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COURTS, OMBUDSMEN AND FREEDOM OF INFORMATION:

THE EMPIRE STRIKES BACK

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Michael Taggart
November 1989

Courts, ombudsmen and freedom of information: The empire strikes back

New Zealand has had freedom of information legislation since 1982. In 1988, the Court of Appeal delivered a significant judgment which held that the legislation could be used to obtain, from the police, witnesses' briefs of evidence prior to trial. The author examines this decision in detail and notes that, as a result, the law and practice of criminal discovery have been radically reformed.

In *Commissioner of Police* v *Ombudsman*[1] the Court of Appeal held that a person charged with a summary offence has a legal right of access, upon request to the Police, to witnesses' briefs of evidence prior to trial. This right was found to flow from section 24 of the Official Information Act 1982 (referred to here as OIA or the Act). The decision is important for several reasons. First of all it transforms the highly discretionary and variable practice of criminal discovery[2] into a regime based on statutory right.[3] Secondly, it is the first occasion in which an Court of Appeal has had the OIA directly before it and the first case in which an Ombudsman has been taken to court since the inception of the office in 1962. Finally the decision in *Pearce* once again shows the New Zealand Court of Appeal in activist mode. Any one of these reasons would justify discussion of *Pearce*. Together they compel detailed analysis.

I THE JUDGMENT AT FIRST INSTANCE[4]

Although it was overruled by the Court of Appeal on the central issue of whether the requested information should have been disclosed by the Police, there is so much of interest and enduring relevance in the judgment of Jeffries J at first instance that it justifies separate treatment.

The judgment at first instance is careful, rigorously analytical and focuses fixedly on the particular matter that called for consideration. That the Court of Appeal judges touch so lightly on his analysis can be taken as a compliment on the thoroughness of the trial

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1 [1988] 1 NZLR 385. The actual name of the case in the court record is *Thompson and McGuire* v *Laking and Pearce*. Pearce, the second respondent, requested the briefs of evidence under the OIA and so it seems appropriate to refer to the case as *Pearce* for ease of exposition.

2 See generally Penlington "Our Criminal Procedure - A Plea for Reform" (1985) 6 Otago LR 1 and Doyle "Criminal Discovery in New Zealand" (1976) 7 NZULR 23.

3 See WC Hodge *Doyle's Criminal Procedure in New Zealand* (2 ed, Law Book Company, Sydney, 1984) xi - "It would be an understatement to record this device [ie OIA access] as revolutionary for District Court practice".

4 *Commissioner of Police* v *Ombudsman* [1985] 1 NZLR 578.

judge in clearing the legal underbrush. In many ways the trial decision provided the launching pad for the different analyses in the Court of Appeal.

Before discussing the judgment, however, a preliminary matter of considerable significance to the manner in which the case was argued and approached at first instance must be mentioned. At a contested interlocutory hearing the Chief Justice upheld the Police's contention that only the reasoned report of the Ombudsman should be lodged in court.[5] Counsel for Mr Pearce and counsel assisting the Court[6] had argued that the court should require the Police to file, in addition to the report, the briefs of evidence themselves, the summary of facts and (subject to the restrictions in the Ombudsmen Act 1975) the documents relating to the Chief Ombudsman's investigation. Although the arguments of counsel are not disclosed in the reasons for decision it seems obvious that the Chief Ombudsman's request[7] was motivated by a desire to make the judge as aware of the merits of the case as the Chief Ombudsman had been. It is a characteristic of the Office of Ombudsman in New Zealand to focus exclusively on the merits of the particular case[8] and (while allowing that earlier cases may provide assistance)[9] to eschew any binding notion of precedent; thereby maintaining flexibility. I imagine it was thought that to have the court close its eyes to the factual matrix in this dispute ran the risk of orienting the judge towards a ruling on a question of law applicable to all pre-trial OIA requests to the Police, whatever the particular facts. In denying the application to receive this additional material into evidence this is exactly what Davison CJ did. "The issue in this case", the Chief Justice said in the preliminary matter, "really at the substantive hearing would seem to me to involve a decision of whether or not briefs of evidence are to be made available in summary proceedings under the Official Information Act and that is the substantial question. That will not involve looking into the facts of this case at all".[10] This ruling, which was not appealed, affected significantly the argument and approach at first instance. It is the reason why we do not learn until the Court of Appeal judgments that the fracas out of which the charges were laid was gang

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5 *Thompson and McGuire* v *Laking and Pearce,* (Unreported) High Court, Wellington, A 487/83, 8 May 1984, Davison CJ. By s35(2) OIA the Ombudsman must report his opinion to the Department.

6 Mr (now Dr) DL Stevens appeared for Pearce in both the High Court and Court of Appeal. Counsel assisting the court at this interlocutory proceeding was Dr GDS Taylor, then Legal Counsel to the Ombudsmen. At the substantive hearing and in the Court of Appeal he was lead by Mr WD Baragwanath QC. The Chief Ombudsman, Mr (now Sir) GR Laking (since retired), was not formally represented at first instance to protect the independence of the office, although as noted above counsel assisting the court included the then Legal Counsel to the office. When the case reached the Court of Appeal, Mr Baragwanath QC and Dr Taylor appeared as counsel for the Chief Ombudsman.

7 Jeffries J records it was the first respondent (the Chief Ombudsman) who requested the court to receive this additional information: above n 4, 580.

8 The report of the Chief Ombudsman in *Pearce* illustrates this point: see *Fifth Compendium of the Case Notes of the Ombudsmen* (1984) Case No. 4, pp12, 21, 23 and 25.

9 See GR Laking "Introduction", above n 8, 6.

10 Above n 5, 4.

related and that the witnesses who had given the statements were both police officers.[11] Although the judges in the Court of Appeal had not read the briefs of evidence either,[12] the ruling had lost much of its significance by that time.

At the substantive hearing Jeffries J began by upholding the Chief Ombudsman's categorization of the requested information as "personal" information. Not having seen the briefs of evidence in question, the court was at some disadvantage, but assumed they were factual briefs of witnesses' evidence about the event, and held that "a police prosecution file containing briefs of evidence is personal information".[13]

The distinction between "personal" and "official" information which is drawn by the OIA requires explanation. It stems from the *Danks Report*, the report of the Committee set up under the chairpersonship of Sir Alan Danks to consider the question of freedom of information in New Zealand,[14] and is reflected in the structure and detail of the Act. Briefly put, the Act confers a legal right of access to "personal" information in Part IV[15] but something less than a legal right of access to "official" information, which might be called an entitlement to access, in Part II.[16] "Personal" information is defined as "any official information held about an identifiable person"[17] and section 24(1) confers on every person a right of access to any "personal" information which is about that person.[18] In conferring this right the Act reflects the widely held view that a person has the strongest claim to information held by the government about himself or herself.[19] Jeffries J called it "[a] principle of high ranking importance in the statutory scheme".[20] Official information, on the other hand, is information held by a subject department or organisation, or by a Minister of the Crown, which is not "about" the requester of the information.

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11 In his report the Chief Ombudsman had pointed out that both of the witnesses were police officers (above n 8, 23) but Jeffries J did not allude to this.

12 Above n 1, 387 (Cooke P) and 409 (Casey J).

13 Above n 4, 586. Jeffries J did not exclude the possibility that if each item on the police file was examined individually some items might be classified as "official" information instead: above n 4, 586.

14 Committee on Official Information *Towards Open Government: General Report* (1980) vol 1 (hereafter *Danks Report*, vol 1); *Towards Open Government: Supplementary Report* (1982) vol 2 (hereafter *Danks Report*, vol 2). See generally Keith "The Official Information Act 1982" in RJ Gregory (ed) *The Official Information Act: A Beginning* (NZ Institute of Public Administration, Wellington, 1984) 31 and Keith "Open Government in New Zealand" (1987) 17 VUWLR 333.

15 There are legal rights of access to certain types of official information in Part III as well. The approach of the Court of Appeal in *Pearce*, above n 1, may have an impact there. See Taggart "The Official Information Act 1982 in the Courts" [1989] NZ Recent Law Review 195, 206.

16 See Taggart "Freedom of Information in New Zealand" in NS Marsh (ed) *Public Access to Government-Held Information* (Stevens, London, 1987) 211, 224-225.

17 Section 2.

18 Note that the "personal" information must be held in such a way that it can readily be retrieved: s24(1)(b).

19 The Act extends this right to corporations as well: s24(2)(d) and (e).

20 Above n 4, 586.

Important consequences flow from classification of information as "personal" or "official".[21] The Ombudsman can only recommend disclosure in respect of complaints over non-disclosure of personal information,[22] whereas in relation to official information under Part II of the Act the Ombudsman's recommendations become legally binding in the absence of a veto after a certain period of time.[23] The aggrieved requester of personal information need not go to the Ombudsman at all and can go directly to court for curial determination of his or her legal rights. In contrast, the aggrieved requester of official information must seek investigation by the Ombudsman before going to court.[24] A seeker of "personal" information enjoys several other advantages as well: (1) there are fewer and, in some respects, narrower exemptions in section 27 than in Part II, and in consequence it is generally more difficult to withhold personal information than official information; (2) there is no obligation on the requester of personal information to specify that information with due particularity;[25] and (3) access to personal information held about an individual is free of charge.[26]

Jeffries J's upholding of the Ombudman's view that briefs of evidence were "personal" information is significant in two respects. Firstly, the High Court approved of the Ombudsman conducting his investigation of Pearce's complaint under section 35 of the Act, rather than under section 28 which applies to investigation of "official" information disputes.[27] Secondly, Jeffries J confirmed the Ombudsman's rejection of the reliance by the Police on s9(2)(k), which provides good reason to withhold "official" information but not "personal" information.[28] The Court of Appeal unanimously upheld the view that briefs of evidence were "personal" information.[29]

The next issue addressed by the High Court was whether an Ombudsman's recommendation could be the subject of challenge in court, in this case by way of judicial review. Jeffries J pointed out that the aggrieved requester under Part IV of the Act had "alternative" avenues of redress: either complaint to the Ombudsman or application for judicial review to the High Court.[30] The judge said "[t]he legislators saw advantages in using the Office of the Ombudsmen with an arbitral function under the ... Act" and later noted without elaboration that there were "many sound reasons for doing so".[31] But the dispute-resolving processes of the Ombudsmen and the courts were not

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21 See generally Taggart "Freedom of Information and the University" (1988) 7 Otago LR 638, 654-656.

22 Section 35.

23 Section 30. As the Ombudsman can only recommend disclosure of personal information there is no veto power provided in Part IV: above n 4, 587, per Jeffries J.

24 Section 34.

25 As the requester of official information must: s12(1). But note "personal" information must be held in such a way that it can readily be retrieved: s24(1)(b).

26 Section 24 (1).

27 Above n 4, 587.

28 Above n 27, 581. See also OIA (as amended), s27(1A).

29 Above n 1, 396 (Cooke P) and 402-3 (McMullin J).

30 Above n 4, 587-588.

31 Above n 4, 588.

mutually exclusive. The alternative avenues of redress established by the legislature could not have been intended to preclude the requester who had sought help unsuccessfully from the Ombudsman from seeking judicial review.[32] Jeffries J had "no doubt" there was power to review Ombudsman investigations of "official" information complaints under section 28. This was shown by the deliberate decision not to incorporate the privative clause from the Ombudsmen Act 1975 into the OIA[33] and the postponement, rather than extinguishment, of judicial review in section 34. Reference also could have been made to section 11(1). It appears that the judge did not think this conclusion of reviewability was so clear cut in relation to the Ombudsman's investigations and recommendations in relation to "personal" information complaints under section 35. The reason was that by section 35(l) the investigation is said to be pursuant to the Ombudsmen Act 1975, which, as noted above, contains a privative clause limiting judicial review to scrutiny for jurisdictional error.[34] Nonetheless Jeffries J was of the opinion that in investigating complaints under section 35 the Ombudsman was performing enough of a function under the OIA to satisfy section 29(2) and thereby oust the privative clause.[35] The judge did acknowledge that another route to reviewability was provided by *Bulk Gas Users Group* v *Attorney-General*[36] but he preferred to found jurisdiction on the OIA itself.[37] Again the Court of Appeal approved of this analysis.[38]

Once he had established jurisdiction to review the Ombudsman's recommendation to disclose the briefs of evidence, Jeffries J found that the Ombudsman had committed several errors of law. The first group of errors resulted from what the judge described as the Chief Ombudman's failure "to secure on the full text of s6(c) of the Official Information Act a fixed, steady and unblinking stare so as to decide exactly what the legislature provided by way of conclusive reasons for withholding official information".[39] Section 6(c) provides:

> Good reason for withholding official information exists... if the making available of that information would be likely -
> (c) To prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial ....

The reasoning of the Ombudsman in his report to the Police recommending disclosure was summarized by Jeffries J as follows: firstly, the Ombudsman "fixed almost

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32 Above n 31.
33 Above n 31, See OIA, s29(2).
34 Section 25.
35 Above n 4, 588.
36 [1983] NZLR 129. In that case the Court of Appeal held privative clauses ordinarily cannot exclude judicial review on a question of law. See generally Smillie "The Foundation and Scope of Judicial Review: A Comment on *Bulk Gas Users Group* v *Attorney-General*" (1984) 5 Otago LR 552 and Taggart "Judicial Review for Error of Law" in *NZ Law Conference, Christchurch 1987: Conference Papers* (1987) 168.
37 Above n 4, 588.
38 Above n 1, 390, per Cooke P.
39 Above n 4, 582.

exclusively" on the right to a fair trial aspect of section 6(c);[40] the focus was narrowed further by treating the right to a fair trial aspect as synonymous with the law on contempt of court; and, lastly, the Ombudsman relied on section 5(j) of the Acts Interpretation Act 1924 to place an onus upon the Police to establish good reason in terms of the Act to withhold the briefs of evidence in this case.[41] Jeffries J held that the Chief Ombudsman had erred at every point in this chain of reasoning and the Court of Appeal agreed.[42]

The first error, the fixation on the right to a fair trial aspect of section 6(c), was explicable by the reliance of the Police on that limb of the subsection. In recommending disclosure the Chief Ombudsman simply rebutted the reasons advanced by the Commissioner of Police in support of the decision to withhold.[43] By so doing, however, the Ombudsman lost sight of his statutory role to reconsider disputes over access on the merits.[44]

The second and third errors, the focus on contempt of court principles and the placement of the onus of persuasion on the Police, flowed from a piece of Ombudsprudence that was a corner-stone of that Office's approach to interpretation of the OIA in the early years, and which was pivotal to the successful interpretation and application of the Act. Time and time again the ombudsmen relied on section 5(j) to give a fair, large and liberal interpretation as would best attain the objects of the Act, as specified in sections 4 and 5, and a consequently narrow construction to those sections of the Act which restrict the general purposes (ie the exemptions or good reasons to withhold).[45] This mirrored the American case law which broadly construed the obligation to disclose under the federal Freedom of Information Act while construing narrowly the exemptions.[46]

Before the High Court and the Court of Appeal counsel assisting argued, in support of this liberal-of-purpose and restrictive-of-exemption approach, that the OIA was a statute of considerable constitutional significance and for that reason should be interpreted generously. Reliance was placed on the Privy Council case of *Minister of*

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40 Above n 4, 583.

41 Above n 40.

42 A word of dissent was entered by Casey J who thought the Chief Ombudsman did turn his mind to the other aspects of s6(c) but had concluded that the submissions by the Police on them lacked relevance and were not supported by the evidence: above n 1, 411. McMullin J supported Jeffries J on this and Cooke P tended to as well (above n 1, 405 and 389 respectively). Also see below nn 63-5 accompanying text.

