Forty Years of FOI: Accountability, Policy-making and The National Innovation and Science Agenda

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ABSTRACT:

Executive power in policy-making has been the subject of longstanding jurisprudential and political debate. Innovation policies aimed at driving collaborative government and industry outcomes sit very much at the intersection of this tension. In the 1990's Christopher Arup highlighted legitimacy concerns around 'corporatist' innovation policy involving greater government-corporate alliancing and selective policy measures, nominating procedural reform and audits to check policy-making power. However, the development of the National Innovation and Science Agenda shows these mechanisms to be less than effective. With the passage of 40 years since the Freedom of Information ('FOI') Bill was considered by a Senate Committee, it is timely to reconsider the role of public scrutiny in policy-making. While increased scrutiny is at least part of the answer to better policy, the FOI regime faces significant obstacles in achieving its objectives in the innovation policy space, if not at broader levels within government policy development. Against the backdrop of recent calls for greater confidentiality in the policy-making process, it is argued that increased secrecy is not the answer.

1. INTRODUCTION

Executive power is an evolving topic of enduring interest. Former Chief Justice Robert French recently noted 'particular anxiety' around the nature of executive power, especially non-statutory power.[1] While lawyers have long advocated for more effective fetters to avoid its 'democratic deficit',[2] political scientists believe it cannot be checked simply by regulation, given its deeply political origins.[3] This article uses the National Innovation and Science Agenda (NISA)[4] as a case study to highlight issues around policy development inherent in this larger theoretical debate.

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[1] Robert French, 'Executive Power In Australia – Nurtured And Bound In Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 16; Cheryl Saunders, *The Scope of Executive Power* (Papers on Parliament No. 59, April 2013); Charles Lawson, *Regulating Executive Power Under the Australian Commonwealth Framework* (Black Jettie, 2011). Cf. KM Hayne, 'Executive Power' (2017) 28 *Public Law Review* 236.

[2] Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) *Oxford Journal of Legal Studies* 97, 104; see also Anne Cossins, 'Revisiting Open Government: Recent Developments In Shifting The Boundaries Of Government Secrecy Under Public Interest Immunity And Freedom Of Information Law' (1995) 23(2) *Federal Law Review* 226, 256-258.

[3] Patrick Weller, 'Parliamentary Accountability for Non-Statutory Executive Power: Impossible Dream or Realistic Aspiration?' (2005) 16 *Public Law Review* 314.

[4] Commonwealth, *National Innovation and Science Agenda Report: Welcome to the Ideas Boom*, November 2015 ('NISA').

Policy-making is an integral part of the executive's constitutional power to govern. Policies may be proposed by a Minister or an agency, and many significant social policies have originated outside government.[5] However, it is the agencies that generally develop a policy, implement it, and evaluate its performance.[6] Agency staff have the difficult mandate of serving the government of the day, yet remaining apolitical.[7] Policy development can thus be a challenging process that is impacted by relations between Ministers, advisers, stakeholders, and agency staff, and the exigencies of party politics.

These dynamics were highlighted in the most recent review of the Australian Public Service (APS). Consultation participants acknowledged the APS' core business of policy-making, along with its heavy responsibility in safeguarding the Australian national interest.[8] However, agency staff keenly feel the tension between this and serving the government interest.[9] Ministerial respect for and adherence to due Cabinet process when developing policy is critical as is, not uncommonly, fearless advice from bureaucrats to Ministers throughout. Several key reports, including the recent APS review final report, acknowledge this.[10]

Undoubtedly, success stories in Australian policy development are more the norm than the exception. As Leutjens et al observe, 'across many public policy domains, the bulk of public projects … perform not so badly at all, and sometimes even highly successfully.'[11] However, the last decade has been marked by a number of high profile, large-scale public policy failures including the Home Insulation Program (HIP) and National Broadband Network (NBN) policy.[12] Calls to learn from these failures[13] have taken varied forms within the media, academic research and political inquiries but with limited success if re-occurrence of similar outcomes is the metric adopted.

