BOOK REVIEW

FREEDOM OF INFORMATION IN NEW ZEALAND, by Ian Eagles, Michael Taggart and Grant Liddell. Auckland, OUP, 1992. 1xiii and 661 (including index). Price $149.95.

Was the Official Information Act, enacted in 1982, simply a nine day wonder or did it mark a major constitutional change? The Prime Minister of the day thought the former, while the Minister of Justice, who had particular responsibility for the Act, held to the latter view.

This important, substantial and comprehensive book published 10 years later confirms the positive prediction. Parliament has also confirmed that assessment by the extension of the principles of the legislation to local government and many other public bodies in 1987, by the careful amendment of the 1982 Act in that year and the repeal of a great number of secrecy provisions in other statutes to facilitate openness in government, and by endorsing the 1990 report of the Parliamentary Committee recommending that the 1982 Act (and the Ombudsmen Act 1975) should continue to apply to State-owned enterprises: Official Information and Ombudsmen Amendment Acts 1992. The value in practice of the legislation can be seen as well in the Annual Reports of the Ombudsmen: their latest report records that they received 1,350 complaints relating to official information matters and that of those which they fully investigated 440 were either sustained or were resolved by the Department and the investigation accordingly discontinued. Those figures merely indicated some of the situations in which the Act has not operated to the satisfaction of those seeking information. There is no assembled record of other activity under the legislation and in particular of the routine release of information under it.

After almost 10 years this book's description and analysis of the law, practice and other relevant material is extremely timely. This is the more so since the Minister of Justice has asked the Law Commission to review aspects of the legislation. The review, says the Minister, is a fine tuning exercise. It does not go to the underlying principles of the legislation. That very reference and its terms can be seen as a confirmation of the opinion his predecessor held 10 years ago. The importance of the legislation is to be seen as well in continuing public controversies about the access to certain sensitive information, such as consultants' reports on the health reforms and the release (or non-release) of information near to an election, the latter of which is the subject of particular reference in the 1991 Ombudsmen Report and the 1992 report of the State Services Commission.

As such controversies show, the practical operation of the legislation is a central matter. In the last 10 years there have been relevant major changes in the administration of government, including the separation of trading activities through the creation of State-owned enterprises, the substantial restructuring of the public service by the State Sector Act 1988, the important changes in financial accountability reflected in part in the

Public Finance Act 1989, and practices such as the preparation of briefing books, intended to be published, for incoming Ministers – the "opening of the books". In all of this we see major evolution which can be related to the emphasis the Committee on Official Information (the Danks Committee) placed on "generality of statement of the grounds for protection and flexibility in applying the precepts" (to borrow from the typically felicitous foreword which Sir Alan Danks contributes to this book). As the Committee spelled it out, in supporting greater openness: "a new and sharper definition of responsibility at senior levels and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required. The importance of careful adjustments in this area [of protecting the interests of effective government and administration] does point yet again to the evolutionary approach to openness."

The book does not always give a sense of the evolving situation. That is a difficult thing to do; indeed a full account would require a massive study of the day to day practice of departmental consultation and disclosure. One chapter which does give some sense of the evolution is chapter 16 which discusses the removal, under the urging of the Information Authority, of many secrecy provisions sprinkled across the statute book. That is a process which needs to be reinvigorated.

This book in very careful detail (as evidenced by its 36 pages of references) examines the legislation in its own terms, in its historical context, in practice, especially in the work of the Ombudsmen and also in the courts, and in its wider comparative context. The historical element is important. As Sir Alan records in his foreword, "information" was in the air in the late 70s and early 80s. It is more than a coincidence that the Australian, Canadian and New Zealand official information statutes all came into force on the same day, 1 July 1983. The world has of course changed greatly since then. The technological possibilities through the computer gathering and sorting of information have grown remarkably. Along with social changes they have probably helped the pendulum to swing away from openness to the protection of personal privacy as seen in work done by the Information Authority and more recently by the introduction into Parliament of the Privacy Information Bill, leading to the establishment of the Office of Privacy Commissioner and the regulating of some data matching within the public sector.

The authors consider the full range of issues presented by the legislation, beginning with the basic principle of openness, referring to the important obligation of public bodies to give reasons for their decisions, emphasising the means of access, describing in extensive and valuable detail the grounds for withholding information (the 400 pages in these chapters making up the bulk of the book), setting out the special rules relating to personal information and local government, elaborating the review mechanisms through the Office of Ombudsmen and the courts, and balancing the principles and procedures for release with an account of the criminal sanctions for the wrongful disclosure of official information. Much of that discussion is of wider significance; for instance the elaboration of

the statutory right to reasons in chapter 2 is directly helpful to a consideration of such a right where conferred by other statutes.