43 Above n 4, 582.

44 Above n 43. See s35(2).

45 See generally the cases noted in the *Fifth Compendium of Case Notes of the Ombudsmen* (1984).

46 See, eg, *Department of Air Force* v *Rose* 425 US 352, 361 (1976) (US SC) and generally BA Braverman and FJ Chetwynd *Information Law: Freedom of Information, Privacy, Open Meetings, Other Access laws* (Practising Law Institute, New York, 1985) vol 1, §4-2.

Home Affairs v *Fisher*[47] where the special nature of the Bermuda constitution lead Lord Wilberforce to conclude that "a generous interpretation" was called for "avoiding what has been called 'the austerity of tabulated legalism'".[48] Jeffries J readily acknowledged "the radicalism" of the Act but was content to interpret its meaning in the conventional way, leaving it to a higher court to add some constitutional ingredient which might affect its interpretation.[49] On appeal, Cooke P accepted "the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure" but that the OIA provided its own code making resort to such considerations unnecessary.[50] McMullin J, while accepting that Act had effected "an important change in the law of New Zealand" towards more open government and that it bears on constitutional freedoms, rejected any benevolent construction for "constitutional" statutes: "it is a domestic statute and the ordinary rules of statutory construction apply to it as much as they do to any other enactment".[51] Casey J also rejected the argument that the quasi-constitutional nature of the Act required a combination of liberal-of-purpose and restrictive-of-exemption interpretations.[52] The Act itself demonstrated "a carefully considered and clear balancing" of the competing interests - a "code" as the President put it - and this would be "distorted" by the approach adopted by the Ombudsman and in some jurisdictions with similar legislation.[53] So the Court of Appeal, like Jeffries J, focused on the terms of the Act unaided by any *ab extra* constitutional consideration.

Turning to the Act, Jeffries J referred to the "philosophical heart" of the Act in section 5, which provides that official information (including "personal" information)[54] shall be made available unless there is good reason to withhold it, and noted that the good reasons to withhold (ie exemptions) were "tightly drawn". The judge inferred from this that the legislature "deliberately meant to narrow the areas of circumstantial interpretation".[55] Sections 4 (outlining the purposes of the Act) and 5 showed clearly enough the impetus of the Act to make any reference to section 5(j) unnecessary.[56]

Jeffries J rejected as too narrow the Chief Ombudsman's reading of a right to fair trial in terms of contempt of court.[57] The Court of Appeal agreed.[58] The trial judge

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47 [1980] AC 391.

48 Above n 47, 329. The purple phrase has been attributed to Cardozo J, the great American judge. See Cooke "The Practicalities of a Bill of Rights", FS Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984, p13. See generally Keith "The courts and the constitution" (1985) 15 VUWLR 29, 41-49.

49 Above n 4, 585.

50 Above n 1, 591.

51 Above n 1, 402. Cf AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1959) 6.

52 Above n 1, 411.

53 Above n 52.

54 See definition of "official information" in s2.

55 Above n 4, 585. The exemptions also were referred to as "crisp and precise": Above n 4, 585.

56 Above n 4, 591.

57 Above n 4, 589.

58 Above n 1, 389 and 391 (Cooke P), 405 (McMullin J) and 412 (Casey J).

spent longer in demonstrating the error of placing the onus of proof of exemption on the Police.[59] By doing so, it was said, the ombudsmen had lost sight of their inquisitorial role as arbiters of disputes under the OIA. An onus of proof is a hallmark of an adversarial proceeding in a court of law. Nothing in the Act expressly placed the burden on the department, the minister or on the organisation resisting disclosure.[60] Nor did it behove an investigatory body like the Ombudsman, chosen by the legislature over the courts to resolve disputes in this area, to adopt a quintessentially curial technique of proof. Jeffries J observed:[61]

> The Act has deliberately located decisions on availability with the Executive, but provided an arbitral system for disputes. Absenting judicial review, the scheme of the legislation creates a system for access to official information in which the Courts take no part whatsoever. The New Zealand solution, on this aspect, is different from many jurisdictions overseas and their case law has limited application here. As the Court system itself is not utilised only the plainest expression in the statute would justify recourse to an important rule of the Courts in litigation.

Nevertheless there was, as the judge recognized, an obligation on the public body to justify its refusal to disclose with sufficient particularity for the Ombudsman to make his or her decision or recommendation.[62]

On appeal the view of the trial judge was broadly endorsed, although only Casey J appears to agree that the Ombudsman erred in law by placing the onus of proof on the Police. Casey J agreed with Jeffries J that the Ombudsmen "are not engaged in an adversarial exercise" and, while in the nature of things a department which alleges good reason to withhold would be expected to bring forward material in support, he said that the Ombudsman's investigation should be conducted "without any presumptions other than those specified in the Act".[63] McMullin J did not see the need to introduce the concept of onus of proof although he recognised in the end it might be a question of semantics.[64] While there is properly no onus on the department to show good reason, if there is no good reason shown or discerned by the Ombudsman (or the court, for that matter) then the information must be made available as prescribed by section 5. Cooke P observed that reference to concepts in adversarial proceedings is not "fully apt".[65]

The remaining error of law that the Chief Ombudsman was held to have committed was his misinterpretation of the phrase "would be likely" in section 6(c). The then Chief Ombudsman interpreted the adverb "likely" as meaning "more likely than not". Jeffries J rejected this interpretation, as did all the judges in the Court of Appeal. This

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59 Above n 4, 591-592.

60 Unlike freedom of information legislation in Australia and Canada: see Freedom of Information Act 1982 (C'th), s61 and Access to Information Act 1982 (Can), s48.

61 Above n 4, 592. Note that the provisions of the Official Information Amendment Act 1987 have changed slightly the situation described by Jeffries J.

62 Above n 61. See also s19, incorporated into Part IV by s24(3).

63 Above n 1, 411.

64 Above n 1, 404-405.

65 Above n 1, 391 (spoken in the context of onus of proof on the balance of probabilities).

error received the most attention on appeal and it is convenient to deal with all the judgments together here.

As Jeffries J observed "[e]ven only a mildly active lexicographer could use much space and many words on the various shades of meaning and possible interpretation" of the phrase "would be likely to prejudice" in section 6(c).[66] In the context of section 6 the judge considered it meant "a distinct or significant possibility [prejudice] might occur, but no higher than that. On the scale of probability it is above a slight chance and below an expectation. It suggests ... without question [that prejudice is] mentally conceivable".[67] The judges of the Court of Appeal agreed but each formulated the threshold test of harm slightly differently: "a serious or real and substantial risk to a protected interest, a risk that may well eventuate",[68] "a real danger or significant risk",[69] "a real risk of prejudice".[70] To require fine judgements as to the balance of probability of harm in the context of the vital state interests protected by section 6 as a whole was said to be "unrealistic"[71] and the judges favoured the more natural and easily applied test of serious, real or substantial risk of prejudice. This test, more restrictive than the liberal one adopted by the Ombudsman, was seen by Casey J as more in keeping with the maintenance of a proper balance of the interests contemplated by the Act.[72]

The Court of Appeal is restrained in its treatment of the Chief Ombudsman's errors. It must be said however, that the reasoned report of the Ombudsman in *Pearce* is typical of the approach of the Office to the OIA in the early years.[73] It is possible to discern in the *Pearce* report and in the Compendium of Case Notes of the Ombudsmen[74] over this period vigorous advocacy of the freedom of information cause, demonstrated most clearly by the push wherever possible for an interpretation favouring disclosure, hence the adoption of the liberal-of-purpose and restrictive-of-exemption approach. Perhaps the presence of the veto encouraged the office to chance its arm in this way; for if the ombudsmen were thought to go too far in a particular case the executive could veto. Moreover, in the personal information sphere the ombudsman's role is only to recommend disclosure, so that non-compliance is always an option.[75] The benefit of such a strategy is that a strictly liberal approach is drummed into the administration early and often enough to promote the kind of attitudinal change vital to real and lasting reform of information disclosure practices. The risk is that by adopting an approach more in favour of disclosure than can be clearly justified by the Act the ombudsmen

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66 Above n 4, 588.
67 Above n 4, 589.
68 Above n 1, 391, per Cooke P.
69 Above n 1, 404, per McMullin J.
70 Above n 1, 411, per Casey J.
71 Above n 1, 404 (McMullin J) and 391 (Cooke P).
72 Above n 1, 411. See also, 391, per Cooke P.
73 See above n 45.
74 Above n 73.
75 As the Police did in *Pearce* itself. Presumably the recommendation to disclose was challenged by the Police in court as a matter of principle and/or to avoid a report on non-compliance to the Prime Minister and ultimately the House of Representatives (see Ombudsmen Act 1975, s22(4)).

might lose credibility within the administration; and the maintenance of credibility is critical to the successful operation of the office. The New Zealand Ombudsmen, to their credit, seemed in the early years to achieve the benefit of a pro-disclosure approach without, as far as an outsider can tell, damaging the office's credibility.

The Court of Appeal in *Pearce* now confirms that it is wrong for the Ombudsman to take a more "liberal" (ie pro-disclosure) approach than that provided in the Act itself. As Jeffries J said in the court below the accent in the Act already is markedly on disclosure.[76] There is no call to tip the scales further in favour of disclosure by "liberal" interpretations or evidential presumptions. However successful the strategy may have been in the early years, it is no longer available to the ombudsmen; still, the belated confirmation of this by the Court of Appeal is unlikely to undo the accumulated benefits of that approach.

All of the errors identified by Jeffries J were confirmed by one or more of the judges in the Court of Appeal,[77] but it remained for the trial judge to consider whether the result reached by the Chief Ombudsman was right, notwithstanding his defective reasoning. Was Pearce entitled as of right to access before trial to witnesses' briefs of evidence taken by the Police? Jeffries J held not, finding that disclosure of witness briefs *in any circumstances* would be likely to prejudice the investigation of offences, the right to a fair trial and, more generally, the maintenance of law.

The judge reasoned that the written briefs of evidence could not be satisfactorily isolated from the Police's investigation itself and that their disclosure would uncover to a great extent the background investigatory and detection processes, thereby likely causing prejudice to the investigation of crime.[78] Moreover, disclosure would prejudice the right to a fair trial by making it possible to coerce and intimidate Police witnesses, and by discouraging some people from assisting the Police, as well as by excluding the court from the discovery process and thereby weakening the judge's control over the adjudicative process.[79] The Police argued before the Ombudsman and the courts that fair trial means one that is fair to both the prosecution and the defence, and that since the disclosure recommended by the Ombudsman lacked reciprocity it was plainly unfair.[80] The Chief Ombudsman countered this by referring to the practice of disclosure in

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76 Above n 4, 590.
77 Above n 1, 389 and 391 (Cooke P), 404-405 (McMullin J) and 411-12 (Casey J).
78 Above n 4, 590.
79 Above n 4, 590-591.
80 Above n 8, 17 (quoted in *Pearce*, above n 4, 582).

criminal jury trials.[81] While he did not refer to this exchange specifically, Jeffries J rejected emphatically any equation of summary proceedings with trials on indictment:[82]

> ... this is a summary prosecution and [I] reject as unsound analogous argument that disclosure of briefs is akin to deposition hearings before trial on indictment. I merely state... [that] a brief of evidence... [is] distinct from deposition or statement, both signed, and available to all involved in the trial, including the Court itself.

The decision really amounted to a blanket exclusion of briefs of evidence from the reach of the Act. On this reasoning the threshold of harm - defined as a distinct possibility of prejudice to the interests stated in section 6(c)[83] - would be crossed in every instance of attempted access under the Act to this material.[84]

An appeal was lodged from this decision but it was not heard for three years. In the meantime important developments took place that throw light on the Court of Appeal judgments.

II THE INTERIM: 1985-1988

Pearce was not the first case to raise the question of the interrelation of the OIA and the rules concerning criminal discovery.[85] In *R* v *Connell*[86] the accused was indicted on various fraud charges. The Crown provided the defence with the names of persons interviewed by the Police during investigation in accordance with the practice sanctioned

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81 Above n 80, 21.

82 Above n 4, 590. Later Jeffries J hints at acceptance of the Police argument about lack of reciprocity, saying "a fair trial summarily, which is bilateral" (591). Cf *Pearce,* above n 1, 391 (Cooke P) and 405 (McMullin J).

83 Above nn 66-67 and accompanying text.

84 The formal order of the court recorded that the decision of the Police to withhold the briefs of evidence was correct. The Police had sought a further order "[t]hat there is good reason to withhold (within the meaning of s6) all briefs of evidence in summary cases" (above n 4, 584). Jeffries J declined to make such an order, although he clearly thought it was justified. The reason the judge gave is laudable but actually undercut his holding that disclosure under the OIA would prejudice the maintenance of law and the right to a fair trial: (above n 4, 593)

> The Court is aware of reasonably extensive formal and informal passing of information from the police to alleged offenders, or their counsel, prior to trial for both summary and indictable hearings .... The Court does not wish to make an order now which might be used as justification for reducing the present flow of information, or altering the status quo.

85 Some of what follows in this section is drawn from an earlier article, see Taggart, above n 15.

86 High Court, Auckland, T51/84, 1 October 1984, Ruling (3), Thorp J; [1985] 2 NZLR 233 (CA). *Connell* at first instance was decided before argument in *Pearce* (HC) commenced and *Pearce* (HC) was decided a couple of months before *Connell* (CA) was decided; but *Connell* (HC) was not cited by the court in *Pearce* (HC) nor was *Pearce* (HC) cited by the court in *Connell* (CA).

in *R* v *Mason*.[87] Defence counsel sought more, namely the records of the outcome of these enquiries, and a contested discovery hearing ensued before Thorp J. The additional material sought was identical to that to which access was refused by Moller J and the Court of Appeal in *R* v *Mason*.[88] Counsel for the defence sought to overcome this obstacle by arguing that the OIA conferred a legal right of access to the information sought and effectively overrode the previous practice. Thorp J accepted that the OIA created a scheme of disclosure which overlapped with conventional criminal discovery, but he did not think that the Act exhibited a clear intention to override or supersede those existing rules and practices.[89] In refusing the request Thorp J said:[90]

> I believe that the Act has created something of an anomaly, that the two sets of rules do not lie easily together, and that the existing interest in reform in this area of the law may be stimulated to greater activity by that situation. However, this court is not a law reform committee.

On appeal against conviction the defence complained that the trial judge had erred in not ordering the Crown to produce the records sought. The submission that the OIA had overridden *Mason's* case was rejected by the Court of Appeal speaking through Cooke J. First of all, Cooke J pointed out that no request had been made under the Act.[91] As the OIA did not apply directly, the argument invoked the Act by way of analogy. Cooke J rejected the analogy, saying "[t]here is nothing in either the Act itself or the Danks Report which led to it to suggest that there was any intention of altering the practice in connection with criminal trials".[92]

Of course *Connell* and *Pearce* did not address the issue of persons convicted of crimes gaining OIA access after conviction to information in the hands of the Police. The most well known instance of this is *R* v *Wickliffe*[93] which highlighted the injustice that can result from the absence of a code of criminal discovery based on right rather than on the discretion of the prosecutor. It was a case where many years after conviction for murder the prisoner obtained under the OIA a police job sheet which had not been disclosed to the defence at trial and which showed that the principal witness had changed her story significantly. As a result the Court of Appeal substituted for the murder conviction one of manslaughter.

The publicity surrounding this case added to the pressure for reform. The Criminal Law Reform Committee had been seized of a reference on the topic of criminal

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87 [1975] 2 NZLR 289 (HC); affirmed, [1976] 2 NZLR 122 (CA).
88 Above n 87.
89 Above n 86, 6.
90 Above n 86, 9.
91 Above n 86, 241.
92 Above n 91.
93 [1987] 1 NZLR 55; (1986-7) 2 CRNZ 310 (CA). See also *R* v *Hall* [1987] 1 NZLR 616 (CA) and *R* v *Patterson*, unreported, CA 88/84, 19 July 1984, referred to by Penlington, above n 2, 5 n30.

discovery since April 1984 and the Minister of Justice awaited their report.[94] Meanwhile section 24A appeared in the Official Information Amendment Act 1987:

> (1) Nothing in section 24 of this Act gives any person who, after the commencement of this section, is sentenced to a term of imprisonment for an offence the right to be given access to any personal information which is held by the Police Department and which relates to the offence for which that person was sentenced, or to the conviction or sentencing of that person for that offence.
>
> (2) This section shall come into force on a date to be appointed by the Governor-General by Order in Council.