Of relevance in the context of this paper are ineffective policy initiatives in the innovation space which have arisen over the last 25 years, albeit on smaller scales than the HIP or NBN failures. Over this period,

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[5] *Freedom of Information: Report by the Senate Standing Committee on Legal and Constitutional Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979) ('FOI Report') 218.
[6] Contracted service providers are often part of the implementation network, which raises its own issues: Myles McGregor-Lowndes and Amanda McBratney, 'Government Community Service Contracts: Restraining Abuse Of Power' (2011) 22 *Public Law Review* 279; Janet McLean, 'The Crown in Contract and Administrative Law' (2004) 24(1) *Oxford Journal of Legal Studies* 129.
[7] APS Commissioner, *Commissioner's Directions 2016* (2016) ('Commissioner's Directions'), Directions 13(j), 17(a).
[8] Inside Policy, *Report on the APS Independent Review Consultations* (Stakeholder Consultations Report, 31 December 2018) 6, 9 ('APS Consultations Report') v, vi, 3, 6, 9, 23.
[9] Ibid vi, 23.
[10] See for example Peter Shergold, *Learning From Failure: Why Large Government Policy Initiatives Have Gone So Badly Wrong in the Past and How the Chances Of Success in the Future Can be Improved* (Independent Review, 12 August 2015) v, 9, 25-30 ('Shergold Report'); Department of the Prime Minister and Cabinet, *Our Public Service Our Future: Independent Review of the Australian Public Service* (2019) 121 ('Thodey Review').
[11] Joannah Luetjens, Michael Mintrom and Paul 't Hart (eds) *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University Press, 2019) 3.
[12] As discussed in Shergold (n 10).
[13] Shergold (n 10); John Howard, 'Public Policy Drift' (Institute of Public Administration Australia Public Policy Discussion Paper, 4 April 2012).

more than 150 reports[14] and a plethora of policies have been introduced to improve outcomes in Australia's innovation performance, including the highly publicised NISA.

The NISA policy process was audited by the Australian National Audit Office (ANAO) in 2017.[15] Findings highlighted difficult timeframes, and shortfalls in basic standards of evidence-based and consultative policy development. Of concern to the auditors, the agencies conceded that little impact would likely be registered from the $1.1 billion spent. The flawed policy-making process cost Australian taxpayers dearly. Given the renewed focus on APS policy work, the difficulties in innovation policy-making and the recent NISA experience are a worthwhile case study for examining the tensions around checks on policy-making, and public scrutiny.

Christopher Arup's seminal 1993 work on innovation law and policy[16] identified various mechanisms to curb innovation policy-making power, including audits and procedural reform. However, these suggestions arguably belie a more fundamental issue: the dearth of effective public scrutiny at agency level impedes sound, fearless advice, allowing ineffectively planned innovation policy to continue. The *Freedom of Information Act 1982* (Cth) ('*FOI Act*') – a key legislative response to this problem – is therefore reviewed in this article through a socio-legal lens.[17] It is contended, in this context, that despite the passage of more than 40 years since a Senate Standing Committee ('Committee') first examined the draft legislation[18] it still faces significant obstacles in delivering on its intent – in the innovation policy space, if not at broader levels within government policy development.

The paper commences in section 2 with an overview of the policy-making process which, in practice, enjoys a low level of scrutiny from parliament and the courts. Section 3 reviews Arup's early examination of innovation policy-making,[19] and the legitimacy problems that closer alliances between industry and government may present. In this 'corporatist' realm, with little scrutiny, policy initiatives often fail to achieve impact. Arup explores mechanisms to check this power in the wider administrative law framework,[20] identifying the possibility of audits and procedural reform.[21]

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[14] Howard Partners, *Australia 2030 Prosperity Through Innovation: Report on the Analysis of Stakeholder Consultations* (2017) 3 ('Howard Partners Report'), and the reports listed there.
[15] Auditor-General of Australia, *Design and Monitoring of the National Innovation and Science Agenda* (Australian National Audit Office (ANAO), Performance Report, Report No. 10 2017-2018, 27 September 2017) ('ANAO Report').
[16] Christopher Arup, *Innovation, Policy and the Law* (Cambridge University Press, 1993).
[17] Consistently with Arup's work, the socio-legal approach considers the practical operation and significance of the law: Arup, ibid 5.
[18] FOI Report (n 5).
[19] Arup (n 16).
[20] Lawson (n 1) 1, 27 denotes 'core' administrative law reforms as: *Administrative Appeals Act 1975* (Cth), *Ombudsman Act 1976* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Freedom of Information Act 1982* (Cth), *Privacy Act 1988* (Cth); here 'administrative law framework' includes the broader regulation of agencies and the APS, including the *Public Service Act 1999* (Cth) ('PS Act'), the *Public Governance, Performance and Accountability Act 2013* (Cth), *Auditor-General Act 1997* (Cth), Commissioner's Directions, agency directives and guidelines.
[21] Arup (n 16) 58, 295, 305.

