only by disclosure of documents which 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.[69]

Hence, in relation to the Tasmanian provision, the crucial determinant is whether or not it was the intention of the Minister to submit the document to Cabinet. Following this, in ascertaining whether this Ministerial intention is present, the Ombudsman specifies three criteria that need to be met before the exemption may apply:

- The Minister must have contributed to the origin, subject or content of the record;
- By section 24(4), the record must have been brought into existence for submission to Cabinet consideration;
- The exemption does not apply to the kind of purely factual information described in section 24(5).[70]

In determining what amounts to a Minister's contribution to the origin, subject or content of a report, the Ombudsman has accepted the holding in *Re: Birrell v Department of Premier and Cabinet*,[71] in which the Victorian Supreme Court stated that preparation by a Minister required the Minister to make some contribution to the document, 'even if it be only by his signature adopting and authenticating material supplied by his officers'.[72] In applying the holding of *Re: Birrell*,

66 *M & the Department of Primary Industries and Fisheries*, 95040102.

67 Western Australia Information Commissioner, *Submission to the Commission on Government* (May 1995), p 12.

68 Australian Law Reform Commission/Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77, ARC Report No 40, (December 1995), p 110.

69 DC Pearce (ed), *Australian Administrative Law* (Butterworths, 1995) p 2220.

70 *Re: C and the Department of Treasury and Finance - Spirit of Tasmania* (94120049, 8 March 1995), p 2.

71 [1993] VR 73.

72 *Re Birrel v Department of Premier and Cabinet* [1993] VR 73

the Tasmanian Ombudsman has stated that 'in the absence of evidence to the contrary it can be assumed that a Minister has contributed to the origin, subject or content of a Cabinet minute or briefing if the Minister has signed the minute or briefing'.[73] In his research study, Ackroyd argues that this interpretation appears to create a presumption in favour of an exemption under s 24(1)(b) for such documents.[74]

While it is clear that the Ombudsman has formulated some guidelines as to the situations in which this exemption applies, it is arguable that in providing a narrow formula that starts from the vague notion of a Minister's intention, the potential for abuse is a very real concern. A scenario could develop whereby a Minister need only request that Ministerial briefings be formulated, for discussion in Cabinet, in relation to a particular matter for them to be later deemed as exempt from disclosure, due to their authentication through the Minister's signature, and the fact that the record's purpose was submission to Cabinet. However, in reality these ministerial briefings are merely Question Time briefings under a different heading.[75]

Section 24(1)(d): 'Officially Published'

Section 24(1)(d) states that information is 'exempt if it is contained in a record, the disclosure of which would involve the disclosure of a deliberation or a decision of the Cabinet other than the record by which a decision ... was officially published'.

Contention exists as to what amounts to 'officially published' under the section. The interpretation of this particular section is critical, because a very narrow definition will mean that information will not be released despite a Cabinet decision being publicly and fully known, because it has never been 'officially published'. The ALRC/ARC, whilst acknowledging some uncertainty about the meaning of the term 'officially published', considered that it would mean:

> that a Cabinet decision has been made publicly available through official channels, including by Ministerial press release. Leaked information or

73 *Re: S & Department of Premier and Cabinet - Amendments to FOI Act* (94110002, 6 February 1995) p 2.

74 B Ackroyd, 'Section 24, *Freedom of Information Act* 1991 (Tas); The Cabinet Exemption and the Tasmanian Ombudsman'. *1995 Advanced Administrative Law Research Paper*, held at the Law School, University of Tasmania, p 9.

75 Question Time Briefs have been frequently released under FOI in Tasmania.

> oral statements that have not been produced in hard copy would not be officially published.[76]

The Tasmanian Ombudsman has regrettably taken the contrary approach and favoured a restrictive interpretation to the term 'officially published'. Such an approach has forced the Ombudsman to deny release of drafts of legislation, even though the final version has been tabled in Parliament, and for example, to deny release of documents concerning the Spirit of Tasmania because there has been no 'official publication' of these Cabinet decisions, despite the fact that the ship crosses Bass Strait several times a week.

The Ombudsman stated in *Re: S & Tasmanian Development and Resources (Amendments to the FOI Act)*[77] that the introduction of a bill into Parliament does not amount to official publication. Indeed, the Ombudsman has specifically stated that the disclosure of draft bills, draft regulations and drafting instructions would disclose the Cabinet decision which gave rise to them and thus are exempt.[78] The Ombudsman argued that 'there is too great a decision between the introduction of a bill into the House and the Cabinet decision which gave rise to it to regard it as the "official publication" of the decision'.[79] In *Re: Snell*,[80] the Ombudsman further considered the meaning of the term, stating the following:

> In s 24(1)(d) the exemption does not apply only if there is a 'record by which a decision of the Cabinet was officially published.' This is not the same as saying that there is an official publication from which a decision of Cabinet can be inferred ... The Cabinet Handbook (which is a Cabinet document and sets out the approved *modus operandi* of the Cabinet process in Tasmania) ... makes it clear that in accordance with generally accepted 'Westminster Principles' of Government, there is no intention that Cabinet decisions per se should be made available more widely than is necessary to ensure the implementation of those decisions. [The Handbook] states ... that Cabinet decisions are not to be copied except under specific circumstances. It follows that, in the absence of evidence to the contrary, Cabinet decisions are not officially published. These are

76 Australian Law Reform Commission/Administrative Review Council Open Government: A Review of the Federal Freedom of Information Act 1982, ALRC Report 77, ARC Report No 40 (December 1995), p 111.

77 95030080, 10 April 1995.

78 *Re: S & Department of Premier and Cabinet - Amendments to FOI*, 94110002, 6 February 1995, p 6.

79 Ibid.

80 Id, at p 3.

> the normal conventions of the 'Westminster system' and I am sure that they are not unfamiliar to you.[81]

The Ombudsman further stated that

> even on a broad view the minimum requirement for official publication would involve the authorised release of the information by the Crown to the public, which would normally be by means of a media release from the Minister ... rather than by specific disclosure of a Cabinet decision.[82]

Ackroyd argues that the Ombudsman would appear to have adopted a presumption in favour of the exemption, through his application of a narrow interpretation of the definition of 'officially published'. In addition, by constructing his reasoning around the authority of the Cabinet Handbook—a creation of the Executive which is able to be changed by a simple decision of Cabinet—the Ombudsman effectively has transferred control over the operation of this part of the legislation.