At that time it was the government's stated intention to bring this provision into force when a legislative code of pre-trial discovery was in place.[95] This reflected the view that pre-trial discovery is superior to post-conviction disclosure via the OIA as had occurred in *Wickliffe* and other cases. The Report of the Criminal Law Reform Committee on *Discovery in Criminal Cases*[96] was finally submitted to the Minister in December 1986, too late to be sent to the Select Committee which had been considering amendments to the OIA.

The Criminal Law Reform Committee certainly had taken its time even for a part-time body - two and a half years from reference to date of report - but the end result was a substantial and compelling Report proposing the enactment of a comprehensive criminal discovery code which would apply to all criminal cases, both summary and on indictment. The committee accepted unreservedly that the interests of justice require accused persons to be fully informed of the case against them and of other information relevant to their defence prior to trial. The traditional arguments against criminal discovery - perjury, witness tampering and intimidation - while real concerns in some cases, did not justify the Common Law approach of non-disclosure and could be dealt with by exceptions to a general statutory rule of disclosure. A survey of the existing law showed it to be long on prosecutorial (and judicial) discretion and very short on legally enforceable rights of access. Furthermore, the "practice" of criminal disclosure by prosecutors was shown, in a valuable survey commissioned by the committee,[97] to vary a great deal from prosecutor to prosecutor, with the amount of disclosure in particular cases depending in large part on the personal relationship between prosecutor

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94 See the address by the Rt Hon Geoffrey Palmer entitled "The Official Information Amendment Bill: Disclosure in Criminal Cases and the Ministerial Veto" given before the Rotary Club of Hutt on 5 November 1986 at Lower Hutt.

95 Rt Hon Geoffrey Palmer, (1986) NZPD 2168-9 (12 June, 1986, First Reading speech); Mr Bill Dillon, (1986) NZPD 5893 (4 December 1986, Report of the Justice and Law Reform Committee).

96 Criminal Law Reform Committee *Report on Discovery in Criminal Cases* (December 1986). The Committee comprised Mr DP Neazor QC (Chairman), Ellis J, Mr KN Hampton, Professor GF Orchard, Mr JC Pike, Chief Inspector NB Trendle, Dr WA Young and Mr JS Hammington (Secretary).

97 M Stace *Disclosure and Criminal Discovery* (Institute of Criminology, Victoria University of Wellington, October 1985).

and defence counsel. This convinced the committee of the need for a uniform and consistent system of criminal disclosure, setting out clearly the duties of the parties and providing an effective mechanism for their enforcement.

Generally speaking the committee proposed a two-stage procedure for disclosure. At the first stage, prior to plea, a minimum level of disclosure would be made which was sufficient to inform the accused of the essence of the case. At the second stage, after a not guilty plea was entered but before trial, more substantial disclosure was proposed. While the committee regarded open file disclosure as being contrary to the adversarial process it did propose that the entire case of the prosecution should be made available to the defence, including copies of briefs of evidence or written witness statements and (upon request) any other less formally recorded "statements" made to the Police by prosecution witnesses. Regarding persons who have been interviewed by the Police but were not to be called as witnesses, the committee proposed the mandatory disclosure of the names, addresses and statements of all such persons who could give evidence "material" to the defence. By majority it was proposed that the defence should have the right to request and receive the names, addresses of and statements made by persons who could give evidence on specific matters nominated by the defence. This would allow the defence to explore areas of particular interest without putting the prosecution to the expense of routinely making this information available in every case. The minority on this issue, which was the only one to divide the committee,[98] thought it would open the door to "fishing" expeditions by the defence and result in unwarranted invasions of privacy of persons who had been interviewed but were not to be called by the prosecution.

The committee made sensible provision for exemptions from disclosure and placed the decision as to access in the hands of the prosecutor. But since prosecutors under this scheme would still have to judge whether information was material or relevant to the defence, the committee recommended that disputes be resolved by the judge in the court hearing the criminal case. The court would ensure that the prosecutor's discretion had been exercised correctly. The committee stressed it did not think judicial resolution of disputes would be necessary in most cases. The committee also ventured views on the controversial topic of disclosure by the defence, recommending that "expert" evidence to be called by the defence at trial should be disclosed to the Crown.

It was proposed that this comprehensive scheme would operate to the exclusion of the OIA; three reasons were given.[99] Firstly, while information obtained under the OIA is not usually subject to restrictions concerning its subsequent use,[100] the committee

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98 In the minority were the then Solicitor-General, Mr DP Neazor QC, and Chief Inspector Trendle. Note, however, that Chief Inspector Trendle added a further reservation about access to police job sheets after reviewing the completed report in draft and this is set out at pp 54-55 of the Report, above n 96.

99 Above n 96, paras 209-220.

100 The Committee is quite right that conditions on subsequent use are not "usually" imposed under the OIA. But the Act does give, in a backhanded way, the power to impose such

thought it was desirable to restrict the use of information obtained for the conduct of criminal proceedings to those proceedings only, and it proposed sanctions for wrongful disclosure. Secondly, the committee thought that the prosecution should not be subjected to requests under both the OIA and the proposed disclosure rules.[101] If this were done, different tests would be applied to the same information, and the response would be subject to two different review procedures, and delays and charges of inconsistency would inevitably result. Lastly, it was said to be sensible that a purpose-built comprehensive code should displace the more general freedom of information regime in the Act, though it was stressed that the proposed scheme "should not be seen as operating more restrictively than the Official Information Act".[102] The committee discussed *Pearce* at first instance and pointed out that Police practice had subsequently "been to refuse *prior* access to much of the information which would fall within our proposal for disclosure".[103] Provision was recommended also for post-trial disclosure when further important information came to hand. Information sought under the OIA for purposes other than use in the criminal proceeding, the committee noted, would still be governed by the OIA.[104]

Since the Department of Justice was conducting a general review of criminal procedure the committee decided not to draft legislative proposals but instead to set out the proposed scheme which could be considered as part of the departmental review.[105] In retrospect that was probably a mistake. It almost certainly accounted for the lack of legislative action on the recommendations before the Court of Appeal decided *Pearce*.

III IN THE COURT OF APPEAL

The Court of Appeal, sitting as a bench of five judges, overturned the decision at first instance and held that the briefs of evidence should have been made available under the Act. The judges were unanimous that the briefs of evidence requested from the Police were "personal information" to which the requester had a legal right under section

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conditions. See generally I Eagles, M Taggart and G Liddell *Access to Official Information in New Zealand* (OUP, forthcoming) §4.

101 This has been a concern voiced overseas with criminal discovery-motivated FOI requests but that experience suggests that the Committee underestimated the difficulty of drafting such an exclusion. See generally Tomlinson "Use of the Freedom of Information Act for Discovery Purposes" (1984) 43 Maryland LR 119, 194-200 and Australian Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982: A Report on the Operation and Administration of the Freedom of Information Legislation* (December 1987) paras 3.64-3.65, pp 53-54.

102 Above n 96, para 220.

103 Above n 96, para 215 (emphasis in original). Precisely what Jeffries J had hoped to avoid by not making a formal order. See above n 84.

104 Above n 96, para 219.

105 Above n 96, 48. As McMullin J pointed out in *Pearce*, above n 1, 407 it has not been the practice of the Committee to annex draft legislation to its Reports but "its recommendations want nothing for clarity and the absence of a draft Bill does not reflect any lack of conviction or certainty on the Committee's part". See also McMullin "The Work of the Criminal Law Reform Committee" (1988) 13 NZULR 199, 202.

24 of the OIA and that section 6(c) did not provide good reason to withhold in this case. The critical differences from the approach in the High Court were that, whereas Jeffries J had dismissed as "unsound" the analogy with the practice of disclosure at trials on indictment and found briefs of evidence to be inextricably intertwined with the investigative process, the majority of the Court of Appeal (Cooke P, Somers, Casey and Bisson JJ) found the analogy compelling[106] and were able to draw a sharp distinction between investigation and the commencement of criminal proceedings.[107] This laid the foundation for their holding that once summary criminal proceedings have commenced, the disclosure of prosecution evidence under the OIA, broadly similar to that disclosed prior to trials on indictment, would not be likely to prejudice the investigation of offences or the right to a fair trial as a general rule. It was allowed that exceptional cases would arise, where in the particular circumstances there would be a real risk of prejudice to the interests protected by section 6(c), but these would be very much the exception and could be accommodated.[108]

The fifth member of the court, McMullin J, was impressed by the analogy with disclosure in trials on indictment to the extent that he agreed that section 6(c) did not justify a blanket exclusion of briefs of evidence in all summary prosecutions.[109] Nonetheless McMullin J expressed agreement in principle with the approach taken by Jeffries J and placed more emphasis than the other judges on the risk of witnesses being intimidated and coerced.[110] Also McMullin J stood alone in rejecting any rule of general application, preferring to deal with each request case by case.[111] In the circumstances of this case the judge concurred in the result because the witnesses were police officers and were therefore not likely to be intimidated.

The leading judgment was delivered by Cooke P with whom Somers J simply agreed entirely. Bisson J wrote a short concurring judgment in which he expressed agreement with Cooke P. Together these judgments represent the majority view of the court. For the sake of convenience I will refer to this as the view of the plurality. Casey J was in agreement with the plurality in holding that disclosure would be the general rule, but his judgment is more tentative in other respects and is openly critical of the OIA as an instrument of criminal discovery. This sets his judgment apart from those of the plurality and places Casey J somewhere between them and McMullin J.

The judgment of Cooke P, and to the extent agreed in by Bisson J the view of the plurality, can be summarized as follows: as a general rule, briefs of evidence, witness statements, police job sheets, notes of interviews and the like must be made available, upon request under the OIA, both in summary proceedings and in trials on

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106 Above n 1, 393-394 (Cooke P), 412 (Casey J) and 415 (Bisson J).
107 Above n 1, 397, per Cooke P. See also, 415, per Bisson J.
108 Above n 1, 397-398 and 400 (Cooke P), 412 (Casey J) and 416 (Bisson J).
109 Above n 1, 406.
110 Above n 109.
111 Above n 109.

indictment.[112] Extensive reference was made to the Report of the Criminal Law Reform Committee, which had recommended legislation along broadly similar lines. Furthermore, power was bestowed on the District Court to adjudicate disputes of legal right under section 24 in summary proceedings. In the light of this Cooke P concluded by questioning the need for legislative action as proposed by the Law Reform Committee.[113]

What distinguishes the approach of Cooke P and Somers J from that of Casey and McMullin JJ, and possibly Bisson J, all of whom held the Act to require some kind of pre-trial disclosure, is the evident zeal with which the President wielded the OIA to fashion an entire system of criminal discovery. General rules, much like legislation, were laid down with a view to exhaustiveness, covering material and proceedings not in dispute before the court.[114] The President said that gaps, if any, in this scheme were to be filled by "judicial resource".[115] And he even suggested that this judicial construct might work better than the more elaborate legislative model of the Criminal Law Reform Committee, or at least might be given a trial.[116] Cooke P, obviously emboldened by the work of the Criminal Law Reform Committee, did not see the need for the courts to wait upon the legislature to reform the law of criminal procedure when suitable tools were ready to hand.

In contrast, McMullin and Casey JJ did not think the OIA was a suitable mechanism for criminal discovery. That, they reluctantly concluded, was the effect of the clear wording of the Act, "however unsuitable an instrument [of criminal discovery] it may be" and whatever the "practical difficulties".[117] To Casey J the Act appeared "an unwieldy instrument of pre-trial criminal discovery" and "a poor substitute for rules of discovery properly developed for use in criminal proceedings" as proposed by the Criminal Law Reform Committee.[118] McMullin J also clearly preferred a legislative solution.[119]

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112 Bisson J restricted his own observations to summary proceedings, although he agreed with the reasons given by Cooke P: above n 1, 415-416. If this agreement is read in the light of his own reasons for decision then the obiter statements of the President in relation to the impact of the OIA on trials on indictment would not have the support of a majority of the Court.

113 Above n 1, 400-401. Bisson J did not go so far, saying "[u]ntil such time as discovery in criminal cases is expressly provided for in legislation, the provisions of the Official Information Act go some way in overcoming inconsistencies in practice when applied in the manner described by the President, with whose views I entirely agree" (415).

114 Above n 1, 388 and 393 (Cooke P) and 414 (Bisson J).

115 Above n 1, 400, per Cooke P.

116 Above n 1, 400-1, per Cooke P.

117 Above n 1, 407, per McMullin J.

118 Above n 1, 413, 414.

119 Above n 1, 407.

A *The Impact of the Work of the Criminal Law Reform Committee*

I suggested above that the Report of the Criminal Law Reform Committee emboldened the plurality. Certainly the reasoning of the court mirrors that of the committee in many important respects. But the Report did more than merely "fortify" the judges in their views.[120] Its presence overcame a significant obstacle to judicial law-making: the inability of the court to carry out wide-ranging investigations to ascertain how particular Common Law rules are working, whether they accord with the needs of the community and, if not, how they might be altered for the better.[121] The Report redressed this disadvantage and so to that extent the court in *Pearce* was in a similar position to the legislature. A comparison of the approaches of the committee and the court is instructive, not the least because it enables an informed choice to be made between the rival schemes.

The Criminal Law Reform Committee proposed a "defined regime" with the duties of the respective parties "clear and enforceable",[122] thereby reducing the variability and uncertainty in practice.[123] However, the committee was more troubled than the court proved to be about the degree of access the accused should have to information held by or known to the prosecution but not forming part of its case.[124] This stemmed from the committee's view that discovery serves the ends of the adversary process and therefore is bounded by and large by materiality and relevance to the central issues in the pending trial.[125] OIA access, however, proceeds from a fundamentally different premise. It provides for the disclosure of information about the workings of government to the general public in order to further democratic ideals, and for access to personal information by individuals to ensure fairness and accountability.[126] Generally speaking, a showing of need, reasonableness or relevance is not required.[127] Criminal discovery, on the other hand, is designed to acquaint the accused with the prosecution case, thereby avoiding surprise at trial and facilitating speedy resolution of the proceeding. That is why fishing is not permitted in a discovery regime bounded by need and relevance requirements, but is no objection to an OIA request. Some oppose reform of criminal discovery via freedom of information legislation for this very reason. In *Pearce*, for

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120 "Fortified" is the term used by Cooke P: above n 1, 394.

121 See *State Government Insurance Commission* v *Trigwell* (1978) 142 CLR 617, 633-634, per Mason J (HCA).

122 Above n 96, para 86.

123 Above n 96, para 91.

124 Above n 96, para 106.

125 Above n 96, paras 92-95, 108 and 145.

126 See OIA, s4 and long title.

127 See *Sixth Compendium of Case Notes of the Ombudsmen* (1985) Case No 216 et al, pp 82, 85 (GR Laking), Case No 335, pp 89, 93 (GR Laking). Cf OIA, ss9(1), 9(2)(k), 18(h), 27(1)(h), 28(1)(a) and Ombudsmen Act 1975, s17(2)(a) and (b).

instance, Casey J referred to *R* v *Connell* as "no more than a fishing expedition", and went on to say of OIA access:[128]

> It is ... by no means certain that widespread attempts to fish for information could be prevented, notwithstanding their generally oppressive or vexatious character. In civil actions, on the other hand, appropriate discovery procedures have been developed by the Courts, enabling them to exercise firm control over the exchange of all relevant information designed to secure a fair and expeditious trial.