Section 4 discusses Arup's mechanisms as exemplified by the NISA audit and its recommendation of procedural reform. There are difficulties with these mechanisms. The prospect of audit scrutiny does not appear to check innovation policy-making. Moreover, even where excellent policy-making procedures exist they will be of little assistance if APS compliance, and its concomitant of fearless advice to Ministers, cannot be secured. It is therefore posited that at least one response must be more effective public scrutiny, to facilitate APS compliance with its administrative duties, including fearless advice.

Section 5 examines the current FOI regime, which faces significant challenges in facilitating public scrutiny of policy-making. Section 6 discusses Chancellor Professor Peter Shergold's *Learning from Failures* report which suggests that the risk of policy-making failures may be lowered by amending the *FOI Act* to *strengthen* secrecy for government decision-making. The report draws on notions of Westminster government and fearless advice, reprising many arguments dismissed by the Committee in 1979. Section 7 discusses the various government reviews that have shaped progress in this area thus far.

The case study highlights the difficulties of the traditional Westminster response to policy-making; confidentiality buttresses the sequestered space within which innovation policy-making failures may continue. Generational change in the APS does not appear to have ameliorated the bureaucratic 'culture of secrecy'[22] or 'malaise' regarding FOI matters.[23] The 'continuing resistance' observed by the ALRC in 1995[24] is still evident today. It may be that strengthening the mandatory information publication scheme provides a way forward.

2. EXECUTIVE POWER, POLICY-MAKING AND ACCOUNTABILITY

In Australia's 'evolving democratic experiment'[25] the *Constitution* formally vests executive power in the Queen, but it is exercised by the Governor-General with advice from the Federal Executive Council.[26] However, the Council's work is essentially to implement Cabinet and Ministerial recommendations, so in reality, it is Cabinet (and the Prime Minister as Chair of Cabinet) that wields executive power.[27] The precise ambit of executive power, particularly non-statutory executive power, has long been debated and

[22] Australian Law Reform Commission, *Open Government: A Review Of The Federal Freedom Of Information Act 1982* (ALRC Report 77, December 1995) ('Open Government Report') [4.16].
[23] Daniel Stewart, 'Assessing Access to Information in Australia: The Impact Of Freedom Of Information Laws On The Scrutiny And Operation Of The Commonwealth Government' in John Wanna, Evert A Lindquist and Penelope Marshall (eds), *New Accountabilities, New Challenges* (Australian National University Press, 2015) 140.
[24] ALRC (n 22) 4.13.
[25] Lawson (n 1) 3.
[26] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 ('*Constitution*') s61-63, see also *Acts Interpretation Act 1901* (Cth) s 16A.
[27] Lawson (n 1) 87; Catherine Althaus, Peter Bridgman, Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 6th ed, 2018) 175-176; Dan Meagher, Amelia Simpson, James Stephen Stellios, Fiona Wheeler, Peter Hanks, *Hanks Australian Constitutional Law: Materials and Commentary* (Butterworths, 2016) ('Hanks') [7.4.9]-[7.4.10C], citing *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 382 (Aickin J).

continues to cause concern.[28] For present purposes, it is sufficient to note that among these powers is the government's ability to engage in policy-making.

In our system of parliamentary supremacy, the legislature is traditionally viewed as a significant check on policy-making power. The executive effectively controls the legislative program of parliament, but any policy implemented by legislation must weather the scrutiny of both Houses of Parliament, particularly the Senate, where a government may not hold a majority.[29]

Yet there are numerous ways to bypass the strictures of legislative scrutiny. For example, a government may implement policy by simple financial appropriations, or cuts, which have 'never been much of a hurdle in the budget context'.[30] A salient example is the Liberal government's failed legislative attempt to abolish the Office of the Australian Information Commissioner ('OAIC') in 2014, then the simple removal of funding for it (later reinstated).[31] Other avenues include policy implementation under 'broad permissive statutory frameworks' and 'informal administrative structures'.[32] Political scientists are generally sceptical of the ability to render the executive accountable to parliament.[33]