Furthermore, the Ombudsman has ignored several decisions under the equivalent provisions in the Commonwealth and Victorian FOI Acts which provide some guidance as to the most appropriate meaning to give this expression. It has been argued by Snell and Townley[83] that in *Re Burchill and Department of Industrial Relations*,[84] Deputy President Forrest appears to suggest that all that is necessary for official publication is that the information be disclosed to a third party. He saw it as unreasonable to claim that disclosure of information would involve the disclosure of a deliberation or decision of Cabinet when, as a matter of fact, disclosure had already occurred. Where the content of the information had already been disclosed, section 34(1)(d) had no application.[85] This decision was appealed to the Federal Court, where the members expressed several views on this interpretation of section 34(1)(d). Justice Davies summarised the AAT's arguments, but declined to consider the issues in detail. He was prepared to assume that disclosure of the information to those attending a confidential conference constituted official *disclosure*, but Snell and

81 Ibid.

82 *Re: D & Department of Environment and Land Management* (94120066, 30 January 1995), p 2.

83 R Snell and H Townley, 'The Cabinet Information Exemption: Theoretical Safeguards Exposed by a Tasmanian Case Study', (1993) 46 *FOI Review* 42-45.

84 (1991) 23 ALD 97.

85 *Re Burchill and Department of Industrial Relations* (1991) 23 ALD 97 at 107. The equivalent provision in Tasmania is s 24(1)(d).

Townley argue that this may or may not be considered as equivalent to official *publication*.[86]

The Queensland Information Commissioner has briefly discussed the meaning of the phrase 'officially published' in *Re Hudson/Fencray and Department of Premier*.[87] The Information Commissioner held that:

> a letter by authority of a Cabinet decision, signed by a Minister and addressed to a 'third party' is a means of publication within the phrase 'officially published by decision of Cabinet'.[88]

The Queensland Information Commissioner has also argued in a submission to the Inter-Departmental Working Group on the Two Year Review of the Qld FOI Act that:

> The precise meaning of the term 'officially published by decision of Cabinet/the Governor in Council' is not clear. The ALRC/ARC Review has stated (at paragraph 6.8 of DP 59) that it understands the phrase 'officially published' to mean that a Cabinet decision has been made publicly available through official channels, including by Ministerial press release. But what of the situation where Cabinet has not considered the question of publication, but a Minister has published matter subsequent to a Cabinet decision? It would seem that if matter has been 'officially published' then the cat is out of the bag, and there is little point in claiming exemption for the matter even though Cabinet did not make a decision to officially publish'.[89]

If this approach were to be adopted in Tasmania, it is clear that the tabling of an amendment bill in Parliament or the official launch, if not purchase, of a $150 million passenger vessel would be classified as Cabinet decisions which had been officially published.

Section 24(3): Conclusive Certificates

Under this section, a certificate signed by the Secretary of a Department conclusively establishes the fact that a record is Cabinet information as described in section 24(1) and is therefore exempt from the application of the Act. Under section 3(6), the Ombudsman has no power under section 48 to require that information contained in such a record be provided, and is limited to determining whether a docu-

86 Snell and Townley, note 83 above, at p 43.

87 (1993) 1 QAR 123.

88 Id, at para 69.

89 Queensland Information Commissioner, *Submission to the Inter-Departmental Working Group on the Two Year Review of the Freedom of Information Act 1992* (Qld), p 41.

ment has been correctly classified as an exempt document within section 24(1).

Ackroyd draws attention to the apparent confusion as to whether the Ombudsman is empowered under section 48(4) to order the release of information found to be incorrectly classified as exempt in a conclusive certificate. In reviewing a similar section of the Victorian *Freedom of Information Act* 1982, the High Court stated in *Victorian Public Service Board v Wright*[90] that:

> A court may review the proper classification of a document as an exempt document but ... may not otherwise review a decision to grant a certificate or a claim for exemption based upon it. The determination of the Court concerning the proper classification of a document will be a binding determination. Moreover, if the court in addition determines that the document ... does not fall within any of the categories of Cabinet documents described in sub-section (1) ... it may grant access to the document because the prohibition ... against its doing so can have no application. By virtue of such a determination the document will not be a document referred to in section 28.[91]

Snell and Townley have expressed the view that the slight differences between the exemptions in Victoria and Tasmania should not affect the application of this decision to the Tasmanian Act.[92] They state that:

> the Ombudsman has the power to decide whether a record subject to a conclusive certificate has been correctly classified as exempt. If the document is determined by the Ombudsman not to be a Cabinet document within the meaning of section 24 the ... certificate can have no application, so therefore the Ombudsman has power under section 48(4) to decide that the information can be released.[93]

However, as Ackroyd opines, the Ombudsman fails to see himself as so empowered.[94] In *Re: S & Department of Treasury and Finance*,[95] the Ombudsman found that a conclusive certificate incorrectly classified purely factual information as exempt under s 24(1). The Ombudsman stated that:

90 (1986) 64 ALR 206.

91 Id, at 213. The equivalent provision in Tasmania is s 24(1).

92 Snell and Townley, note 83 above, at p 44.

93 Ibid.

94 The Ombudsman reaffirmed this interpretation in his *Annual Report for the Year Ended 30 June 1996*, p 49.

95 94090027.

> whilst I am satisfied that the factual information is not exempt under section 24(1)(d), even if it is not exempt under any other exemption, I have no power to require its release. The only recourse available to me if I am of the opinion that the public interest requires that the factual information should be provided, is that I can prepare and present a report to Parliament.[96]

Similarly, in *Re: M and the Department of Primary Industries and Fisheries*,[97] the Ombudsman appeared to reject the application of any decision on the Victorian Cabinet exemption to the interpretation of the Tasmanian Act. He stated:

> Whilst all Australian FOI legislation provides for a Cabinet exemption, I note there is a significant difference between the wording of the equivalent sections in the Victorian, Queensland and Commonwealth Acts. These differences render inapplicable in Tasmania the interpretations given by the Courts and review bodies in those jurisdictions.[98]

Ackroyd notes that such a determination appears inconsistent with other decisions made by the Ombudsman, and additionally, supports the restriction of the Ombudsman's powers in relation to section 24(6). He argues that if the foundation of a conclusive certificate is its correct classification of the material it covers, for the cases in which the Ombudsman found the classification to be incorrect, the certificate would prove invalid. Hence, the provisions of section 24(6) would no longer apply, and the Ombudsman could release the document pursuant to his powers in section 48. Indeed, Ackroyd submits that if this were not the intention of the drafters of the legislation, why then would it be necessary to provide the Ombudsman with power in section 24(6) to determine whether the documents in question have been correctly classified?