In short, the committee and the plurality proceed from different premises. The committee is geared to the adversarial trial process whereas the plurality by necessity is attuned to the OIA.

The committee recognised that its proposals would increase demands on judicial resources and that copying, supplying, and evaluating information would involve additional expenditure. In order to minimise delay and cost, thereby (one imagines) making the scheme more acceptable to the powers that be, the committee placed two limits on disclosure.[129] First of all, only some information was to be disclosed as a matter of course. Other information was to be disclosed upon request only. Secondly, in making such a request the accused or counsel had to identify a particular interest in the information or show its relevance to the issues at trial.[130] Under the OIA, in contrast, a request is always necessary but, as discussed above, relevance or need generally will not be issues. Neither approach would require the accused to pay directly for access.[131]

A significant feature of the scheme proposed by the committee was a difference in the amount of disclosure before plea and after a not guilty plea is entered. Before plea the accused would be entitled as of right and automatically to the disclosure of the charge, its statutory basis, the maximum penalty (and any minimum penalty), and a summary of the facts alleged by the prosecution.[132] In addition, the defence could request further information itemised in the Committee's Report but not, at this stage, briefs of evidence of witnesses or similar witness statements.[133] These and much else besides were to be disclosed at the second stage, after a not guilty plea is entered but before trial.

This two-step procedure cannot be replicated under the OIA scheme of access. Interestingly, at an early stage in *Pearce* the Police offered counsel a summary of facts as a compromise. But this was rejected as inadequate for reasons given in the reasoned report of the Chief Ombudsman.[134] There is nothing in *Pearce* to stop an accused from requesting under the Act copies of witness statements from the Police after proceedings are commenced but before plea. (The exemption justifying non-disclosure if the

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128 Above n 1, 413. See also the minority view on the Criminal Law Reform Committee, above n 96, para 150 (Mr Neazor QC, Chief Inspector Trendle).

129 Above n 96, para 112.

130 Above n 96, para 113.

131 Above n 26 and accompanying text.

132 Above n 96, para 117.

133 Above n 96, para 119.

134 Above n 8, p 14.

information will soon be publicly available is not applicable to requests for personal information).[135]

This is one of the most important respects in which OIA analysis departs from the recommendations of the committee. Cooke P pointed out this difference, saying the "elaborate" two-stage procedure "would presumably add quite considerably to the administrative burden and cost falling on the police".[136] This was his major reason for suggesting that "a less sweeping change" by application of the law laid down in *Pearce* might produce "much the same result or go as far as is reasonable at the present stage".[137] This is rather ironic; in recommending varying disclosure before and after plea the committee had attempted to balance the advantages of disclosure against administrative efficiency and cost. Uppermost in the committee's mind was the desire to minimise implementation costs, as far as this was consistent with the goals of providing adequate and fair disclosure. In the practical world of law reform one eye must be kept on political reality,[138] which today means cost consciousness. Not so, of course, judges in courts whose lawmaking efforts just as much visit costs of implementation but whose decisions come into effect immediately on pronouncement.[139] Cooke P did not disclose how the scheme fashioned in *Pearce* will be cheaper and less burdensome to administer for the Police than that proposed by the committee. He did say, however, that a period of operation under the *Pearce* regime might be "useful experience" which could shape future legislation if it were found necessary.[140]

The committee proposed the mandatory disclosure of the brief of evidence and/or the written statement upon which the expected testimony of each prosecution witness is based, and any previous inconsistent statement made by such a witness.[141] Furthermore, the defence could request a copy of any other "statement" made by a prosecution witness, whether signed or unsigned, and including records of interview.[142] However the committee was emphatic that one category of statements should not be disclosed:[143]

> That category includes the officer in charge of the case and any other investigating officer who makes a report in the course of an investigation. We have a clear view that what is to be disclosed is information relevant to the content of evidence which will or could be given at trial and that disclosure should not extend to the investigative process itself. On

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135 OIA, s18(d).

136 Above n 1, 401.

137 Above n 136.

138 Cameron "Allies of a Kind: The Politics of Law Reform" [1988] NZLJ 18.

139 In the different context of imposing procedural fairness, Sir Robin Cooke has accepted extra-judicially that it may be relevant in working out what is required to take into account cost and administrative efficiency. See Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1, 12 n48.

140 Above n 1, 401.

141 Above n 96, 25.

142 Above n 141.

143 Above n 96, para 130.

this approach, directions to investigators, progress reports, summaries of views, records of conferences and the like would not be required to be disclosed.

Again the different premises of OIA disclosure may dictate a different result. With the holding in *Pearce* that the balance shifts in favour of disclosure once criminal proceedings are commenced[144] much of this routine investigative police work would seem to be discloseable as far as it relates to the accused. In *Pearce* Cooke P was careful not to suggest that any of this material would be available under the Act, saying some of it might disclose police investigation methods and that some will not be about the accused.[145] Having earlier referred to the committee's recommendations in this respect, Cooke P said that in order "[t]o give workable effect both to s6(c) and to the right conferred by s24 lines have to be drawn somewhere".[146] But if the information is about the accused, proceedings have commenced, and disclosure will not disclose investigative techniques there seems to me to be no basis in the Act for drawing a line of non-disclosure around this material.[147]

At the end of the Report Chief Inspector Trendle expressed some additional views. The Chief Inspector was concerned that "criminal discovery procedures ... [should] not provide the means whereby the trial itself becomes diverted from its central issues".[148] He feared that abuse might occur if police job sheet records of witness interviews were made available. Trendle emphasised that a police job sheet contains only an outline of what an interviewed person has said, that it is prepared from notes and recollection of the interview, and it is not signed by the witness, who rarely ever sees it. In the absence of a material discrepancy from the evidence given at trial, the Chief Inspector questioned the appropriateness of permitting cross-examination of the witness based on the job sheet statement.[149] Cooke P referred to these views in *Pearce* but concluded that, although police job sheets containing accounts of interviews were more marginal than briefs of evidence and written statements of witnesses, the principle of disclosure in section 5 required the disclosure of job sheets containing information about the requester after a charge has been laid.[150]

The right of access under section 24 to statements of any variety is restricted to those containing "personal" information about the requester. Cooke P pointed out that

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144 See above n 107 and accompanying text.

145 Above n 1, 397. The former would be protected presumably by s6(c) and the latter would not be "personal" information and therefore would not be accessible as of right.

146 Above n 145.

147 Cf *Teki* v *R*, High Court, Wanganui, M 26/89, 9 June 1989, McGechan J (voir dire). Following *Pearce*, McGechan J in that case made an order for defence access to all references to the accused in the undercover agent's daily notes. But, after inspecting the operator's diary, he declined immediate access to the references to the accused in that diary "on the basis of the sensitivity of undercover drug work and s6(c) Official Information Act" (p2). Leave was reserved for the defence to apply further but, in reliance on Crown Counsel's assurance that there was no useful material in the diary, defence counsel declined to apply.

148 Above n 96, 54.

149 Above n 148.

150 Above n 1, 396.

some of the information contained in briefs of evidence, witness statements, job sheets and documentary evidence "will not be about that person in any natural use of language - a medical report on a victim, for instance, or photographs, sketches and plans of houses or localities".[151] This troubled Casey J:[152]

> The kind of information available under the Act to an accused may not coincide with what he or she wants, and much of it may be quite irrelevant to the particular case. For example, in a case of sexual violation by rape he may have a right to the complainant's statement about him as personal information, but no right to a medical report on her.

This was one of the reasons Casey J gave for thinking the Act an unwieldy instrument for pre-trial criminal discovery. The avoidance of any such distinction between personal and official information is an attraction of the committee's proposals.

A further difficulty with the Act in this context is that its coverage is restricted to "information". It is difficult to see how the Act can be used to gain access to real evidence or many exhibits collected by the prosecution,[153] as the Criminal Law Reform Committee proposed.[154] Defence counsel will likely be thrown back on the Common Law.[155]

The committee proposed that disclosure be made by the prosecutor and did not favour a strict timetable for disclosure.[156] Under the OIA, as we will see later, it is likely that requests will have to be made to the Police and not to the prosecutor.[157] The Act's time limits will also apply, so that requests must be answered within twenty working days unless exceptional circumstances justify an extension of time.[158] As it is difficult to frame an OIA request for anything relevant that may turn up in the future there will be a continuing need under the *Pearce* scheme for the prosecutorial duties of disclosure, which will commingle with the statutory duties under the OIA.[159] The committee stressed that an accused who appears without legal representation should have the same rights to request and receive information as would counsel on his or her behalf.[160] Under the committee's scheme there is a mandatory disclosure of much information, but OIA access is triggered by a request alone. One wonders whether the unrepresented accused will know enough to make an OIA request.

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151 Above n 150. See also above n 1, 402-403, per McMullin J.

152 Above n 1, 413.

153 See also Jordan, Kehoe and Schechter "The Freedom of Information Act - A Potential Alternative to Conventional Criminal Discovery" (1976) 14 Am Crim LR 73, 99-101.

154 Above n 96, paras 155-156.

155 See generally Campbell "Access to Exhibits in Criminal Trials" (1986) 8 Queensland Lawyer 177.

156 Above n 96, paras 157-159.

157 See below nn 271-274 and accompanying text.

158 OIA (as amended in 1987), ss15(1) and 15A, incorporated into Part IV by s24(3).

159 Cf *Pearce*, above n 1, 392, per Cooke P with Criminal Law Reform Committee, above n 96, para 160.

160 Above n 96, para 161.

The court and the committee agree on the involvement of judges to resolve access disputes.[161] Furthermore the exemptions from disclosure proposed by the committee are mirrored in the Act.[162] Reliance on OIA access, however, rules out expanding disclosure by the defence and extending the disclosure scheme to cover private prosecutors; both of which the committee recommended.[163]

As I have pointed out already, Cooke P concluded his judgment in *Pearce* by suggesting that the legislature stay its hand in implementing the committee's proposals and give the OIA scheme of criminal discovery established in *Pearce* a chance to prove itself.[164]

All of this prompts three comments. Firstly, while it is a truism today that the legislature has displaced the courts as the major law-maker, paradoxically this orgy of statute-making has expanded the judges' law-making role.[165] The presence of the OIA permitted the court in *Pearce* to fashion a system of pre-trial disclosure, something the courts had been unwilling or unable to do without statutory assistance.[166] Secondly, the virtue of judge-made law is its flexibility but its vice is uncertainty. This can be seen clearly by comparing the approach of the court with that of the committee. Thirdly, to my mind it was premature to develop an entire system of criminal discovery out of the OIA. It is important in matters of judicial law-making, as Professor Dale Gibson has said, to determine the likelihood of remedial action being taken by the legislature:[167]

> If the prospect of legislative reform is good, the courts should bide their time. If, however, the legislative branch has had ample opportunity to consider the question, and has not done so ... the courts should be willing to take the initiative themselves.

Pearce was not a case where the problem before the court was simply a troublesome precedent which a law reform committee had recommended be repealed by statute.[168] The committee had given adequate reasons for not drafting legislation itself, the Department of Justice review was progressing and the government through the Minister of Justice had signalled support for the reform.[169] It would have been more appropriate, for the court to have contented itself with resolution of the dispute in hand with perhaps some

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161 Above n 96, paras 167-168, 202-208. See below n 202 and accompanying text.

162 Cf above n 96, para 176 with OIA, s27(1).

163 Above n 96, paras 158, 181-201. Prosecutions initiated by local bodies subject to the Local Government Official Information and Meetings Act 1987 will be covered by the analysis in *Pearce*: *Ross* v *Tamaki City Council,* below n 216.

164 Above n 1, 401.

165 Traynor "The Courts: Interweavers in the Reformation of Law" (1967) 32 Sask LR 201, 202.

166 Only six years prior to the enactment of the OIA the Court of Appeal in *R* v *Mason,* above n 87, failed to seize an opportunity to judicially reform the Common Law and practice of criminal discovery.

167 Gibson "Judges as Legislators: Not Whether But How" (1987) 25 Alta LR 249, 259. Cf Smith "Judicial Law Making in the Criminal Law" (1984) 100 LQR 46, 68-69.

168 Cf *R* v *Camplin* [1978] AC 705, 725-726, per Lord Morris (HL).

169 Above nn 94 and 95 and accompanying text.

indication that the judges would not be prepared to await remedial legislation forever.[170] It seems likely that the legislature would have moved quickly if the court had been unanimous in urging legislative action. Obviously views will differ over the appropriateness of this approach.[171] It can be said in defence of the court that the legislature can always overrule the decision, and enact the proposed legislation.[172] But this approach does raise the stakes in considering legislative action, thereby creating the possibility of tension between the three branches of government.

At the beginning of this paper I said that *Pearce* showed the court in an activist mode, and the use made of the Committee's Report and the evident desire to pre-empt legislation show this. But such labels can be misleading or, at least, might not tell the full story. I will argue in what follows that the plurality can be seen as pursuing actively the conservative goal of preserving decision-making about criminal procedure within the province of the judiciary.[173]

B Enforcement

The most problematic aspect of *Pearce* is the holding, in which all the judges appear to concur (albeit Casey J with hesitation), that the newly found right to criminal discovery in the OIA can be enforced directly by the District Court.[174] Cooke P downplayed the difficulty, saying such "procedural points ... should not be exaggerated .... [for] clearly any procedural difficulties cannot be allowed to negate statutory rights".[175] In contrast, Casey J confessed to "some reservations" about whether the District Court could be bestowed with this enforcement jurisdiction.[176] In the end he simply assumed that it could in concluding that disclosure should have been made in this case.[177] In this section of the paper, which of necessity will touch on a good many other things, I suggest that Casey J had good reason to feel ill at ease.

The "standard remedy" for direct enforcement of the statutory right in section 24, as Cooke P pointed out, is an application to the High Court for judicial review of a refusal

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170 Compare *Beswick* v *Beswick* [1968] AC 58, 72, per Lord Reid (HL) with *Woodar Investments Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 All ER 571, 591, per Lord Scarman (HL). See generally Levy "Who is to accomplish Criminal Law Reform: The Interrelationship between Parliament and the Judiciary" (1988) 22 Is LR 424.

171 Cf Devlin "Judges and Lawmakers" (1976) 39 MLR 1, 13 (arguing that the rules of evidence and procedure are a special case where it is the duty of the judiciary to take full charge of the Common Law).

172 See Fraser "Law Reform: The Judicial Contribution" [1988] Jurid Rev 26, 27.

173 See Kerr "Renewing the Law" (1974) 7 Sydney LR 157, 159.

174 Above n 1, 399 (Cooke P), 413-414 (Casey J) and 415 (Bisson J). McMullin J did not address the point but in view of his concurrence with the result must be taken to agree on this point.

175 Above n 1, 398.

176 Above n 1, 414.

177 Above n 176. It is possible to relate this to Casey J's concern about the lack of "defined procedures" in the OIA, which, in turn, influenced his view that OIA access "would be a poor substitute" for legislated rights of criminal discovery along the lines proposed by the Criminal Law Reform Committee: idem.

to disclose and an order in the nature of mandamus.[178] This ancient prerogative writ has for centuries compelled disclosure of public records to which the applicant has a legal right of access.[179] But the law regarding mandamus was technical and the case law discloses instances where the beneficiaries of legal rights of access were denied the remedy for lack of standing (eg having no special interest) or for having an improper motive (eg to gain information to aid legal action).[180] These limitations on the remedy are unlikely today to stand in the way of the High Court armed with the remedial flexibility of the Judicature Amendment Acts of 1972 and 1977.[181] More of an obstacle at first sight is the Common Law rule that mandamus does not lie against the Crown or Crown servants.[182] The utility of mandamus in the OIA context could be seriously curtailed by this limitation. But it has been argued elsewhere that where both the legal duty is imposed directly on a minister or Crown servant and is owed directly to the applicant - as occurs in the OIA - mandamus can issue.[183]

While mandamus is the "standard" remedy for direct enforcement of statutory rights it is not the only one. The remedy of declaration is available against the Crown and its servants,[184] as well as all other public authorities covered by the OIA. The jurisdiction

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178 Above n 1, 399.