Policy-making, particularly when implemented by non-statutory means, also 'minimises and partly eradicates' the possibility of judicial scrutiny.[34] The *Administrative Decisions (Judicial Review) Act 1977* (Cth) and *Administrative Appeals Tribunal Act 1975* (Cth) apply to administrative decisions made pursuant to statute rather than policy-making although, admittedly, there is no bright line between the two.[35] Other sources of jurisdiction in the *Constitution* and *Judiciary Act 1903* (Cth) are confined to 'matters' where a court must establish an immediate right, duty or liability.[36] If challengers to a policy do not seek such a decision, the court's jurisdiction is not enlivened. As Sir Gerard Brennan has noted, given the concern for individual litigants' interests, judges are 'not very good at formulating or evaluating policy'.[37] Further, some decisions are simply not viewed as justiciable due to the constitutionally different roles of the courts and executive. Where the exercise of power involves 'complex policy questions'

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[28] See George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31(3) *Federal Law Review* 421; French (n 1) 22. French notes some believe it now has little guidance as to boundaries: at 16, 32, 37; see also Francis Gurry, 'The Implementation of Policy Through Executive Action' (1977) 11 *Melbourne University Law Review* 189, 193. Cf. Hayne (n 1).

[29] Althaus, Bridgman and Davis (n 27) 20; Hanks (n 27) [7.3.27C]; Cohn (n 2) 117.

[30] Saunders (n 1); Arup (n 16) 226; Gurry (n 28) 199.

[31] Maureen Henninger, 'Reforms to Counter a Culture of Secrecy: Open Government in Australia' (2018) 35 *Government Information Quarterly* 398, 402-403.

[32] Arup (n 16) 226; see also Sue Taylor, Julie-Anne Tarr and Anthony Asher, 'Australia's Flawed Regulatory Impact Statement (RIS) Process' (2016) 44 *Australian Business Law Review* 361.

[33] Weller (n 3) 324. See also Arup (n 16) 293; Hanks (n 27) [7.3.12].

[34] Saunders (n 1).

[35] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s3; *Administrative Appeals Tribunal Act 1975* (Cth), s 25; Peter Bayne, 'The Court, the Parliament and the Government - Reflections on the Scope of Judicial Review' [1991] *Federal Law Review* 1, 12.

[36] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *Judiciary Act 1903* (Cth) s 39B; *Constitution* ss 75(iii), 75(v); Chris Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31(3) *Federal Law Review* 551.

[37] As quoted in Bayne (n 35) 1.

Cabinet decisions have been held non-justiciable.[38] So while the rule of law may be 'strongly invoked' in other exercises of executive power, 'the executive, as opposed to the judiciary … [possesses] a monopoly of the policy-making function'.[39]

The next section discusses Arup's concerns regarding the legitimacy of innovation policy-making given the low levels of practical scrutiny. Arup presaged closer relations between state and industry, and the ineffective nature of innovation policy measures, suggesting various checking mechanisms.

3. ARUP ON INNOVATION POLICY

Over 25 years ago, Arup observed the government's adoption of innovation as a central policy concern in Australia's transformation from a resource-based to a 'high-technology' economy.[40] Arup suggests that the loosely regulated policy-making space allows government to pursue what he calls a 'corporatist'[41] approach; policy is freed from rule-based review through the use of statutory privileges, flexible regulation, administrative action and collaborative decision-making.[42] In this space, instead of the traditional free market 'hands off' approach and primacy of the rule of law, government enlists the aid of large companies, peak bodies, and trade associations to selectively 'discipline industrial activity towards modernising production and renewing growth'.[43] Or, in the more exciting words of the NISA, to 'drive smart ideas that create business growth, local jobs and global success'.[44]

Where corporatism is taken to extremes, Arup sees the law reduced to provision of a shell – property law, contract law, law of associations – within which the government pulls its policy levers, 'fashioning working standards and individual decisions to further innovation objectives under fluctuating conditions'.[45] The line between public and private sectors is blurred. Power is shifted to the executive's discretionary programs over rule-based regimes.[46] Apart from placing a large financial burden on the state, legitimacy problems include allegations of favouritism and discrimination.[47]

Arup anticipates a constitutionalist call for innovation policy favours to be allocated legislatively, with decisions to be measurable against legal criteria to open them up for review, to provide accountability to parliament and the courts.[48] However, in the end and despite some intellectual frustration, he concludes that the liberal facilities of property and contract will co-exist in a complex interaction with the (then)