The most serious problem with the current approach of the Ombudsman to section 24(3) is that the option of submitting a report to Parliament is an avenue that the Ombudsman has felt should only be utilised in extreme cases. This leaves open the possibility of a series of circumstances where a conclusive certificate has been issued incorrectly, but the Ombudsman fails to pursue the mistake any further.[99]

96 Ibid.

97 95040102, 29 June 1993.

98 *Re: M and the Department of Primary Industries and Fisheries* (95040102) 29 June 1993, p 3.

99 See *Re: Snell and Treasury and Finance - 'Spirit of Tasmania'*, (94090027) 27 October 1994.

The Select Committee Report Widening the Cabinet Exemption

In view of the Ombudsman's perceived wide interpretation of the Cabinet exemption provision, it is quite disheartening to read the recent report by the Legislative Council Select Committee into the Liberal Government's proposed Freedom of Information Amendment Bill 1994. One of the primary recommendations of the report involves the widening of the Cabinet exemption to protect even more government documents. It is interesting to note that one of the justifications provided by the Committee in widening the scope of the exemption was the fact that the Ombudsman will retain his power to review information in relation to which a conclusive certificate had been issued.

Yet, as the foregoing evidence demonstrates, the Ombudsman's approach to interpretation of the Act has, if anything, served to increase rather then decrease the 'buffer zone' of exempt information which applicants are rarely able to penetrate. Indeed, it is arguable that the Ombudsman has, by his restrictive interpretation of the Cabinet exemption and therefore by de facto means, already enacted the amendment.

The proposed Cabinet amendment removes the requirement that a Minister contribute to the origin, subject or contents of a record which is created for the purpose of being submitted to Cabinet. Under the amendment, an exempt record is one prepared *by or for* a Minister for the purpose of being submitted to Cabinet, *whether or not the record has been so submitted.*

In justifying the recommendation, the Committee stated that it was impressed with the level of commitment to the objects of the legislation demonstrated by agency representatives who presented submissions, and was therefore convinced that an expansion of the exemption for Cabinet information is unlikely to be abused by agencies. Reasons provided by the Committee in justifying widening the exemption included:

- that such amendments are required to recognise the practicalities of modern Government (supported by advice from the Solicitor-General);
- that it is in the public interest that Cabinet information be exempt from the ambit of FOI legislation;
- that any attempt to alter the principles of Cabinet solidarity should be achieved by a deliberate process, rather than as a consequence of an amendment to FOI legislation.

A number of non-agency submissions to the Committee had contested the commitment of many agencies to the Act and provided evidence to the contrary. However, the Solicitor-General argued that:

> '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 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 section 24. That, in my view, is ridiculous.[100]

While the Solicitor-General may have described the actual process of policy formulation in Tasmania and aptly captured the role of Ministers as mere message deliverers of their bureaucrats' designs, it misses the rationale for the Cabinet exemption in FOI legislation, namely, protection of the actual deliberations of Cabinet.

The Committee also stated that Executive Council information warrants the same degree of protection from disclosure as is afforded to Cabinet information, and therefore agencies should retain the discretion to issue a conclusive certificate in respect of Executive Council information, as long as the Ombudsman's power to review the issuing of these certificates is maintained. The Committee views the amendments to Section 23 which include briefing papers and records prepared for submission to the Governor or Executive Council, whether or not they have been submitted, as 'logical extensions of the current provisions'.[101]

In widening the Cabinet exemption to conceal greater numbers of government documents, the Council is actually taking a stance that runs counter to recent reforms suggested by the Queensland Infor-

100 Tasmanian Legislative Council Select Committee Report, *Freedom of Information*, February 1997, p 47, quoting advice from Mr WCR Bale QC, The Solicitor-General of Tasmania, to Mr SP Haines, the then Deputy Secretary, Department of Premier and Cabinet, 16 August 1995.

101 Tasmanian Legislative Council Select Committee Report, *Freedom of Information*, p 58.

mation 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, in relation to similar amendments to the Cabinet exemption in the Queensland FOI Act, that so wide is the reach of the section, that it can no longer be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information.[102] 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.[103]

The Western Australian Commission stated that while it appreciated that there are competing considerations which must be assessed when considering the justification for Cabinet secrecy, it nevertheless favoured greater openness in the Cabinet process, noting that any body that operates in secret has the potential to engage in improper, illegal or corrupt conduct.[104] 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.[105] 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.[106]

The Commission favoured the introduction of a Cabinet decision register that would record the decisions of Cabinet and be made available for public inspection after a Cabinet meeting. The register should reveal such details as the names of those attending the meeting, the collective Cabinet decision reached, the quantum of any public funds committed and the Minister responsible for

102 The Queensland Information Commissioner, *4th Annual Report 1995/1996*, p 31.

103 Id, p 32.

104 Commission of Government (Western Australia) Report No 1, 114.

105 Id, p 132.

106 Ibid.

implementation.[107] The purpose of the register would be to make available to the public a clear record of what decision has been reached. Although, in the Commission's view, public access to the proposed Cabinet decision register is paramount, it recognises that in certain instances it may be necessary to temporarily exempt the disclosure of information (such as decisions involving variation in tax rates or the provision of support for private sector organisations).[108] Nevertheless, the exemption of decisions should be limited and should be lifted once the decision is implemented or after a period of two years (which is not to be extended).[109] The Premier would hold the discretion in deciding what items require exemption on these grounds. The Commission stated that the benefits of this model would include: a statutory right of access to a timely record of Cabinet decisions, the establishment of an audit trail of decisions, greater accountability of the Executive, and no impairment of the freedom and candour of Cabinet deliberations.[110]

It was further recommended by the Commission that the federal system of Cabinet record-keeping should be introduced. In particular, Cabinet minutes should be kept recording the collective decisions reached.[111] Cabinet notebooks which record the individual contributions of ministers should also be kept, and while not being a verbatim account of the proceedings, should accurately reflect the discussion which occurred.[112]

In light of the considered and careful approach of the Western Australia Commission on Government to the issue of the Cabinet exemption under Freedom of Information legislation, the old-fashioned, conservative and closed government attitude of the Tasmanian Committee's approach is clearly displayed.