179 See JW Willcock *The Law of Municipal Corporations; together with a brief sketch of their history, and a treatise on Mandamus and Quo Warranto* (William Benning, London, 1827) 34.

180 See *R* v *Justices of Staffordshire* (1837) 6 Ad & E 84, 112 ER 33; *R* v *Southwold Corporation; Ex p Wrightson* (1907) 97 LT 431; *R* v *Hampstead Borough Council; Ex p Woodward* (1917) 116 LT 213; *R* v *Baines Borough Council; Ex p Cowlan* [1938] 3 All ER 226; and generally on the topic of problems in enforcing statutory rights to information see TG Brown *Government Secrecy, Individual Privacy & the Public's Right to Know* (1979, Research Publication 11, prepared for the Ontario Commission on Freedom of Information and Individual Privacy). See also on the relevance of the motives of the applicant for mandamus, JM Evans (ed) *de Smith's Judicial Review of Administrative Action* (4 ed, Stevens, London, 1980) 559.

181 Extra-judicially Cooke P has said "procedural complications in administrative law seem to be almost a thing of the past in New Zealand": Cooke "The Public and Administrative Law Reform Committee: The Early Years" (1988) 13 NZULR 150, 153-154.

182 See, eg, *R* v *Powell* (1841) 1 QB 352; *R* v *Secretary of State for War* [1891] 2 QB 326. This Common Law rule is unaffected by the Crown Proceedings Act 1951: *VUWSA* v *Shearer (Government Printer)* [1973] 2 NZLR 21, 24, per Wild CJ (HC).

183 Eagles, Taggart and Liddell, above n 100, §27.

184 Crown Proceedings Act 1951, s17(1)(a).

of the High Court to make a declaration of legal right is both original and supervisory. As Zamir explains:[185]

> The original jurisdiction may be invoked for the determination of disputes at first instance; the supervisory jurisdiction is exercised to review decisions arrived at by other bodies. In many cases the courts have both original and supervisory jurisdictions. Accordingly, upon a particular issue they may be resorted to either in the first instance or, if the issue had already been decided by another authority, for the review of that decision. Furthermore, both original and supervisory jurisdictions may be exercised in one action: the court may declare invalid a decision of an administrative authority and then proceed to declare upon the disputed right ... of the plaintiff.

However, one or both of these arms of the court's jurisdiction may be restricted or ousted by statutory provision;[186] as may the court's supervisory jurisdiction by way of mandamus.

The issue whether the legislature had intended to oust the court's original and supervisory jurisdiction by providing an avenue of complaint to the Ombudsman was considered in depth by Cooke P and was touched on by Casey J. The starting point is the old learning on the prerogative remedies, particularly but not exclusively mandamus, that where an Act creates an obligation and provides a remedy no other remedy can be adopted.[187] Cooke P referred to this as the principle in *Pasmore* v *Oswaldtwiste Urban District Council*,[188] a leading mandamus case in the House of Lords. But the principle was held not to apply here to oust the court's role of enforcing legal rights because the ombudsman remedy was incomplete and therefore not exclusive. Complaint to the ombudsman, who under Part IV can only make recommendations, was said to be an avenue of redress "in the political and parliamentary spheres" and does not "perfect the right given by s24".[189] Cooke P emphasized that Parliament conferred a legal right on individuals and, by reference to the Act itself, extracts from the *Danks Report* and a published paper by Professor Sir Kenneth Keith, he demonstrated beyond doubt that the legislative intention was that this right be legally enforced "through the Courts". Casey J spoke of the courts having a concurrent jurisdiction with the Ombudsman in this field.[190]

But what did the Danks Committee mean when it referred to enforcement "through the Courts"? In the two passages quoted by Cooke P from the *Danks Report* the phrases "through the Courts" and "by the Courts" appear and are given emphasis.[191] On the face

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185 I Zamir *The Declaratory Judgment* (Stevens, London,1962) 69-70. See also Evans, above n 180, 502-3, 514-8.

186 Above n 185, 69-70, 170-1.

187 See generally GE Robinson *Public Authorities and Legal Liability* (University of London Press, London, 1925) 114-29 and *Maxwell on the Interpretation of Statutes* (11 ed, Sweet & Maxwell, London, 1962) ch 5.

188 [1898] AC 387, cited in *Pearce*, above n 1, 389.

189 Above n 188.

190 Above n 1, 413.

191 Above n 1, 389-390.

of it the generic term "Courts" naturally covers all courts of law. Some support for this can be found in the fact that section 2(6) excludes from the Act information held by "A Court" and undoubtedly this covers the District Court. But was the District Court really intended by the Danks Committee to be one of "the Courts" entrusted with the enforcement of section 24 legal rights? In a passage not quoted by Cooke P the Danks Committee said:[192]

> This clause [enacted as s35] lays down a special procedure for cases where the complainant alleges that he has been denied information to which he is entitled as of right. In such a case the Committee considers that he should be able to seek a review by the Ombudsman as an alternative to Court proceedings. However, the procedure adopted in clause 31 [enacted as s32], whereby an Ombudsman's recommendation is to create a public duty to observe it subject to a direction by a Minister or the Prime Minister, is inappropriate where the issue is the existence or otherwise of a legal right. The Ombudsman's recommendation in such a case amounts to an interpretation of the law and as such it should neither be binding nor subject to Ministerial veto. The clause therefore requires the Minister to advise the Ombudsman within a specified time whether he is prepared to accept the Ombudsman's recommendation. If he is not, the issue can be resolved only by Court proceedings brought by the person seeking the information.

To which court could proceedings be brought when the 1982 Act did not specifically confer jurisdiction on any court? Only a court with general and unlimited jurisdiction; in other words, the High Court.[193] This point will be picked up again shortly.

In discussing the remedy of mandamus Cooke P pointed out it "could be cumbrous and time-consuming".[194] The other disadvantage of enforcement of access rights in the High Court, rather than the District Court, was said to be delay. This concerned all the judges. Cooke P spoke of "[t]he possibility of tactical delay",[195] and Casey J saw the process "could be manipulated by an unscrupulous defendant".[196] This was one of the reasons why the court was not content to leave the enforcement of section 24 rights to the Ombudsman. The time taken by that office to investigate, and the uncertainty about whether or not favourable recommendations would be acted upon lead Cooke P to the view that this would "tend to subvert the maintenance of law,"[197] while Casey J thought it might prejudice the right to a fair trial.[198] Also, as we have seen already, Cooke P thought High Court proceedings for mandamus could be time-consuming and, in another passage, he spoke of the undesirability of trials being held up while possibly lengthy contests about the disclosure of information are litigated.[199] This concern over

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192 Above n 14, 86 (comment on s 34, enacted as s35).

193 *Pearce*, above n 1, 413, per Casey J ("Original Court jurisdiction over the Act would be exercisable by the High Court ....").

194 Above n 1, 399.

195 Above n 194.

196 Above n 1, 413.

197 Above n 1, 399.

198 Above n 1, 413.

199 Above n 1, 399.

delay is an echo of the American case law on this subject[200] and Cooke P quoted a long passage from an American lower court decision to reinforce the point.[201]

All of this leads up to this passage of critical importance in the reasoning of the President:[202]

> In proceedings on indictment there is no reason why a High Court Judge cannot determine a preliminary or incidental question as to whether the accused has received information to which he is entitled under the Official Information Act. In my opinion the same applies to a District Court Judge in relation to summary proceedings. Inferior Courts have by implication the necessary powers to control their own proceedings and to determine incidental or preliminary questions of law and fact: *O'Toole* v *Scott* [1965] AC 939, 959; *Re GJ Mannix Ltd* [1984] 1 NZLR 309; *McMenamin* v *Attorney-General* [1985] 2 NZLR 274 and the authorities there collected at p276. Admittedly none of the foregoing cases is precisely in point, but in principle and quite apart from specific authority it seems to me that any Court must be able to postpone or adjourn its hearing if it appears to the Court that the defendant is disadvantaged by being denied access to information to which he is entitled by statute .... [I]n most cases the provision before trial of personal information on request under the Official Information Act and the extent of what has to be provided should follow as a matter of course and without any need to ask a Judge for a ruling. In exceptional cases a ruling can be sought by applying for a postponement or adjournment of the trial ... pending delivery of the information requested. At that stage the Judge will be able to determine, if he thinks fit, whether a refusal has been for good reason.
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> It would be for the Judge in his discretion to decide whether to give such a ruling and on any postponement or adjournment, a discretion extending also in District Courts to whether after a ruling time should be allowed for challenging it by review proceedings in the High Court. Otherwise the point will be able to be raised after trial on an appeal from the conviction....

In order to analyse fully this reasoning it is necessary first to understand the differences between superior and inferior courts, unlimited and limited jurisdiction, and inherent jurisdiction and inherent powers. There are two types of courts of law, superior courts and inferior courts. The labels are not pejorative but descriptive of jurisdiction. A superior court is deemed to have general or unlimited jurisdiction.[203] As far back as 1667, it was said in *Peacock* v *Bell*[204] that "nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so". On the

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200 See *United States* v *District Court, Central District of California, Los Angeles, California* 717 F 2d 478, 481 (9th Cir 1983) and *United States* v *Murdock* 548 F 2d 599, 602 (5th Cir 1977).

201 Above n 1, 399. The case is *United States* v *Wahlin* 384 F Supp 43, 47 (1974) (WD Wis 1974).

202 Above n 1, 399-400.

203 See A Rubinstein *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press, Oxford, 1965) 11-13. For a discussion of the limits on a superior court's general jurisdiction see Lanham "The Reviewability of Superior Court Orders" (1988) 16 MULR 603.

204 (1667) 1 Wms Saund 69, 73-74, 85 ER 84, 87-88.

contrary, an inferior court is one which is limited by law with regard to either the area, the persons or the subject matter over which it has jurisdiction.[205] Again to quote from *Peacock* v *Bell*, "nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged".[206] Inferior courts, then, are courts of limited jurisdiction.

By way of further contrast between the two types of court, only a superior court enjoys inherent jurisdiction.[207] This jurisdiction, which can be defined for present purposes as[208]

> The authority of the [superior] judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective fashion,

is not derived from statute or court rule, but is enjoyed by the court by virtue of its very nature as a superior court of unlimited jurisdiction.[209] Inferior courts of limited jurisdiction by their nature cannot enjoy inherent jurisdiction. While it is still said sometimes that the jurisdiction of these inferior courts must be deduced from the four corners of the constituting statute it has long been recognised that inferior courts have powers incidental to or implied from the actual powers conferred.[210] The superior courts have gone beyond implying such powers from statute as a matter of interpretation and have recognised that inferior courts have all necesary powers to control their own proceedings and to prevent abuse.[211] Increasingly these powers of inferior courts are termed *inherent powers*.[212]

We are now in a better position to understand the passage quoted above. There can be no quarrel with the point that an inferior court has the power to postpone or adjourn its hearing in order for an OIA request to be resolved (by the proper body). This was

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205 Rubinstein, above n 203, 11.

206 Above n 204.

207 See *R* v *Forbes; Ex p Bevan* (1972) 127 CLR 1, 7, per Menzies J (HCA). This passage was quoted in part with approval in *Taylor* v *Attorney-General* [1975] 2 NZLR 675, 678, per Wild J (CA).

208 Jacob "The Inherent Jurisdiction of the Court" (1970) 23 Curr Leg Probs 23, 28. For other treatments see Mason "The Inherent Jurisdiction of the Court" (1983) 57 ALJ 449 and de Jersey "The Inherent Jurisdiction of the Supreme Court" (1985) 15 Queensland Law Society J 325.

209 Jacob, above n 208, 23-5; J Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta, Cape Town, 1985) 1. Mason argues that inferior courts should have inherent powers tantamount to inherent jurisdiction but his is a voice in the wilderness: above n 208, 456.

210 See, eg, *McMenamin* v *Attorney-General* [1985] 2 NZLR 274, 276, per Somers J (CA) and *Overton* v *Loukides* [1970] VR 462 (SC, Vict).

211 See, eg, *O'Toole* v *Scott* [1965] AC 939 (PC); *Miller* v *Ryan* [1980] 1 NSWLR 93 (NSWSC, CL Div); *Bosch* v *Ministry of Transport* [1979] 1 NZLR 502 (HC); *Mills* v *Cooper* [1967] 2 QB 459 (QB).

212 See, eg, *Bogeta Pty Ltd* v *Wales* [1977] 1 NSWLR 139, 149, per Hutley JA (NSWCA); *Re GJ Mannix Ltd* [1984] 1 NZLR 309, 316, per Somers J (CA); *Bryant* v *Collector of Customs* [1984] 1 NZLR 280, 282, per Richardson J (CA).

described in an Australian case as the inherent *power* of an inferior court to adjourn proceedings for a reasonable time and upon reasonable grounds.[213] And while Cooke P placed this power of adjournment firmly within the discretion of the inferior court judge it must not be forgotten that he quoted with apparent approval dicta in an American case that "judicial economy and basic fairness" demand that the accused have access to requested information before the trial goes ahead.[214]

The critical issue, however, is whether the District Court has inherent power to adjudicate upon any OIA disputes *itself*. Cooke P held the District Court does have that power, subject to appellate or supervisory review of its exercise by the superior courts. The President began by pointing out that in proceedings on indictment there is no reason why a High Court judge cannot determine the question whether the accused has received information to which he is legally entitled under the OIA. That is undoubtedly so, but the reason for it is that superior court judges have unlimited jurisdiction including inherent jurisdiction. Cooke P then asserted that District Court judges have the same enforcement powers by virtue of the doctrine of inherent powers. Apart from the cases referred to, which he admitted were not precisely on point, Cooke P does not explain how the doctrine of inherent powers enables the (inferior) District Courts to adjudicate upon legal rights. Casey J, who had reservations about the propriety of conferring enforcement power on the District Court, provides a clue to the argument:[215]

> ... as with any other legal right, the Court must also have a concurrent jurisdiction in this field and, as part of their inherent ancillary powers, they can make orders requiring information to be disclosed ....
>
> Original Court jurisdiction over the Act would be exercised only by the High Court, there being nothing in the District Courts Act 1947 conferring such power directly on the latter. However, they may be entitled to determine the existence of this statutory right to information as a collateral matter arising for decision in an issue before it, if that appeared necessary in order to ensure a fair trial ... [And after quoting from *McMenamin* v *Attorney-General* [1985] 2 NZLR 274, 276 he said] I confess to some reservations about whether this principle is sufficient to justify the bestowal on the District Court of powers which go beyond those currently recognised as appropriate or available to them in criminal proceedings

The argument was more fully developed in *Ross* v *Tamaki City Council*[216] where Harvey DJ held that the District Court has power to determine OIA disputes before trial under its inherent powers to prevent abuse of process and to ensure a fair trial.

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213 *Howard* v *Pacholli* [1973] VR 833, 840, per Anderson J (SC, Vict).

214 *United States* v *Wahlin*, above n 201.

215 Above n 1, 413-414.

216 (Unreported) District Court, Otahuhu, CRN. 8048303008-10, 12 May 1989. This case concerned a traffic prosecution by a local authority and a request for personal information prior to court hearing pursuant to the Local Government Official Information and Meetings Act 1987, which for all relevant purposes is identical to the OIA.
It should be noted that in his reasons for decision Judge Harvey erroneously treats *Pearce* as laying down a general Common Law principle about disclosure. "[I]t is clear", the judge said - presumably from *Pearce* - "that the right of a person to information is

It may well be unfair, and therefore an abuse of process, to put an accused on trial before a disputed question of statutory right to information is resolved. Such unfairness can be prevented by the District Court exercising its undoubted power to adjourn the proceeding until the question is resolved by the proper body. The ombudsmen having vacated the field, as we will see,[217] the proper body is the High Court which has general and inherent jurisdiction to adjudicate upon legal rights. There is nothing in the OIA or the District Courts Act 1947 which confers such a power on the District Court, as Casey J pointed out.[218] What the Court of Appeal did in *Pearce*, in my view, is to confer a jurisdiction (for that is what power to enforce a statutory right is) on an inferior court for reasons of expedience and convenience. In other words, that court granted the District Court inherent jurisdiction under the cloak of inherent powers. Quite simply that is constitutionally improper.