Particularly in the lengthy discussion of the reasons for withholding information, the authors have elaborated the terse wording of the legislation by effectively referring to a wide range of material, some of it of greater authority and significance than other. The wording of the legislation itself is critical to the value of comparative material. One significant difference is that the New Zealand legislation does not, to quote from the authors, manifest the "loophole blocking defensiveness" of that enacted in Australia and Canada. The case notes of the Ombudsmen are given important and welcome place. *Important* since the many thousands of cases which they have handled are to be compared with the handful of relevant cases (some undoubtedly of major importance) which have been decided by the courts; *welcome* since not enough attention is given to the work of the Ombudsmen in legal commentary. There are distinguished exceptions, such as the valuable chapters relating to official information in Dr G D S Taylor's recent book on *Judicial Review* (1991) and, from 10 years ago, the 20th anniversary issue of the Victoria University of Wellington Law Review on the Ombudsmen. That special issue demonstrated among other things that the Office of the Ombudsmen had already developed a special knowledge of official information matters. It has since become a central part of the evolutionary working out of the principle of openness and the limits on it, as the book clearly shows.

The book makes valuable use of related bodies of law including those directly invoked by the legislation, such as the principles of confidence and legal professional privilege, and those not yet so clearly established such as privacy and trade secrets. American, Australian and Canadian official information decisions also receive much attention although, as the authors warn, it is important to have regard to the differences both in the legislation and in the constitutional and political systems in which the legislation operates.

In addition, broader jurisprudential writing (for instance about the nature of discretion) is valuably invoked and in addition the Danks Committee reports are used to give a sense of the intended reform. It is as well to remember though that legislation of this kind should not be anchored in the past. It proceeds on a voyage which cannot be precisely plotted by those who had a hand in its original construction. But the motivating purposes and principle remain very important.

The purposes and principles are clearly stated in the statutes, in sections 4 and 5 of the 1982 Act. Basic to the new approach is that this is an Act concerned with official *information* and not with official *secrets*. Information is to be made available unless there is good reason for withholding it. Until 1982 the law had of course been the converse: information was to be kept secret unless there was good reason to release it (essentially according to the unfettered judgment of the relevant part of the executive).

As indicated, the bulk of the book concerns those good reasons for withholding information. The major strengths, and one or two of the weak-

nesses, of this valuable book could be illustrated by a consideration of any one of the chapters treating those good reasons. That on protection of governmental and administrative processes (chapter 12) suggests itself, given the centrality and difficulty of the issues it presents. Foremost is the balance to be struck between the public interest, first, in Ministers, their officials and members of other public bodies being able to give and to receive advice from one another and to resolve policies and other decisions in some privacy, and second, the public interest in wide participation in matters of public importance. The purpose of the Act after all includes the enabling of the people of New Zealand to more effectively participate in the making and administration of laws and policies and the promoting of the accountability of the officials. Participation and accountability support the broader purpose of enhancing respect for the law and promoting the good government of New Zealand.

The New Zealand legislation was deliberately drafted in broad terms. It does not for instance provide, as do the statutes enacted in Australia and Canada, for the categorical protection of certain papers submitted to Cabinet. Rather, to facilitate broader access and to enable law and practice to evolve, the New Zealand Act allows some access to the internal deliberative processes of government; but how much access? The relevant chapter gives important emphasis to the wording of the legislative reasons which are based on constitutional conventions concerned with the protection of the advisory process and on protecting the effective conduct of public business through the free and frank exchange of opinion. The chapter draws on material about constitutional conventions; its discussions of the particular wording giving special reference to the case notes of the Ombudsman; and it distinguishes between the individuals involved (for instance contrasting officials with outside consultants) and between the different phases of the deliberative process (separating, for instance, fact from technical and other opinions, and from advice about action). While the chapter does make some use of American and Australian material it does that to a more limited extent than do some of the other chapters, and it could also have given greater attention to the broader developments in public administration in New Zealand over recent years. Particularly relevant is the increased willingness of officials and Ministers to engage in more public processes of advice and decision. The opening of the books mentioned earlier in this review is just one manifestation of that.

The discussion of the protection of the internal processes of government, like the discussion to be found in the other chapters about the good reasons for withholding, provides an excellent basis for an evaluation of the operation of the legislation and for its further operation and possible amendment. The question can for instance be asked in respect of the two principal provisions protecting government processes, whether both are needed. Does that which is concerned with constitutional conventions relating to the tendering of advice (section 9(2)(f)(iv)) really add anything in the way in which it has been interpreted and applied to that designed to protect the free and frank exchange of opinion (section 9(2)(g)(i))?

The users of this book will find material in it helpful to the resolution

of many such questions. Undoubtedly those who have a close day to day involvement with the operation of the statute will find it of great value. It is well presented and there appear to be only a small handful of errors of a typographical and related kind, although reading would be facilitated by the inclusion in an appendix of the principal provisions of the legislation.

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