The submission by the Tasmanian Government to the Select Committee also supported the widening of the Cabinet exemption. Reasons given included the upholding of the principles of Ministerial collective responsibility. The government stated:

> Cabinet is central to the proper operation of the Westminster system of government. The principle of collective responsibility of Ministers can

107 Id, pp 132-33.
108 Ibid.
109 Ibid.
110 Ibid.
111 Id, p 124.
112 Ibid.

> only be upheld if Cabinet debate is candid and unrestricted. Not all information essential to the confidentiality of the Cabinet process is covered by the existing exemption. Records prepared on behalf of a Minister by an agency can be the subject of an important Cabinet deliberation and decision, irrespective of whether or not the Minister has contributed to their 'origin, subject or contents' in any substantial sense. Such records may not be exempt from disclosure at present.[113]

In pushing this desperate need for Cabinet solidarity, perhaps heed should be taken of comments made by the Queensland Information Commissioner in his 4th Annual Report (1995-96), in which he stated:

> FOI legislation was not primarily intended to confer direct benefits on the Executive branch of government (though a host of indirect benefits for the Executive government is frequently claimed for it, by supporters of FOI legislation). It was enacted for the benefit of the citizens, with a view to fostering more responsive and accountable government and a healthier, more robust and more participative democracy, by conferring legal rights on citizens that are enforceable against the executive branch of government.[114]

The Queensland Information Commissioner has voiced strong opposition to mooted similar amendments to the Cabinet exemption in the Queensland Act, in his submission to the Inter-Departmental Working Group on the Two Year Review of the *Freedom of Information Act* 1992 (Qld). He states that under the new amendments, any document may now be made exempt by placing it before Cabinet.

> A bundle of documents, whether containing 5 or 50,000 pages can be made exempt by being placed in the Cabinet room. Every Minister, or official with sufficient influence to have a document placed before Cabinet now holds the power, in practical terms to veto access to any document under the FOI Act by adopting this mechanism. It does not matter that the document was not created for the purpose of submission to Cabinet, or that the disclosure of the document would not compromise or reveal anything about the Cabinet process. It is not even necessary that the document be in any way relevant to any issue considered by Cabinet'.[115]

113 Tasmanian Government, *Submission to the Legislative Council Select Committee on Freedom of Information*, p 49.

114 Queensland Information Commissioner, *4th Annual Report (1995-96)*, at p 28.

115 Queensland Information Commissioner, *Submission to the Inter-Departmental Working Group on the Two Year Review of the Freedom of Information Act* 1992 (Qld), p 33.

He further notes:

> Many agencies have been quick to take advantage of the widened exemption provision ... Based on my experience in the short time since it came into force, I have no doubt that it will frequently be claimed to justify non-disclosure on the basis of tenuous connections with a matter which has been to Cabinet, or has at any time been proposed for submission to Cabinet. Nothing before me at this time suggests that it is likely that good sense or discretion will be used by all agencies in its implementation'.[116]

> The position taken by agencies in a number of external reviews makes it clear to me that the fear of misuse of section 36 and section 37 in their present form is not fanciful ... FOI decision makers, faced with possible disclosure of a potentially embarrassing document, will I imagine, find it very tempting to draw a link between a document prepared for a chief executive or a Minister and some matter which once went, or was proposed to go, to Cabinet ... Citizens are entitled to feel cynical about the achievement of the accountability objects of the FOI Act in the face of these provisions.[117]

> The other chilling factor in this context is the all-pervasive nature of the Cabinet government in Queensland. It is not just that every decision of importance is routed through Cabinet, but that an enormous number of minor decisions, of significance only to small segments of the public or individuals, are routed through Cabinet or the Executive Council ... The potential negative impact on access to information posed by section 36 and section 37 in their present form is enormous.[118]

In conclusion he states:

> I consider that urgent action is required to return section 36 to its original form, if the credibility of Queensland's Freedom of Information legislation is to be maintained.[119]

In stark contrast to such comments is the anti-disclosure of information platform from which both the Committee and the Tasmanian Government are approaching the whole issue of FOI law reform, and significantly, the newly emerging role of the Ombudsman. While this article serves to highlight several deficiencies in the current workings of the Ombudsman, namely through analysis of his statement of reasons, and his generous interpretation of the Cabinet exemption provision, the real test of the Ombudsman's commitment to the

116 Id, p 34.
117 Id, p 35.
118 Ibid.
119 Id, p 39.

objectives of FOI is still to come. Now that the Tasmanian Government and the Legislative Council Select Committee have laid their cards clearly on the table with respect to their views on the proposed amendments under the Freedom of Information Amendment Bill (1994), the Tasmanian Ombudsman remains the only player left to deal his hand.

Look at What They Have Done to the Public Interest: Section 27 and 'Thinking in Private'

A better litmus test for determining the effectiveness of FOI in accessing the upper spectrum of governmental information than the question purely of access to Cabinet documents, is the issue of availability of information relating to the deliberative process. Once it has been conceded that the inner core of government information is to be protected, and the only question is the extent of that protection, then accessing information about the policy formulation process becomes the primary function left for FOI to perform.

Central to this idea are the Campbell Tests which seek to evaluate FOI regimes in relation to information access both pre and post deliberative policy decision making. Applying these tests to Tasmanian FOI legislation has revealed a somewhat haphazard approach by the Ombudsman to the interpretation of the public interest test contained within section 27, as endorsement of the *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*[120] principles are at times compromised by the need to protect the 'frankness and candour' of Tasmanian public servants. In addition, the practice of the Tasmanian Ombudsman in which exemptions on behalf of the agency are substituted at the external review level merely serves to increase the likelihood that information access to deliberative policy documents will be curtailed.

The Campbell Tests

Madeline Campbell, a key contributor to the FOI process in Australia, in an important threshold paper[121] set two simple tests for Commonwealth and State FOI schemes in Australia. The tests were:

120 (1993) 1 QAR 60.

121 See M Campbell and H Arduca, 'Public Interest, FOI and the Democratic Principle - A Litmus Test', paper presented at INFO Two, 2nd National Freedom of Information Conference, 7-8 March 1996, Gold Coast International Hotel.

- 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?
- 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?

Campbell derived the first test from a series of sources including the volumes of quotes used by the governments introducing FOI regimes, expressions of undying commitment by opponents 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 sold, in large part, as a mechanism which would allow the common person to become aware of, and involved in, the policy formulation process before the Executive and/or bureaucracy had determined their final and often non-negotiable positions. Furthermore, Freedom of Information legislation was a statutory endorsement of the principle of government by the people.