This is not an instance where there is no remedy or no forum in which a remedy might be obtained - the remedies are available in the High Court. Cooke P said application to the High Court for an order in the nature of mandamus "could be cumbrous and time-consuming".[219] But following the approach of the majority in *Pearce* there should be very few cases of dispute or where the exception of secrecy is required.[220] In these few cases adjournment in the District Court and speedy adjudication in the High Court is not unthinkable or unattainable. Nor need this be done by judicial review (ie mandamus or declaration). It could be achieved by application to the High Court, under its inherent jurisdiction, to render assistance by determining legal right to enable the District Court to administer justice fully and effectively.[221] Questions of cost and delay here are largely within the hands of the higher judiciary. There is no reason, for instance, why the Crown should not be ordered to pay the solicitor-client costs of a requester who succeeds before the High Court. None of this would "negate" the rights under section 24, as Cooke P suggested would be the case if the District Court did not have enforcement power.[222]

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considered an ingredient of the process of ensuring a fair trial" (p9). The dicta in *Pearce* cited in support were all directed to showing that disclosure of personal information would not prejudice the right to a fair trial protected in s 6(c). It was in that statutory context that Cooke P, Casey and Bisson JJ thought such disclosure could not prejudice a fair trial but, rather, enhance the fairness of the trial. That the court did not on this occasion intend to lay down any general Common Law rule about disclosure outside the OIA is made clear by Cooke P (above n 1, 392; in his comparison of disclosure under the Act and the duties of fairness which fall on prosecutors) and is supported by *R* v *Brown* ((Unreported) High Court, Gisborne, T 9/88, 16 November 1988). In that case Smellie J held that, outside the OIA, there was no basis under the "general jurisdiction" of the court to order the Crown to produce the requested documents (p5).

217 See below n 234-238 and accompanying text.

218 Above n 1, 413.

219 Above n 1, 399.

220 Above n 1, 396-398 and 400 (Cooke P), 412 (Casey J) and 416 (Bisson J). Cf Criminal Law Reform Committee, above n 96, para 208.

221 See Jacob, above n 208, 48-49.

222 *Pearce*, above n 1, 398.

To some ears the distinctions between superior and inferior courts, unlimited and limited jurisdiction, and inherent jurisdiction and inherent powers will ring hollow:[223] Ghosts from the bygone days of formalism, rattling their chains.[224] This might seem to be underscored by the recent proposals of the Law Commission to greatly expand the concurrent jurisdiction shared by the District Court and the High Court, with the evident desire to increase the appellate role of the High Court.[225] Taking the last matter first, interestingly the Law Commission has recommended that inherent jurisdiction be retained exclusively in the High Court.[226] As to formalism, these distinctions are the conceptual underpinnings of the law of judicial review and much else besides.[227] We tamper with these foundations, knowingly or not, at considerable risk.

For the time being, until it is reconsidered by the court or overturned by the legislature, *Pearce* is the law and so it cannot be argued that the District Court judge who adjudicates on disputed OIA matters is acting ultra vires and without jurisdiction. In giving this jurisdiction to the District Court the Court of Appeal once more trod in the footsteps of the Criminal Law Reform Committee.[228]

C *The Role of the Ombudsmen*

Where does this leave the ombudsmen? As the ombudsmen and the courts (ie the High Court and now the District Court) enjoy "concurrent jurisdiction"[229] over personal information OIA disputes seemingly the accused has a free choice between these two avenues of redress. There is nothing in the Act or the *Danks Report* to suggest otherwise.[230] Clearly this vexed the Court of Appeal because of the perceived delay in seeking the assistance of the ombudsmen and the deleterious impact this might have on the conduct of criminal trials.[231] In addition, it is possible to sense an unwillingness to

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223 This seems to be the extrajudicial view of Cooke P. In a paper entitled "The Changing Place of Remedies" delivered at an international symposium on Remedies at the University of Windsor, Canada, on 19 October 1989, Sir Robin Cooke said "the majority, and perhaps all, the members of the Court of Appeal [in *Pearce*] saw the answer to any procedural problems in the *inherent jurisdiction* of Courts, *whether technically superior or inferior*, to control their own proceedings and determine incidental or preliminary questions of law and fact" (p 14, emphasis added).

224 See *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1, 29, per Lord Atkin (HL).

225 Law Commission *The Structure of the Courts* (Report No 7, 1989) ch 5.

226 Above n 225, paras 287-288.

227 See generally Rubinstein, above n 203 and E Henderson *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, Cambridge, 1963).

228 Above n 96, paras 202-206.

229 *Pearce*, above n 1, 413, per Casey J.

230 Quite the contrary, as is clear form Cooke P's exhaustive treatment of the Act and its legislative history: above n 1, 389-390.

231 See above nn 195-201 and accompanying text.

see the job of adjudicating statutory rights taken out of the judges' hands.[232] It is worth contemplating for a moment how the court might have stopped an accused preferring the ombudsmen over the court to resolve a dispute over a criminal discovery-related OIA request.[233] Presumably a court so minded could refuse to adjourn the criminal proceeding and thereby virtually force the requester to argue the question of access right before the court. But this is mere speculation. The court never had to address the issue for the ombudsmen indicated that if effective court procedure for criminal discovery existed the office would decline to investigate complaints pursuant to section 17(1)(a) of the Ombudsman Act 1975.[234]

That provision gives the ombudsmen a discretion to refuse to investigate a complaint if it appears that there is an adequate remedy to which it would be reasonable for the complainant to resort.[235] It underscores that the office of ombudsman is one of last resort[236] and enables the ombudsmen to avoid stepping on the toes of other institutions. And, no doubt reflecting the fact that the actions of ombudsmen are subject ultimately to judicial review, the ombudsmen both in New Zealand and overseas take "particular care" not to step on the toes of the judges.[237] More subtly put, as befits a distinguished former diplomat and Chief Ombudsman, Sir George Laking spoke of the work of the Ombudsman as "complementary rather than supplementary to the judicial system".[238] Given this power relationship, defined in part by the wording of the ombudsmen legislation, it is difficult to criticise the ombudsmen for shying away from confrontation with the courts. By the token of the classical ombudsman model, in *Pearce* the office was merely acting true to form as the avenue of last resort.

But that points up, in my view, a major drawback in involving the ombudsmen (at least as the office is classically perceived) in the resolution of disputes about freedom of information. The classical conception of the office, enshrined in the New Zealand Ombudsmen legislation, has the Ombudsman as an officer of Parliament, separate and distinct from the administrative process, acting in general as an avenue of last resort for the aggrieved citizen. The Danks Committee and generally speaking successive

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232 Cf *Pearce*, above n 1, 399, per Cooke P: "[I]t would not be right for the Court to renounce the ordinary jurisdiction deliberately left to it by the legislature to determine and give effect to the person's rights".

233 Cf the broadly analogous problem in *O'Reilly* v *Mackman* [1983] 2 AC 237 which the House of Lords resolved by use of the abuse of process doctrine. A technique not obviously applicable in the present context.

234 *Pearce*, above n 1, 399, per Cooke P. Such has been the practice of the ombudsmen in relation to civil discovery-motivated OIA requests. See *Seventh Compendium of Case Notes of the Ombudsmen* (1986) Case No 289, p164; *Report of the Ombudsmen 1986* p 11.

235 Incorporated into the OIA by s29.

236 See also Ombudsmen Act 1975, s13(7)(a), which was specifically not incorporated into the OIA (s29(2), OIA).

237 Napier "Ombudsman Authority: A Commonwealth Restatement" (1984-85) 4 Ombudsman J 65, 73.

238 Laking "The Ombudsman in transition" (1987) 17 VUWLR 307, 313. See also *Report of the Chief Ombudsman, GR Laking, on Leaving Office* (1984) para 1.3, p3.

Ombudsmen have seen little or no incompatibility between this role and the one assigned by the OIA.[239] I cannot agree. While I readily concede that the ombudsmen have performed their task under the Act tolerably well to date, the differences between the jurisdictions are so marked that serious doubts must be raised as to the suitability of the office to resolve OIA disputes over the long haul.

First of all, for the first time in the history of the office the ombudsmen have the power of decision over the release of "official" information under the Act (since their recommendations become binding unless they are vetoed by Order in Council). There have been very few vetoes of late and in all but the most controversial cases the ombudsmen have the final say. Of course, this is not to say that the presence of the veto power is unimportant in the scheme of things. It may, for instance, operate to keep the ombudsmen "honest" or allow the ombudsmen to "chance their arm" secure in the knowledge that the executive can veto a recommendation where reasonable people can differ in evaluating the harm of disclosure. This is not directly relevant, of course, to personal information (at issue in *Pearce*), where the ombudsmen merely make recommendations, and there is no power of veto, but it does seem to me to colour the role of the ombudsmen in OIA matters generally. Secondly, under the OIA the ombudsmen have been made an integral part of the formal statutory decision-making structure; acting effectively as an appellate body deciding appeals *de novo* from disgruntled requesters. A far cry from the classical model of an officer of Parliament separate from the administration. This co-option of the office into the administration of the Act is insufficiently recognised and, for instance, creates expectations on the part of complainants and others which do not arise to the same degree under the general jurisdiction. Lastly, it is now clear that freedom of information disputes are always disputes over law: every case raises issues of statutory interpretation and application. They are a different diet from the traditional "maladministration" fare of the office which is capable of resolution in almost every case by thorough investigation, discussion, persuasion and, often, negotiation and compromise. Sir George Laking recognised this in his *Report on Leaving Office*:[240]

> I am not, as under the Ombudsmen Act, deciding whether a departmental decision or action is unjust, unreasonable, discriminatory or wrong. I am called upon to decide, *much as a Court would do,* whether the department or organisation has, first, interpreted correctly the provisions of the Act and, secondly, provided an adequate justification of its decision to withhold the information.

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239 See *Report of the Ombudsmen 1981*, p3; GR Laking "Comment" in *Proceedings of the Fifth Conference of Australasian and Pacific Ombudsmen* (1981) 11, 15. See also below n 245 and Shelton "The Ombudsman and Information" (1982) 12 VUWLR 233, 247. There are signs of change however. In the Foreword to *Eighth Compendium of Case Notes of the Ombudsmen* (1987) the present Chief Ombudsman, Mr J Robertson, said that the Office must accept the challenge of change brought on by access to information and privacy issues and "be prepared to undergo some mutation of the original concept otherwise the office runs the risk of becoming 'yesterday's' concept and obsolete".

240 Above n 238, para 2.19, p 14 (emphasis added).

In a more theoretical vein, Professor Grunewald, an American commentator, recently described a freedom of information dispute as "ordinarily a highly contentious, single transaction that inherently produces binary results" and therefore is not easily resolved by compromise.[241] But for these reasons Grunewald says such disputes are relatively well suited to resolution by adjudication; which he describes as "a process that identifies interests and declares rights based on proof and argument measured against precedentially-refined statutory standards".[242] It is clear to me that the values underlying adjudication - participation, procedural fairness, reason-giving, precedent and openness - are not all to be found in full measure in the ombudsman process.[243]

The extent to which successive ombudsmen have failed to internalize these significant changes in role is evident from the resistance of the office to proposed amendments seeking to remove the veto and giving the ombudsmen final decision-making power subject to court review.[244] The then Chief Ombudsman, Mr Lester Castle, said this in the 1985 Annual Report to the House of Representatives:[245]

> The abolition of the ministerial power of directive would result in the Ombudsman's recommendation becoming a binding directive and thus a decision. Such a change would herald a major departure from the traditional characteristics of the Ombudsmen:
>
> (i) as officers of Parliament;
> (ii) whose whole process is informal and in private; who superintend investigations closely, and reach all conclusions themselves;
> (iii) who make no binding decisions; and
> (iv) whose functions, while they are subject to the law, mean they stand to one side of the legislative, administrative, and judicial processes - observing, appraising, and when necessary censuring.
>
> These 4 characteristics relate closely one to another and in totality give the office its character. The elimination or contradiction of any one of these characteristics in turn affects the others, and at some stage the new totality of characteristics means that the office described ceases to be that of the Ombudsman.
>
> Already the Official Information Act responsibilities have had some effect on these characteristics. Section 32 makes an Ombudsman's recommendation binding at one remove

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241 Grunewald "Freedom of Information Act Dispute Resolution" (1988) 40 Admin LR 1, 34.

242 Above n 241, 30 (drawing on Fuller "The Forms and Limits of Adjudication" (1979) 92 Harv LR 353).

243 See, eg, Williams "Official Secrecy and the Courts" in PR Glazebrook (ed) *Shaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens, London, 1978) 154, esp. 155, 167, 173; Zacks "Administrative Fairness in the Ombudsman Process" (1987) 7 Ombudsman J 55.

244 For a brief discussion of the 1987 amendment process, see Eagles, Taggart and Liddell, above n 100, §1.

245 *Report of the Ombudsmen 1985*, p8. Also see Castle "The Ombudsman's experience with local government" (1982) 12 VUWLR 225, 231 and *Report on Complaint under the Official Information Act from Mr Michael Laws* (J Robertson, Chief Ombudsman, 11 May 1989) pp 4-5.

> and this has had an impact on characteristic (iii) and moved the Ombudsman towards the judicial process, so compromising (iv). The essential characteristics remain, however, in that the recommendation becomes binding only at the volition of a minister.
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> If the Ombudsmen are invested with binding decision-making powers reviewable only by the courts, characteristics (iii) and (iv) are eliminated. Ombudsmen would become partly responsible to the courts for their actions thus contradicting characteristic (i). Whether the right of appeal is on questions of law alone, or on the merits, the Ombudsmen's review process would be forced into a tribunal mould, thus losing characteristic (ii).

The Chief Ombudsmen went on to indicate the kind of deleterious effects likely to result from visiting final decision-making power on the Ombudsman subject to curial review.[246] It would put the ombudsmen in a judicial role, thereby polarising the activity of the office. Some system of stare decisis would be forced on the office which would negate its flexibility and blunt its sensitivity to the merits of each case. Such a role also would likely on occasion lead to conflict with politicans and contradict the ombudsmens' status as officers of Parliament. All of this would have deleterious "flow on" effects from the OIA jurisdiction to the general one. Consistent with this stance, and to the credit of the Office, the Chief Ombudsman suggested to the Minister of Justice that if the government went ahead and eliminated the-veto the task of dispute resolution under the OIA should be removed from the ombudsmen and placed on the shoulders of an Information Commissioner, along the lines of the Canadian federal model.[247] In the face of this opposition the Minister of Justice retreated from the proposal to eliminate the veto and chose instead to modify the veto power.

The evident desire of successive ombudsmen to conceive of and operate OIA dispute resolution within the classical paradigm of the office eschews reality and is misleading. Just as misleading is Cooke P's description in *Pearce* of the Ombudsman's role under the OIA as an officer of Parliament operating "in the political and parliamentary spheres".[248] As long as the ombudsmen and others remain prisoners of the classical conception of the office in OIA matters, the differences between the ombudsman process and the courts will continue to be highlighted[249] and the essential similarities of role ignored or downplayed.