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[38] *Minister for Arts Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274, 278-9 (Bowen CJ). *Sankey v Whitlam* (1978) 142 CLR 1 ('*Sankey*') made 'inroads' regarding common law judicial review, although policy is still 'at the heart' of tensions between the judiciary and executive: Bayne (n 35) 6, 7.
[39] McLean (n 6) 130.
[40] Arup (n 16) 7.
[41] Ibid 17, 31.
[42] Ibid 50.
[43] Ibid 25.
[44] NISA (n 4) 1.
[45] Arup (n 16) 50.
[46] Ibid 56.
[47] Ibid 29-30.
[48] Ibid 31, 285, 293-294; see also Cohn (n 2).

newly emerging corporatism, its inducements and closer relations with interested parties.[49] Perhaps political scientists may conclude Arup simply acknowledged the growing drivers of regulatory evolution.

Yet Arup's analysis of early innovation policy is a remarkably insightful depiction of innovation policy-making as it has eventuated over the past quarter century. While the constitutionalist struggle against corporatist policy-making failed to gain significant traction,[50] Arup accurately notes the degree of difficulty still encountered in the innovation sector: choosing the correct policy instruments often appears to devolve to 'picking winners'.[51] Arup canvasses various positive adjustment measures (such as research and development (R&D) grants and the R&D tax incentive), concluding that they generally seemed small-scale and did not really influence change.[52]

With some ambivalence, Arup suggests a number of mechanisms to check executive policy-making power, including the possibility of an Auditor-General's performance audit,[53] and procedural reforms to inject 'suitable standards of internal administrative rationality and participative democracy'.[54] Interestingly, these mechanisms were exemplified in the 2017 Auditor-General's performance audit of the NISA. The next section discusses the NISA, its audit and outcomes.

4. DEVELOPMENT OF THE NATIONAL INNOVATION AND SCIENCE AGENDA

4.1 Policy proliferation, the rapid rise and fall of NISA

Innovation is still seen as a crucial driver of economic prosperity,[55] and innovation policy-making has proliferated in the last 25 years. However, as Arup predicted, it has largely been ineffective. Despite many selective policy measures and hundreds of government-funded reports[56] Australia has not achieved a more competitive position on innovation indices.[57] Indeed, there is little consensus even on indices, and a review panel is examining just how Australia should assess its innovation performance.[58] There is a vast business social science literature on innovation policy, the disadvantages of traditional regulatory approaches and, increasingly, the need to view and regulate innovation as a complex system.[59] It poses a challenging and

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[49] Arup (n 16) 59.
[50] Cf. Cohn (n 2).
[51] Arup (n 16) 28, 233, 282. See also John Howard and Roy Green, *Challenges for Australian Research & Innovation* (Discussion Paper, 10 April 2019) 12, 35.
[52] Ibid 278; nb. Bill Ferris, Alan Finkel, John Fraser, *Review of the R&D Tax Incentive* (Review Report, 4 April 2016).
[53] Arup (n 16) 295-296.
[54] Ibid 59, 305.
[55] NISA (n 4) 1; Innovation and Science Australia (ISA), *Australia 2030: Prosperity Through Innovation* (Policy Framework, November 2017) ('2030 Report') 9.
[56] Howard Partners Report (n 14) 3.
[57] NISA (n 4) 1, 4, 10.
[58] Department of Innovation, Industry and Science, *Improving Innovation Indicators* (Consultation Paper, March 2019). Final report yet to issue.
[59] For a seminal discussion see Mark Dodgson, Alan Hughes, John Foster and Stan Metcalfe, 'Systems Thinking, Market Failure, and the Development of Innovation Policy: The Case Of Australia' (2011) 40 *Research Policy* 1145; Howard (n 13). More recently, see 2030 Report (n 55) 21-22; ISA, *Performance Review of the Australian Innovation, Science and Research System* (Report, December 2016) ('ISA Performance Review') 11.

entrenched policy problem; the level of complexity means it is 'not feasible to map the … system in detail and quantify all of the variables, interactions and feedback loops.'[60]

When former Prime Minister Malcolm Turnbull was appointed in September 2015, he immediately placed innovation squarely on the political agenda.[61] As for policy-making, he noted –

> *We need to restore traditional cabinet government. There must be an end to policy on the run and captain's calls. We need to be truly consultative with … the wider public. We need an open government …*[62]