Campbell formulated the second test upon the proposition that an essential part of liberal-democratic representative democracies is access to information, which in turn enables a *post facto* auditing of the actions of the Executive branch of government. In the words of an American observer of FOI:

> A further public interest promoted by the FOI Act is the citizens 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.[122]

This *post facto* access to information concerning policy decision-making in isolation, may make no intrinsic difference to the review or monitoring process. Geoffrey Palmer has argued:

> the notion that one can read documents obtained under the Official Information Act 1982 and understand the dynamics of the development of

122 Id, at p 4, quoting G Dickinson, 'The Public Interest served by the FOI Act', (1990) 59 *Cincinnati Law Review* 191 at 192.

> government policy is flawed. The Ministers decide the policy but they hardly ever write the documents.[123]

However, access to a significant percentage of these preparatory 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. Palmer is correct, in stating that sole reliance on documents obtained under any access regime may well present a distorted understanding of the dynamics and interrelationships of a policy development process, but what is the alternative?

Waiting for decision-makers to articulate and analyse the details of policy developments could be endless and fruitless. Ought we wait for the political and bureaucratic (auto)biographies that present an edited version of one key actor's role several decades down the track? Quite simply, there is no alternative to a dialogue between citizens and key participants about the accuracy, necessity, and efficacy of policy directions. Palmer would also have to acknowledge that any policy decision is always preceded by large numbers of documents which have been prepared by officials canvassing the need for policy development or refinement, and the options available.

In her brief survey of cases at the Commonwealth level, Campbell sadly concluded that access to information on the 'deliberative processes short of Cabinet, on policy making or even policies already made' was virtually non-existent.[124] The results of the Campbell tests applied at state level were less definitive.[125] Jurisdictions which had adopted the return to the objectives of FOI demonstrated in the Queensland Information Commissioner's decision in *Re Eccleston* (Western Australia and Queensland) or which had accepted in part that determination (Tasmania and possibly New South Wales) showed access under the second test to have been significantly improved.

Conflicting Tasmanian Test Results

The approach of the Tasmanian Ombudsman has oscillated between a general endorsement of the pro-disclosure attitudes of *Re Eccleston*—albeit a practical implementation which falls short of the

123 G Palmer, *New Zealand's Constitution in Crisis: Reforming Our Political System*, (McIndode, Dunedin, 1992), footnote 47 at p 95.

124 Campbell and Arduca, note 121 above, p 6.

125 Ibid.

ideal—and a deference to the cultural milieu and independence of the local bureaucracy. The Ombudsman's interpretation of section 27 shows his uncertainty as to what is a desirable outcome in terms of information access in Tasmania. The ideological pull of *Re Eccleston* on the Ombudsman has been offset by the general Tasmanian bureaucratic mindset that incorporates a perfected vision of the Westminster system. Within that noble vision apolitical and professional civil servants operate in an ambience of deference where frankness and candour must be carefully nurtured and relentlessly protected. The role of citizens becomes that of mere consumers of the product created by the ministerial - civil service dialogue, and elections allow the citizen consumers to take their unmet demands to another policy producer.

This idealistic vision of parties, bureaucracy and the public interest was epitomised in the following extract from a response to an FOI request:

> The public interest consideration has been noted against relevant documents where applicable. These considerations are based on a view that good government requires that departmental advice to Ministers be frank, open, honest, complete and professional. If that advice is to be subsequently made available to third parties, officers will be reluctant to provide advice and offer opinions in a complete and frank way. This also applies to advice from departments on Cabinet submissions. The quality of the advice will accordingly be of a lower standard than if it remained entirely between the Department and Ministers. The quality of the decision making based on that advice and consequently the quality of the government will be lower than otherwise would be the case. This is not in the public interest.[126]

The tone, spirit and mindset of this approach to the protection of deliberative information pervades the Tasmanian Government submission to the Legislative Council Select Committee on Freedom of Information:

> The Government's view is quite clear. Candid and robust debate amongst officials and between senior officials and Ministers is a critical element in the creation of sound policy. This debate and exploration of policy alternatives ought accommodate the widest possible range of views. For example, examining more extreme options is a useful method

126 Letter dated 5 October 1994 from Department of Treasury and Finance (Tas) to the author in relation to an FOI request.

> of testing the validity of a particular approach. Governments and their officials must be able to 'think' in private.[127]
>
> Of necessity, this thinking process involves the creation of documents and other records which detail internal discussions, potential approaches and options. Not only do such documents contribute to the rigour of the debate but they form part of the immeasurably valuable asset of corporate memory. The unnecessary exposure of such records runs the grave risk that corporate memory will be lost as details of the debate surrounding policy alternatives are not recorded. This means that subsequent administrations are deprived of the benefits of work which has already been done and of the experience which is embodied in comprehensive records.[128]
>
> A key element of the Westminster model is the existence of a politically neutral public service which is able to serve a Government of any political persuasion with the same degree of loyalty and efficiency. There is at times a creative tension between the advice tendered by senior officials and the position adopted by a Minister. They are expressing different but equally valid perspectives on an issue. The Government believes that this is an example of the strength of that neutrality and a confirmation that the public service does tender frank advice and puts a range of issues or options before Ministers.[129]

Yet, in a representative or participatory democracy such fears as these would only be justified by showing that the entire decision-making process, as opposed to the minor role played by an overly sensitive official, would be placed under intolerable pressure. Freedom of Information should, of course, never be canvassed as a reasonable excuse for the destruction or neglect of corporate memory.

The decisions in *Re Snell and Department of Treasury and Finance*[130] and *Re Patmore and Department of Treasury and Finance*[131] exemplified this unresolved tension for the Ombudsman, between the attraction of the *Re Eccleston* principle and the modus operandi of the higher echelons of the Tasmanian State public service. In those cases, separated by only two months, the Ombudsman himself sent out diametrically opposed signals about the basis of the interpretation to be applied to section 27. Adding this interpretational uncertainty to an inadequate application of the public interest test, it is doubtful

127 Tasmanian Government, *Submission to the Legislative Council Select Committee on Freedom of Information*, 1995, p 25.

128 Ibid.

129 Ibid.

130 Unreported Ombudsman (Tas), 1 Feb 1995.

131 Unreported Ombudsman (Tas), 10 April 1995.

whether FOI practice in Tasmania could satisfy even the second of the Campbell performance tests.