In an insightful student paper JK Crawshaw listed these similarities as follows: both are in the business of conflict resolution, of doing justice; both are complaint based, information eliciting and issue determining bodies; and both have jurisdiction in the

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246 Supra n 245, pp8-9. In the text the phrasing is largely mine but the sentiments are those of Mr Castle.

247 Letter from the then Chief Ombudsman, Mr LJ Castle, to the Rt Hon Geoffrey Palmer, Minister of Justice, dated 24 December, 1984.

248 Above n 1, 389.

249 See, eg Jones "Do we still Need the Ombudsman's 'Lamp of Scrutiny'" (1987) 7 Ombudsman J 48, 52-53.

same area - the supervision of the activity of government bodies.[250] These similarities not only admit of the possibility of conflict but also "the possibility of one being preferred to another".[251] Of course that is exactly what happened in the OIA context. It is pellucidly clear from the Act and the *Danks Report* that the Ombudsmen were chosen over the courts to perform the primary role of dispute resolution under the Act.[252] In modern jargon the courts were marginalised by the legislature: marginalised *de jure* in the "official" information part of the Act[253] and marginalised *de facto* in the "personal" information part by the high costs of court access.[254] The decision in *Pearce* represents to me a conscious, deliberate and so far successful attempt on the part of the plurality to push back towards the centre of OIA dispute resolution in relation to criminal discovery-motivated requests. The bestowal of inherent "power" on the District Court judiciary is the dubious means by which this end is achieved.

I say "so far successful" because it seems likely that the legislature will not stay its hand as Cooke P appears to request.[255] The view of the former Minister of Justice, the Rt Hon Geoffrey Palmer, in November 1986 was "that the Official Information Act is neither an appropriate nor an efficient mechanism for pre-trial disclosure in criminal cases";[256] a view echoed by McMullin and Casey JJ in *Pearce*.[257] It appears that the

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250 JK Crawshaw "The Ombudsmen and the Courts" (1977, LLM research paper, Victoria University of Wellington) p7.

251 Above n 250, p 8.

252 See *Danks Report,* vol 1, paras 66-67, 106 and p39 point 12. Note at this stage of the evolution of the committee's proposals the distinction between personal and official information was not clearly drawn - there is simply reference to some categories of information being available as a matter of course (paras 28-32 and 69-71). Also at this stage the committee did not propose any change to the "essential immunity" of the Ombudsman processes from judicial control (para 103). The role of the court was marginal in this scheme. By the time the second Report was published the ideas had developed further. The dichotomy between personal and official information, representing the difference between legal right and statutory entitlement, is firmly in place. Moreover the spirited defence of keeping the courts out as primary OIA dispute resolvers in relation to official information matters, in favour of the ombudsmen, goes hand-in-hand with a shared jurisdiction between ombudsmen and courts in relation to the now fully elaborated legal rights of access provided in Parts III and IV. See *Danks Report,* vol. 2, paras 2.01-2.31 and p86.

253 Above n 252. See OIA, s34. The explicit recognition of the courts' ultimate reviewing role in the Official Information Amendment Act 1987 does not change this fact: see OIA (as amended), s32B. Although the cost indemnity provision (s32B(3)) will make the court, as a last resort, more accessible.

254 Above n 252. It would have been as obvious to the Danks Committee as it has been to complainants ever since, that the advantages of informality, ease of access and lack of cost would ensure "personal" information complaints went to the ombudsmen instead of the court. There are only two instances of complaint to the courts; once by the Police in *Pearce*, the other in *Hicks* v *Attorney-General,* High Court, Wellington No 33/84 (discussed in Taggart, above n 15, 206).

255 *Pearce*, above n 1, 400-401.

256 Above n 94, p13.

257 Above nn 117-119 and accompanying text.

Minister has not been persuaded by the reasoning of the President to change his mind. After the decision in *Pearce* the Minister of Justice indicated to Parliament that the planned legislation on criminal discovery would still proceed.[258]

D Pearce *in Comparative Common Law Perspective*

The audacity of the plurality is highlighted by the cautious approach of overseas courts in this area. As I have treated this topic in detail in a separate paper I will only touch on it here.[259]

In the United States of America, the first Common Law country to enact freedom of information (FOI) legislation in 1966, there is considerable jurisprudence rejecting FOI Act access as a means of circumventing the limited criminal discovery regime provided by the Federal Rules of Criminal Procedure.[260] To be sure, there are important differences between the legislation, criminal justice systems and societies of the United States and New Zealand but I would have expected the court to take a serious look at this jurisprudence. Closer to home, the courts and administrative appeal tribunals in Australia also have indicated they will not countenance criminal discovery-motivated FOI Act requests.[261] And that is a jurisdiction with an identical Common Law backdrop to that of New Zealand. Indeed, Cooke P was not impervious to a comparative perspective. He referred to the "widespread international trend" towards greater freedom of information and then quizzically referred only to liberalisation of criminal discovery by legislation in England,[262] a country which does not have general freedom of information legislation. Crown Counsel cited two cases - one from the United States Supreme

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258 Parliamentary written reply, Order Paper no 106, 6 December 1988. The newly appointed Minister of Justice, the Hon Bill Jeffries, has said that a Criminal Disclosure Bill along the lines recommended by the Criminal Law Reform Committee will be introduced as soon as draft legislation has been settled on and approved: (1989) 12 TCL #548, p 6. Note that the Law Commission now has a reference on criminal procedure, which includes examination of the division of offences into summary and indictable offences, and preliminary hearings and criminal discovery.

259 Taggart "The Impact of Freedom of Information Legislation on Criminal Discovery in Comparative Common Law Perspective", unpublished paper (a comparative survey of the law in New Zealand, the United States of America (federal level), Canada (federal and provincial levels) and Australia (federal and state levels)). This brief treatment here is drawn from an earlier article, above n 15.

260 See *Fruehauf Corporation* v *Thornton* 507 F 2d 1253 (6th Cir 1974); *United States* v *Murdock* above n 200; *United States* v *Buckley* 586 F 2d 498 (5th Cir 1978); *United States* v *United States District Court, Central District of California, Los Angeles, California,* above n 200.

261 See *News Corporation Ltd* v *National Companies and Securities Commission* (1984) 57 ALR 550; *Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313 (AAT): *Kingston Thoroughbred Horse Stud and Australian Taxation Office* (1986) 10 ALN N38 (AAT); *Stewart* v *Victoria Police* (1988) 15 Freedom of Information Review 27 (Vict AAT).

262 *Pearce*, above n 1, 397. Cf *R* v *Director of Public Prosecutions, Ex p Hallas* (1988) 87 Cr App R 341 (DC).

Court, the other from the Federal Court of Australia - containing dicta throwing doubt on criminal discovery-motivated FOI Act requests but Cooke P confined these cases to the context in which they arose and did not explore the dicta.[263] This is the more surprising because at another point Cooke P quoted a lengthy extract from an American federal trial court decision in support of a point he was making.[264] Ironically that case almost certainly was wrongly decided on its facts[265] and an American appellate court has declined to follow it.[266] Proving perhaps that poor comparativism is worse than none at all, as McMullin J espoused.[267]

E Crown Prosecutors and Legal Professional Privilege

One of the dangers of judicial law-making is that pitfalls not arising in the particular case before the court may not be anticipated.[268] The court's attempt to follow the lead of the Law Reform Committee[269] and extend the holding in *Pearce* to trials on indictment illustrates this.

In *Pearce* the information requested was in the hands of the Police. The prosecution of summary offences and indictable offences tried summarily is conducted by Police prosecutors, so "personal" information in the form of witness statements and the like will remain in the hands of the Police up to and during trial. The extension of the holding in *Pearce* to trials on indictment raises interesting questions. Is information in the hands of a Crown prosecutor rather than the Police requestable under the OIA? If so, is such information likely to be protected from disclosure by exemptions recognising legal professional privilege?

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263 Above n 1, 398. The two cases recorded in the judgment as cited are *National Labour Relations Board* v *Robbins Tire & Rubber Co* 437 US 214 (1978) and *News Corporation Ltd v National Companies and Securities Commission,* above n 261. In *Robbins'* case Justices Stevens, Rehnquist and Chief Justice Burger only joined the majority opinion on the understanding that its rationale applied equally to all enforcement proceedings (243). In the *News Corporation* case (555-56) Fox J saw the claim under the Commonwealth Freedom of Information Act 1982 as analogous to a claim for criminal discovery and rejected it for that reason!

264 Above n 1, 399, quoting from *United States* v *Wahlin,* above n 201.

265 See the analysis in *United States* v *Steele* 799 F 2d 461 (9th Cir 1986) and cases cited there.

266 See *United States* v *United States District Court, Central District of California, Los Angeles, California,* above n 200.

267 McMullin J thought "little help" was to be obtained from cases decided in other Freedom of Information Act jurisdictions, referring expressly to Australia. The judge gave three reasons for this: the statutes are differently worded, the Danks Committee had considered the matter with special reference to the New Zealand situation, and the overseas legislation may be influenced by its own local conditions (above n 1, 402).

268 See Sir Robin Cooke "Foreword" to the inaugural issue of [1989] New Zealand Recent Law Review.

269 Above n 96, paras 104-105, 125.

At some point in the criminal proceeding on indictment, usually after the preliminary hearing, the Police file passes to Crown Counsel or a Crown Solicitor. If a copy of the file is retained by the Police then request under the Act can still be made to them. Where no copy of the file is retained by the Police the question arises whether the information is "held by" the Police even though it is in the physical possession of the Crown prosecutor. (This would not matter if all Crown prosecutors were covered by the Act but, as we will see shortly, that is not clearly the case.) Unlike freedom of information legislation overseas, the Act makes "information", not documents or records, the subject-matter of access. There is little doubt that "information" means that of which one is apprised or told, and covers things that a person has observed or said in public or heard others say.[270] It would be a rare case where the "information" requested, which is contained in the file with the Crown prosecutor, would not be mirrored in one form or another in police note books, file notes, etc, or be within the memory of the police officers concerned.

Obviously it would be more convenient if Crown prosecutors were subject to the OIA so that requests could be made directly to them rather than to the Police. The Crown Law Office, which is independent of the Department of Justice and situated in Wellington, is covered by the OIA.[271] But that office seldom conducts criminal prosecutions. That work is performed by Crown Solicitors who are appointed by the Crown and hold warrants of appointment from the Governor-General.[272] The ultimate direction of all criminal prosecutions is in the hands of the Solicitor-General, subject to general superintendence by the Attorney-General, who is politically responsible for the operation of the criminal justice system.[273] Clearly the Attorney-General, who is subject to the OIA, does not in any sense "hold" information in the hands of local Crown Solicitors. But section 2(5) would deem the information to be held by either the Attorney-General or the Crown Law Office if it can be said that a Crown Solicitor is "an independent contractor engaged by any Department or Minister of the Crown or organisation". There is no difficulty in viewing Crown Solicitors as independent contractors. In both the lay and legal senses the criminal prosecution work is contracted out to senior lawyers in the various regions of the country. The difficulty rather is that Crown Solicitors are not obviously engaged by *any* department or minister. They are appointed by the Crown, ie by the Governor-General, conventionally on advice of the Executive Council. Unless one accepts that "any" can mean "all" ministers and view Cabinet (and its mirror image the Executive Council) as synonymous with the Crown, Crown Solicitors would not appear to be caught by the Act. This would be anomalous

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270 This point is discussed more fully in Taggart, above n 21, 639-41. Contra, *Ross* v *Tamaki City Council*, above n 216, 13-15. This aspect of the decision is criticised in GDS Taylor and J Timmins *Administrative Law - The Changed Role of Government* (August 1989, NZ Law Society seminar) 39, 54.

271 Note that the exclusion from the Ombudsmen Act 1975 of decisions and actions of persons acting as legal advisers to the Crown (s13(7)(c)) does not apply to investigations by the Ombudsmen under either Parts II or IV of the OIA. See s29(2) OIA, as interpreted in *Pearce*, above n 4, 588 (Jeffries J); endorsed on appeal, above n 1, 390 (Cooke P) and 410 (Casey J).

272 The Crown Solicitors Regulations 1987, SR 1987/58, reg 3.

273 See Haughey "The Legal Work of the Crown" (1957) 38 NZLJ 203, 205-6.

given that the Crown Law Office is covered. Moreover the Danks Committee's rationale for subjecting institutions and offices to the freedom of information regime would strongly favour including Crown Solicitors.[274] This may prove important given the increasing weight placed by the courts on such reports in general and the *Danks Report* in particular. Perhaps the courts might be willing to accept that while Crown Solicitors are appointed by the Crown they are "engaged", in effect, by the Crown Law Office and so come within section 2(5). In that event OIA requests would have to be directed to the Crown Law Office.

If Crown Solicitors are not subject to the OIA it will prove inconvenient, to say the least, in light of the *Pearce* holding. Strictly speaking requests will have to be made to the Police, not the Crown Solicitor or his or her representative. This will be cumbersome and cause delay, and almost certainly will be circumvented in practice.

The involvement of Crown prosecutors in proceedings on indictment raises a substantial question about the applicability of legal professional privilege for witness statements, briefs, interview notes and the like.[275] Legal professional privilege provides good reason for withholding information under both the official and personal information regimes of the OIA.[276] Police prosecutors in summary proceedings, as in *Pearce*, cannot claim the privilege for two reasons. First of all they invariably lack the formal university legal training and professional practising certificate necessary to attract the privilege.[277] Secondly it has been held that a police prosecutor is not, in relation to an informant, in a like position to that of a solicitor preparing for litigation on behalf of a client.[278] But does the fact that in proceedings on indictment the witness statements, etc, will eventually go to the Crown prosecutor make a difference? A number of recent Australian cases have addressed this issue.

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274 *Danks Report*, vol. 2, 105.

275 This issue has arisen overseas see *Re Medicine Hat Greenhouses Ltd & German & The Queen (No 3)* (1978) 45 CCC (2d) 27 (Alta SC, App Div) and Feldman "The Work Product Rule in Criminal Practice and Procedure" (1981) 50 Cincinnati LR 495, 507-10 and 516-20. In *Pearce* at first instance Jeffries J hints at the relevance of legal professional privilege. He described the function of briefs of evidence to "assist the prosecutor or counsel" and said "[a] brief generally in litigation resides in the zone of private papers belonging exclusively to a party": above n 4, 578 and 590.

276 See ss9(2)(h) and 27(1)(g). The exemptions differ in two respects. Personal information is exempt on this ground if disclosure would "breach" the privilege, whereas under s9(2)(h) official information can be withheld only if it is necessary to "maintain" legal professional privilege. Secondly, once the exemption in s27(1)(g) is made out it is absolute, in contrast to s9(2)(h), which may be outweighed by the public interest in disclosure provided for in s9(1). This is the only obvious place where a requester may be worse off applying for personal information under s24 rather than for official information under s12.

277 *Attorney-General (Northern Territories)* v *Kearney* (1985) 158 CLR 500 (HCA) and *Adams* v *Anthony Bryant & Co Pty Ltd* (1986) 67 ALR 616, 620, per Wilcox J (Fed Ct).

278 *Ex p Dustings; Re Jackson* (1967) 87 WN(NSW) 98, 103 per Walsh JA (NSWCA).