Hitting Home Runs for the Agency

> I have the power not only to review the decision of an agency, but to consider the application as if it were an original application. This means that as well as making a decision on the exemptions claimed by an agency, I may consider other exemptions and exceptions that may be relevant. Thus, it has happened that I have declined to uphold an agency's decision in relation to one exemption, but have decided that the information was nevertheless exempt under another. In the event that I find that the information is not exempt, I cannot release it to the applicant myself, rather the agency is informed of my decision and directed to take all such action as may be necessary to implement it (s 48(7)).[132]

This procedure of substituting exemptions on behalf of the agency highlights a serious flaw in the Ombudsman's approach to his review task throughout 1993-1996. The onus should be on the particular agency to establish the relevant statutory exception, not the Ombudsman. The Ombudsman ought to refrain from playing the role of safety net or catcher in the rye for the agency, particularly with regard to a section 48 external review which has arisen from a section 47 internal review. The agency has already had two opportunities to claim any relevant exemptions.

To ensure fairness, the standard procedure should be that the Ombudsman adjudicate the section 48 external review based on the arguments presented by the agency and the applicant. If the Ombudsman is in a position to advance new arguments for either the agency or the applicant then, in order to maintain procedural fairness, a preliminary conclusion could be reached, and communicated to both parties with additional arguments being gathered. This is the procedure and practice that is adopted by the review bodies in Western Australia and Queensland. The Information Commissioners form preliminary views and give the parties a chance to address those views directly.

If the Ombudsman does decide to step in and claim new exemptions on behalf of the agency, that should occur with adequate reasons being given and the presumption in favour of release (or the onus on the agency to justify non-disclosure) must transfer to the Ombudsman, with any non-release of information being justified.

132 The Ombudsman reaffirmed this interpretation in his *Annual Report for the Year Ended 30 June 1996*, p 49.

Case Studies

The interface that has arisen between sections 24 and 27, due to the determinations of the Tasmanian Ombudsman, operates to exclude the vast bulk of information which could be accessed by citizens to understand or monitor the public policy formulation on key issues. Two case studies demonstrate the information drought caused by the thus far limited efficacy of sections 24 and 27, with the further self imposed limitations placed by the Ombudsman on the operational parameters of the public interest test in section 27. The deficiencies in the approach to the FOI Act are largely interpretational, or relate to quality of reasons statements or concern the isolated focus given to each individual exemption. They have culminated over the past three years in an access regime which produces information of a low quality on an inconsistent basis. The overall result is a lack of opportunity for meaningful insight into the policy formulation process.

The following case studies were chosen because they were topics or events causing fierce public debate.[133] Information would have acted as a catalyst for more informed and meaningful public exploration of the issues. These case studies show that the approach of the agencies to release of information was antithetical to the objectives of the Act. The nature of the Ombudsman's decision making matrix also did not favour disclosure. The studies chosen were:

- the Legionnaires' Disease Outbreak; and
- the Spirit of Tasmania

Legionnaires' Disease Outbreak

This particular case study was selected on the basis that it demonstrates the Ombudsman's limited capacity to release information in the public interest. The limitation results not only from the design of the FOI Act, the restrictions incorporated via the *Freedom of Information Amendment Act* 1992 and the Ombudsman's own interpretational restraints but also in the active steps taken by bureaucracy to keep information from the public domain. The primary shortcoming identified in this case study is the Ombudsman's inability, since the

133 For additional case studies see R Snell, 'Hitting the Wall: Does Freedom of Information Have Staying Power?', note 62 above, at pp 159-165; N Smith and A Pless 'A Case Study Evaluating the Effectiveness of FOI Legislation in Several Tasmanian Controveries: Purity Shop Trading Hours, Clarence Tip and the Cable Car Dispute', *1995 Principles of Public Law Research Paper*, held at the Law School, University of Tasmania.

passage of the *Freedom of Information Amendment Act* 1992, to release otherwise exempt information in the public interest. At present, if information is exempt under section 24, the only avenue open to the Ombudsman, if he feels that it would be in the public interest to release that information, is to prepare a report on the matter and submit it to Parliament under section 24(7). Yet, as this case study strongly demonstrates, if the Executive arm of Government is determined to withhold such information, the Ombudsman's powers of suggestion and review are rendered virtually ineffectual. The Canadian Information Commissioner has recommended 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.[134]

In March 1989, a major outbreak of Legionnaires' Disease was detected in Burnie Hospital, believed to have originated from the air-conditioning system. At least three Tasmanians died from the disease, 25 persons were conclusively diagnosed, and many more persons possibly suffered from the disease without any conclusive diagnosis.[135]

Legionnaires' Disease is an infectious disease in humans, caused by the naturally-occurring Legionella bacteria, found frequently in water supplies, but also discovered in air-conditioning units and similar systems in well documented cases before 1989.[136] The potential for the disease to run rampant in hospitals was both obvious and documented, as nearly all large hospitals have air-conditioning systems, and are necessarily occupied in the main, by persons with weakened immune systems. It follows that hospitals need to be rigorous in the installation, maintenance and upgrading of their air-conditioning systems.

Following the outbreak in March 1989, the local community began calling for answers to such questions as how the outbreak occurred, the source of the infection, why the outbreak had not been prevented and who, if anyone, was responsible for the outbreak. Because there was no Freedom of Information Act in 1989, the community had to rely on willing politicians and bureaucrats for any disclosure of in-

134 Canadian Information Commissioner *Annual Report 1994*, pp 21-22.

135 See Dr A Jackson, 'Freedom of Information and the 1989 Burnie Outbreak of Legionnaires' Disease', 24 May 1995, *submission to the Tasmanian Legislative Council Select Committee on Freedom of Information*. In addition, see S Dally 'Hospital Knew of Vent Faults', *Saturday Examiner* (22 October 1994) p 1; and 'The Legionnaires' Disease Reports', in *Examiner* (2 and 3 November 1994).

136 Jackson, note 135 above, at pp 4-5.

formation and subsequently little information was forthcoming at this time.

In 1994, three independent FOI requests—two were by State politicians, Mrs D Hollister MHA and Mr R Hope MLC, with the third by Dr A Jackson—were made under the Act, in an attempt to gain information regarding the outbreak. Both of the State politicians were unsuccessful in their applications having their appeals rejected at the internal review stage. Neither sought external review by the Ombudsman.[137] Dr Jackson's request was likewise rejected, both initially and at the internal review stage, and it was not until he sought appeal to the Ombudsman (under section 48 of the Act) that the Department released 19 out of a possible 55 pages of the relevant reports, known as the Gutteridge Haskins and Davey Report and Vince Smith Report. The remaining 36 pages were said to constitute 'Cabinet Information' and so were exempt under section 24 of the Act.

After Dr Jackson had appealed to the Ombudsman by virtue of section 48, the Secretary of the Department of Premier and Cabinet issued a conclusive certificate under section 24(3). The Ombudsman determined that the conclusive certificate had been correctly issued for the Vince Smith Report and for the letter from the Minister requesting the report. The Ombudsman then determined that the conclusive certificate had been incorrectly issued for the Gutteridge Haskins and Davey Report and other material.

The Ombudsman then had to decide, pursuant to section 24(7) of the Act, whether and in what terms he should report to Parliament requesting that the remaining documents, essentially the Vince Smith Report, be released in the public interest. Significantly, the Ombudsman sought the advice of the Solicitor-General, Mr WRC Bale QC, as to whether or not he could report to Parliament on the matter. It was the 'very definite' view of the Solicitor General that section 24(7) did not refer to exempt information, but rather was intended to allow the Ombudsman to recommend to Parliament to release only information which he had found not to be exempt, and which was contained incorrectly within a conclusive certificate.[138]

The initial documents released under FOI, concerning extracts of the Gutteridge Report, suggested that negligence by the hospital and its

137 There appears to be a general malaise among Tasmanian politicians in seeking external review of an FOI decision, subsequent to the internal review level. Refer to Table 2.

138 Jackson, note 135 above, at p 11.

officers had occurred, in that there was knowledge prior to the outbreak that the air-conditioning equipment was 'outdated,' in 'poor condition,' with sections 'non operational' and 'badly deteriorated,' and with 'ventilation rates below the current standard'.[139]

As if this information was not damning enough, a letter dated 21 May 1990, written by the Solicitor-General, was released in 1994 by the State Opposition after the initial press stories about Dr Jackson's efforts to uncover information about the Burnie outbreak.[140] The letter stated that the Vince Smith Report accepted without question that a primary source of the Legionnaires' outbreak was the hospital's air-conditioning plant, and specified that the Report contained material that would lead to the conclusion that the hospital's negligence allowed the plant to become a source of infection.[141] Significantly, for that reason and others, the Solicitor-General recommended against the publication of the report on the basis that 'its broadcasting would almost certainly precipitate a plethora of claims from everyone who contracted the virus and the hospital would ... be deprived of its most effective tool in ensuring that the claims are kept within legitimate bounds'.[142] The Solicitor-General also noted that the hospital did not hold insurance which would provide indemnity against liability for the Legionalla outbreak. The Solicitor-General further stated:

> I would prefer that the Minister made no statement about the report at all, and would recommend that course if it is achievable. If he feels obliged to make a statement publicly, I would recommend that he say no more than that the report has been received by the Solicitor-General who will determine if and when it should be publicly released.[143]

The Solicitor-General also noted that he was surprised that there were any persons or organisations, except those who may have a direct interest in pursuing a claim against the hospital, who could be said to have a 'particular interest' in the report. So saying, he emphasised the inadvisability of any public release. Indeed, the Solicitor-General then noted that limited 'in Government' circulation of the report for the purpose of recommendations for future action could

139 Id, p 10.

140 B Prismall, 'Doctor had to dig deep for information', *Saturday Examiner* (22 October 1994).

141 R Bufton, 'Cause for alarm apparent', *Examiner* (2 November 1994) p 4.

142 Letter dated 21 May 1990 by the Tasmanian Solicitor-General, Mr WRC Bale QC to the then Acting Secretary of the Department of Health, Dr JM Sparrow. The letter was later released in 1994 by the State Opposition.

143 Ibid.

properly take place, 'given that adequate safeguards against its wider circulation are put into place'.[144]

As a side issue, the case study also demonstrates the follow-on effect of a government department which seeks to prevent the release of information and a *Freedom of Information Act* that can do little to stop it. The payment of compensation due to those affected by the outbreak remained an issue at the time of Dr Jackson's request given that the statutory limitation period for which personal injury actions may be brought in Tasmania had not expired.

Spirit of Tasmania

This case study revolves around an initial Freedom of Information request sought by a Tasmanian journalist for information regarding the financing arrangements for the purchase of the replacement vessel for the Abel Tasman, and its subsequent impact on the Tasmanian economy. As the replacement vessel was to cost $150 million, the method of financing, and the subsequent finance arrangements that did occur involved considerable expenditure of public money, that committed the State to a particular debt liability, and was deemed sufficient, in the journalist's opinion, to warrant media attention. However, as will be seen from a brief chronological outline of the various FOI requests and reviews, very little information, and certainly even less relevant information, was subsequently released.

The journalist's initial request for information in March 1994 yielded little, and it was not until he sought help from an academic in defining the ambit of his request, that progress was made.[145] Another request for information pertaining to the financing arrangements of the Spirit of Tasmania acquisition was submitted in early June 1994. A major part of the request was rejected at the internal review stage on the basis that the information fell within the Cabinet exemption under section 24, while one memorandum from the Department of Treasury and Finance to Tascorp, dated 11 August 1993 was released, with a paragraph being deleted. On subsequent external review to the Ombudsman in September 1994, the Ombudsman noted that the deleted paragraph did not relate to the financial information sought, and therefore did not pertain to the specific request. A further specific request was made for the deleted paragraph. Eventually, on

144 Ibid.

145 This first request is detailed in R Snell, 'Hitting the Wall: Does Freedom of Information Have Staying Power?', note 62 above, pp 160-162.

the eve of an internal review request the Department of Treasury released the paragraph. Further, the Ombudsman stated that there was factual information evident in the information under review that should have been released by the Department. However, he noted that given that his power as the Ombudsman extended only to tabling a report to Parliament about the request, the specific circumstances in this case did not warrant such a report. By this stage a conclusive certificate had been issued by the Secretary of the Department of Premier and Cabinet in respect of the information sought.

The deleted paragraph had referred to delays caused in the financing arrangements, by a small boutique finance leasing firm, of the purchase of the vessel. Subsequent to this decision, a third request was lodged, requesting specific information relating to certain financing arrangements of the finance leasing company in question. This request was refused, both initially and at internal review, on the basis that the information sought would expose the company to competitive disadvantage (section 31 exemption) and under section 27 (internal working documents exemption). The review noted that the information sought concerned a particular financing package with lease arrangements, and so was of a proprietary nature for the company, given that it was the type of information that would be readily used for other prospective clients. Significantly, the Department provided little justification as to why the release of the internal working documents was not in the public interest, although this justification was required under the section. An external review was then sought from the Ombudsman. In contrast, in his review the Ombudsman evaluated each of the public interest arguments that were advanced for the release of the documents, and granted the release of one document on public interest grounds. However, the remainder were deemed exempt under the Act as information that would likely expose Tascorp to a competitive disadvantage if released.