In *Maddison* v *Goldrick*[279] at a preliminary hearing before a magistrate, defence counsel sought an order under section 12 of the Evidence Act 1898 (NSW) that the Police produce to the court statements of persons interviewed by the Police and whom the police prosecutor proposed to call thereafter.[280] The magistrate so ordered and, upon further request, allowed the defence to view the statements. These rulings were challenged successfully before Taylor CJ who held, inter alia, that the so-called "police brief" (ie the whole of the information collected by the Police and furnished to the Police Prosecuting Branch handling the matter at the preliminary hearing) was properly the subject of legal professional privilege.[281] On appeal Samuels JA, speaking for the New South Wales Court of Appeal, devoted two pages of his judgment to rejecting the privilege claim.[282] The main reasons given were that at the preliminary hearing conducted by a police prosecutor it was difficult to identify who was the client and who was the lawyer, and there was no evidence to show that a purpose of obtaining the witness statements was to enable the Crown Solicitor to advise the Police upon the conduct of the proceedings. Moreover, and this is plainly obiter, Samuels JA thought there would be "insuperable obstacles" to any claim of privilege later at the trial on indictment. Assuming at that later stage that the Attorney-General was the client and the Crown Solicitor the lawyer, it was thought to be unlikely that either knew what the Police were doing or that any evidence would show that the Police gathered the information to aid the Crown Solicitor in the conduct of the trial. On application for special leave to appeal this decision to the High Court of Australia, brief reasons were given for refusing leave. Barwick CJ, with whom Gibbs and Jacobs JJ agreed, understood the Court of Appeal to say "that such statements of witnesses are not as a class subject to professional privilege" and he had no sufficient doubt of the propriety of that holding to grant leave to appeal.[283]

That pronouncement from the High Court of Australia has not stilled the tempest over legal professional privilege for witness statements in Australia. In the Australian Capital Territory, a federal jurisdiction with similar legislation to that considered in *Maddison* v *Goldrick*, the courts have upheld claims of legal professional privilege for witness statements when sought in preliminary proceedings by defence counsel.[284] In that jurisdiction the preliminary hearing is conducted by Crown Solicitors, and not by the Police as is generally the case in New South Wales. The evidence in these cases

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279 [1975] 1 NSWLR 557 (NSWSC, CL Div); [1976] 1 NSWLR 651 (NSWCA); *sub nom Attorney-General for New South Wales* v *Findlay* (1976) 50 ALJR 637 (HCA). Followed by the Queensland Court of Criminal Appeal in *R* v *Kingston* [1986] 2 Qd R 114.

280 Section 12 provides that any person present at a legal proceeding wherein he or she might have been compellable to give evidence or produce documents by virtue of a subpoena or other summons shall be compellable to give evidence and produce documents in the same manner, and in case of refusal suffer the same punishment. Victoria, Western Australia, Tasmania and the Australian Capital Territory have similar legislation: see Campbell "Discovery in Committal Proceedings" (1985) 9 Crim LJ 270, 281.

281 Above n 279, 567.

282 Above n 279, 664-666.

283 Above n 279, 638.

284 *R* v *Cahill; Ex p McGregor* (1985) 61 ACTR 7 (SC,ACT); *R* v *Dainer; Ex p Pullen* (1988) 78 ACTR 25 (SC, ACT).

showed that the statements were taken for the sole purpose of being referred to the legal adviser of the Police, the Director of Public Prosecutions. These cases and others hold that communications to the Director of Public Prosecutions, if brought into existence solely for the purpose of obtaining advice or for use in litigation, will be the subject of legal professional privilege.[285] As it is patent that the privilege is that of the client and not the lawyer, and therefore depends on the existence of a client,[286] the courts have identified the Police, the Attorney-General or the Crown as possible clients.[287] An earlier English case eschewed the search for a client altogether and invoked on public policy grounds a privilege analogous to legal professional privilege for the Director of Public Prosecutions.[288]

In *Cain* v *Glass*,[289] a case decided in the Common Law Division of the Supreme Court of New South Wales, Lusher J upheld a claim of legal professional privilege in respect of subpoenaed statements of witnesses whom the Crown indicated may not be called at the preliminary hearing. The proceeding involved a large number of gang members indicted on murder charges and it appears that the preliminary hearing was being conducted by a Crown prosecutor and not the Police Prosecuting Branch. In upholding legal professional privilege the trial judge rejected English authority to the contrary,[290] did not mention the Court of Appeal decision in *Maddison* v *Goldrick* and read the reasons of Barwick CJ for denying leave to appeal in that case as not precluding privilege in relation to witness statements in particular cases.[291]

Finally this issue has been the subject of consideration twice by the Federal Court of Australia. In *Chang Kui* v *Quinn*[292] the claim of legal professional privilege for witness statements was not made out on the evidence. In Australia, unlike New Zealand,

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285 *R* v *Dainer; Ex p Pullen*, above n 284; *Austin* v *Attorney General's Department* (1986) 67 ALR 585 (Fed Ct); *Adams* v *Anthony Bryant & Co Pty Ltd*, above n 277.

286 *Maddison* v *Goldrick*, above n 279, 664, per Samuels JA.

287 Idem and above n 285.

288 *Auten* v *Rayner (No 2)* [1960] 1 QB 669 (HC). Cf *Evans* v *Chief Constable of Surrey* [1988] 1 QB 588 where public interest immunity was claimed successfully to prevent production in a civil damages action of a Police report submitted to the Director of Public Prosecutions.

289 [1985] 3 NSWLR 39.

290 *R* v *Barton* [1972] 2 All ER 1192 (Crown Ct).

291 Above n 279.

292 (1986) 67 ALR 231 (Fox, McGregor and Beaumont JJ).

privilege can be claimed only if the sole purpose of making the statement was to submit it to legal advisers for advice or for use in legal proceedings.[293] Fox J said:[294]

> It is not sufficient that it [ie the witness statement] merely passes through the hands of solicitors, or is prepared or used for purposes other than those mentioned. The statement rather had the character borne by the statements commonly given to police, which are used, if at all, for further investigations or as proof in summary or committal proceedings.

The other case, *Adams* v *Anothony Bryant & Co Pty Ltd*,[295] deviates from the standard fact pattern in that the witness statements were sought by way of interlocutory order prior to trial rather than at trial. The company was charged with misleading conduct under the trade practices legislation and counsel for the company argued that fairness and expedition required the prosecutor to supply copies of the witness statements prior to summary trial. Wilcox J did not doubt that he had inherent power to so order and, if necessary, to stay proceedings until the statements were supplied,[296] but he refused to do so since he found the documents to be the subject of legal professional privilege. If the judge had been satisfied that the production of the statements was necessary to ensure a fair trial he would have ordered disclosure regardless of the privilege. But he was not persuaded that a trial without prior supply of proofs of evidence would be likely to prove unfair.[297] However, the court did order the prosecutor to furnish to the defence in advance of trial a list of names of the witnesses intended to be called. Wilcox J rejected as a matter of principle that information as to the names of proposed witnesses could be the subject of legal professional privilege.[298]

In these Australian cases legal professional privilege is claimed in an effort to resist pre-trial disclosure of witness statements or briefs. The concerns expressed by prosecutors in raising the privilege are the mirror-image of those voiced against liberalising criminal discovery - perjury and witness intimidation.[299] And they reflect, no doubt, the understandable desire on the part of prosecutors to retain any existing forensic advantage.[300] These concerns no longer hold sway as a general rule in New

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293 The "sole purpose" test is firmly established in Australian law: *Grant* v *Downs* (1976) 135 CLR 674 (HCA); *Baker* v *Campbell* (1983) 49 ALR 385 (HCA). This test has been rejected in New Zealand in favour of one of "dominant purpose" (see *Guardian Royal Exchange Assurance of New Zealand* v *Stuart* [1985] 1 NZLR 596 (CA)). This should make it easier to claim privilege for witness statements than in Australia, if such statements can properly be the subject of legal professional privilege in the criminal context. As to which, see below n 305 and accompanying text. For a review of the rival tests see generally Peiris "Legal Professional Privilege in Commonwealth Law" (1982) 31 ICLQ 609.

294 Above n 292, 234. See also 237 (McGregor J) and 242 (Beaumont J).

295 Above n 277.

296 Relying on *Barton* v *R* (1980) 147 CLR 75, 96 per Gibbs ACJ and Mason J (HCA).

297 Above n 277, 621.

298 Above n 277, 622-623.

299 See *Cain* v *Glass*, above n 289.

300 An argument raised in *Pearce*, for instance, but soundly rejected by Casey J: above n 1, 412.

Zealand after *Pearce*. It would be ironic if these arguments were allowed to succeed under the legal professional privilege exemption in section 27(1)(h) while dismissed under section 6(c). Historically the privilege developed in the civil law context, there being no criminal discovery known to the Common Law.[301] Even in the civil context the claim for privilege in relation to witness statements is relatively weak in policy terms.[302] But in the criminal context, where one arm of the state investigates and gathers information and another prosecutes, and where the overwhelming "balance of advantage" lies with the state,[303] privilege should not cover witness statements. The only legitimate reach of the litigation arm of legal professional privilege in the criminal context, in my view, is coverage of what is called "work product" in the narrow sense; that is,[304]

> Internal legal research, records, correspondence and memoranda, to the extent that they contain opinions, theories or conclusions of investigating or prosecution personnel or staff, or reflect their mental processes in conducting the investigation or preparing the case for trial.

To stretch the privilege beyond work product to cover witness statements debases the privilege and undermines the purposes served by it.[305] I realise there may be a more analytical route through the Australian cases which could lead to the same result[306] but my preference is to address the issue in terms of general principle. In my submission, legal professional privilege should not attach to witness statements in criminal proceedings on indictment. Moreover, that is what I understand the High Court of Australia to say in *Attorney-General for NSW* v *Findlay*.[307] It is hardly likely that the New Zealand Court of Appeal would allow the model of criminal discovery fashioned out of the OIA in *Pearce* to be rendered inoperable in an important respect by overly broad claims of legal professional privilege.

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301 See *R* v *Holland* (1792) 4 TR 691; 100 ER 1248 (KB) and JH Wigmore *Evidence in Trials at Common Law* (Chadbourn rev, Little Brown, Boston, 1976) vol 6, §1859g.

302 See generally Waits "Work Product Protection for Witness Statements: Time for Abolition" [1985] Wis LR 305.

303 See generally Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure" (1960) 69 Yale LJ 1149.

304 Law Reform Commission of Canada *Study Report: Discovery in Criminal Cases* (1974) 177, quoted and discussed by Elkington "Discovery Upon Indictment in New South Wales" (1980) 4 Crim LJ 4, 25-6.

305 See generally Feldman, above n 275.

306 Such an argument would follow *Maddison* v *Goldrick* (above n 279), read the High Court decision in *Attorney-General for NSW* v *Findlay* (idem) in its natural sense, reject the case viewing the Director of Public Prosecution as legal adviser to the Police as our arrangements are different and such a role for Crown counsel is inconsistent with the prosecutor's role as "minister of justice" (see *R* v *Thomas (No 2)* [1974] 1 NZLR 658, 659, per Wild CJ (CA)), and distinguish the ACT cases on the ground that Police prosecutors normally conduct preliminary hearings in New Zealand.

307 Above n 279.

F *The Privacy Interests of Potential Witnesses*

Pearce concerned access to briefs of evidence of witnesses, to wit police officers, and did not address specifically whether names, addresses or phone numbers of these potential witnesses must be made available as a general rule as well. Section 27(1)(b) of the OIA, which protects personal information from disclosure if it would involve the unwarranted disclosure of the affairs of another, is similarly worded to exemption 7(C) of the United States FOIA.[308] Under that latter exemption protection is almost automatically given to the names, addresses and phone numbers of those persons interviewed in the course of law enforcement investigations.[309] And this is so even though the person interviewed did not give the information in confidence and might testify at a later hearing.[310] In protecting from disclosure the identities of interviewees and potential witnesses, the American courts have stressed the potential for witness harassment and intimidation, the stigma that attaches to any connection with police investigations and the effect disclosure might have on the ability of law enforcement agencies to gather information in the future.[311] Similarly, exemption 7(C) has been held to prevent the identification of law enforcement officers, although it is recognised that the privacy interests of these public officials is less than civilian witnesses and is more easily outweighed by a public benefit from disclosure.[312] Some of these concerns were voiced by a minority on the Criminal Law Reform Committee.[313]

The New Zealand courts are unlikely to emulate the American approach. First of all, it is generally recognised that the American courts have taken too expansive a view under exemption 7(C).[314] Secondly, the motivating concerns behind this expansive view (indicated above) are undercut by the reasoning in *Pearce*. Thirdly, the "old" practice of criminal discovery in proceedings on indictment required disclosure to the defence of the names and addresses of all persons interviewed by the Police who could give material

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308 Exemption 7(C) permits withholding of records compiled for law enforcement purposes whose release could reasonably be expected to "constitute an unwarranted invasion of personal privacy". What follows in the text is a misleadingly brief and incomplete treatment of exemption 7(C). It is treated more fully in Taggart, above n 259 and see generally Braverman and Chetwynd, above n 46, vol 2, §24-5.22; Waldman "Privacy Versus Open Government: Section 7(C) Exemption of Freedom of Information Act" [1986] Annual Survey of American Law 809; Hammett "Privacy and the FOIA: Law Enforcement Records" (1988) 14 Access Reports/FOI (No 15, July 27) 4.

309 See, eg, *Lesar* v *Department of Justice* 636 F 2d 472 (DC Cir 1980) and *Cuccaro* v *Secretary of Labour* 770 F 2d 355 (3d Cir 1985). See generally JT O'Reilly, *Federal Information Disclosure: Procedures, Forms and the Law* (Shepards/McGraw Hill, Colorodo Springs, 1986) vol 2, §17.09, p17-44.

310 See *New England Apple Council Inc* v *Donovan* 725 F 2d 139 (1st Cir 1984).

311 Above n 309; *Lame* v *Department of Justice* 654 F 2d 917 (3d Cir 1981); *Antonelli* v *Sullivan* 732 F 2d 560 (7th Cir 1984).

312 See, eg, *Lesar* v *Department of Justice*, above n 309; *Johnson* v *Department of Justice* 739 F 2d 1514 (10th Cir 1984); *Miller* v *Bell* 661 F 2d 623 (7th Cir 1981); Waldman, above n 308, 610-617.

313 *Report on Discovery in Criminal Cases*, above n 96, paras 147-156.

314 See the commentaries, above n 308.

evidence.[315] In the light of that practice disclosure is hardly likely to be held "unwarranted" in the general run of cases.[316] Of course in those exceptional cases where the interests in section 6(c) require protection section 27(1)(b) also would likely apply.[317] Lastly, it is not clear that the word "affairs" in section 27(1)(b) covers the name of a third person.[318]

IV CONCLUSION

Pearce is a significant case for all the reasons given in the introduction. But it is significant for another, less obvious reason.

One way or another the courts were marginalised by the OIA scheme. Astute practitioners realised, however, that the Act itself might be utilised to obtain criminal discovery by the "back door". The consequent involvement of the ombudsmen in the resolution of these disputes under the OIA threatened the judiciary's monopoly over criminal procedure. In *Pearce* the Court of Appeal used the OIA to radically reform the law and practice of criminal discovery while managing to maintain the court's exclusive jurisdiction over these disputes. To make this scheme workable, the judges thought it necessary to share with the District Court the jurisdiction to enforce the statutory right of access. In this, as in so many other respects, the OIA driven scheme of criminal discovery laid down in *Pearce* parallels the recommendations of the Criminal Law Reform Committee. As we have seen, Cooke P even suggested that the holding in *Pearce* might render unnecessary any further legislative action in the field.

The deeper significance of *Pearce*, to my mind, is that it shows law's empire striking back.

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315 See *R* v *Mason*, above n 87.

316 See the competing views of the privacy interests of persons interviewed by the Police, above n 313.

317 It is possible to envisage cases where the statement can be disclosed but s27(1)(b) would require the removal of personal identifiers. In such a case deletions can be made under s17 (incorporated into Part IV of the Act by s24(3)). Cf *Cain* v *Glass*, above n 289, 41, per Lusher J.

318 The ordinary dictionary meaning of the word points against it covering names. The issue has arisen occasionally before the Ombudsmen. See *Fifth Compendium of Case Notes of the Ombudsmen* (1985) Case No 10, p27; *Sixth Compendium of Case Notes of the Ombudsmen* (1986) Case No 210, p118; *Report on Complaint under the Official Information Act from Mr Michael Laws*, above n 245, pp13-17.