Therefore, after several requests, internal reviews and external reviews, the journalist was only marginally wiser as to the details of the financing of one of the largest single capital expenditures in the history of Tasmania. The Government, after the purchase, had exempted the shipping line from coverage of the *Freedom of Information Act*.

Neglected in the Reform Maelstrom

The Freedom of Information Amendment Bill 1994 sought to amend 29 sections of the *Freedom of Information Act* 1991. The Legislative Select Council Committee on Freedom of Information, after two

years of hearings, research and significant periods of inactivity, made 64 recommendations about the Freedom of Information Amendment Bill 1994 and the *Freedom of Information Act* 1991.

> The Freedom of Information Amendment Bill 1994 appears as if it was deliberately drafted to ensure that each section achieved the same standard as the lowest common denominator amongst all Australian FOI Acts. The Government has taken the lowest level of performance, or weakest section, in Australia for each area of the Act and introduced it to Tasmania. The amendment bill resembles a deliberate attempt to plug access 'loopholes' that appeared in 1993 and 1994 as a result of interpretations and decisions made by the Ombudsman during that period. To describe the process as 'watering down' the Act is a misnomer. The process is designed to remove the spirit and lifeblood of the Act and replace it with a lifeless doppelganger ...
>
> The joint operation of these 29 amendments (plus one Schedule) would be to give real meaning to the cliche of a *Freedom From Information Act.*[146]

The Tasmanian Government's Freedom of Information Amendment Bill 1994 did not directly challenge the jurisdiction or core operations of the Ombudsman's FOI review functions. The intent was to generally restrict overall access to information, other than personal information, and to recast and reformulate a number of key exemption provisions to achieve that objective of limited access. By proposing a new fee regime which included fees for internal and external reviews, and removing the Ombudsman's jurisdiction to oversee the validity of conclusive certificates, the Government clearly intended to have the Ombudsman as the mere formal facade of a review function. The Amendment Bill would have ensured a low volume of potential clients, with little manoeuvrability on the part of the Ombudsman, and little reason to ensure a successful review.

The Legislative Select Council Committee on Freedom of Information, by generally narrowing its focus to the terms and conditions of the Amendment Bill, failed to adequately evaluate the role, efficacy and functions of the Ombudsman. Such an evaluation ought to have been a central feature of the Select Committee's final report as it was with the concurrent ALRC/ARC review of the Commonwealth *Freedom of Information Act.*

146 R Snell, 'The Walls of Jericho: Under Threat From Paper Swords?', *Submission to the Legislative Council Select Committee on Freedom of Information*, February 1995, p 20.

Chapter 6 of the Committee's Report dealt with the role of the Ombudsman. The chapter is only 3.5 pages in length, yet it had to examine the key mechanism of FOI legislation in Tasmania. During the course of the two year life of the Committee, the merits and operations of the Information Commissioner model became a common point of comparison in the evaluation of FOI regimes. Despite the prominence of this model and the associated concept of an Independent Monitor, raised in the review by the ALRC/ARC, the Tasmanian Committee merely listed, in its Report, the arguments in support of an Information Commissioner model before proceeding to recommend continuing with the current Ombudsman model. The only concession it made was to increase the time required to conduct an external review from 30 days to 60 days.

In granting the extension in time limits the Committee made no mention of the drastic staffing cuts in the Ombudsman's Office over the previous 3 years, or other matters raised in the Annual Reports of the Ombudsman, which impacted on the Ombudsman's involvement with FOI. Despite having a year to study the ALRC/ARC Report chapter on the need for an Independent Monitor, and being referred to that point, the Committee made no mention of such issues as training, agency audits, publicising the Act or providing policy advice.

The Committee's relative neglect of the Ombudsman's functions and performance under the *Freedom of Information Act* 1991 builds upon the roughshod foundations which saw the initial inclusion of the Ombudsman in the Tasmanian FOI regime.

Conclusion

This article provides clear evidence, within an analytical framework, that the manner in which an external review body approaches its task of external review proves a very significant determinant in information accessibility. While much literature has centred around arguments pertaining to the achievement of FOI objectives in a more general sense, this article demonstrates that other factors relevant to FOI interpretation cannot be underestimated, or ignored. Despite oscillating between the potential poles of FOI interpretation, the Tasmanian Ombudsman appears to have favoured a wide approach to achieving the objectives of FOI legislation. However, it is suggested that this achievement is largely rhetorical, in that while the Ombudsman pays lip-service to FOI objectives, his substantive interpretative approach is too favourable to the Government and too narrow in terms of permitting access.

Evidence of this narrow interpretative approach lies in the ad hoc way that the Ombudsman goes about interpreting the exemption provisions of the Act. By proceeding with his review on an exemption-by-exemption, case-by-case basis, the overall objective of all FOI legislation—that of information access—is, in the long run, severely compromised. In essence, by failing to 'see the forest for the trees' such an approach, in the first three years of external review in Tasmania, has resulted in significant restrictions to the access of information. Evidence from various empirical research papers lends weight to this proposition, even if only within the focus of the Cabinet and Internal Working Documents exemptions. While it is acknowledged that these particular exemptions are, by their very nature, sensitive, indeed it is the ability to use the FOI Act to access information at this end of the spectrum, close to the heart of government, that ultimately secures its role as a successful piece of legislation.

The authors do not suggest that the Ombudsman's approach is deliberately restrictive or anti-FOI, but that the combination of a case-by-case approach with a 'benefit of the doubt' presumption in favour of the Executive on key exemptions, has served to limit the flow of accessible information from the Tasmanian public administration. Certainly, while such an approach continues there appears little need for the massive revising of FOI provisions as set out in the Government Amendment Bill, and as supported by the Legislative Council.

In conclusion, the authors believe that a clear commitment to the overall policy objectives of FOI needs to be formally re-acknowledged by the Tasmanian Ombudsman. His interpretation in review over the last three years did not help the public reach close to the heart of government. Worst, it rendered access to the type of information that Campbell regards as critical for the success of FOI virtually impossible.