Surprisingly, then, the NISA package was developed and launched by December 2015. One year on, the government announced Australia had 'come a long way' and that the NISA was having 'a significant impact'.[63] Another year, and work was underway on a different innovation policy framework (that largely failed to gain traction),[64] and Australian officials signalled to the International Monetary Fund (IMF) that the NISA would be wound down.[65] The IMF's assessment, echoing Arup, was that the NISA was small-scale and did not reflect a longer-term vision.[66] Literature on the NISA was not favourable.[67] The government then advised that, after reassessment, it would pursue a 'new policy focus' on the space sector and advanced manufacturing.[68] The 'violent swings'[69] around corporatist innovation policy-making thus seem largely unchecked.

4.2 What did the NISA promise?

The NISA promised an ideas boom, injecting $1.1 billion between 2015-2019. It comprised 24 measures administered by nine different portfolios. Expenditure was divided between four 'pillars' as follows:

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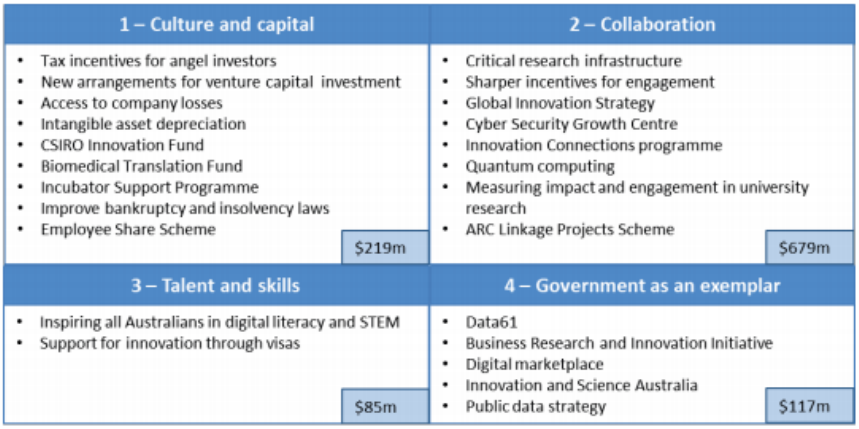
[60] ISA Performance Review (n 59) 11.
[61] Malcolm Turnbull (Prime Minister), 'Changes to the Ministry' (Media Transcript, 20 September 2015) <https://www.malcolmturnbull.com.au/media/Ministry>.
[62] Malcolm Turnbull, 'Malcolm Turnbull's Speech In Full: "We Need a New Style of Leadership"', *The Guardian* (Online News, 14 September 2015) emphasis added <https://www.theguardian.com/australia-news/2015/sep/14/malcolm-turnbulls-speech-in-full-we-need-a-new-style-of-leadership>.
[63] Greg Hunt and Malcolm Turnbull, 'National Innovation and Science Agenda is Having a Significant Impact One Year On' (Media Release, 7 December 2016) <https://www.minister.industry.gov.au/ministers/hunt/media-releases/national-innovation-and-science-agenda-having-significant-impact-one>.
[64] The government accepted only 17 of 30 recommendations in the new proposed policy framework (2030 Report (n 55)): Commonwealth, *Australian Government Response to Innovation and Science Australia's 'Australia 2030: Prosperity Through Innovation' Report* (May 2018).
[65] International Monetary Fund, *Australia: 2017 Article IV Consultation* (IMF Country Report No. 18/44, February 2018) ('IMF Report') 22. Some NISA initiatives continue.
[66] Ibid 20.
[67] Sinclair Davidson and Jason Potts, 'A New Institutional Approach to Innovation Policy' (2016) 49(2) *The Australian Economic Review* 200, 205; Yuliani Suseno and Craig Standing, 'The Systems Perspective of National Innovation Ecosystems' (2018) 35 *Systems Research and Behavioral Science* 282; Harry Bloch and Mita Bhattacharya, 'Promotion of Innovation and Job Growth in Small- and Medium-Sized Enterprises in Australia: Evidence and Policy Issues' (2016) 49(2) *The Australian Economic Review* 192.
[68] James Riley, 'Labor "hypocrisy" on R&D: Andrews', *InnovationAus* (Online Innovation News Forum, 10 May 2019) <https://www.innovationaus.com/2019/05/Labor-hypocrisy-on-RD-Andrews>.
[69] FOI Report (n 5) 54.



Source: ANAO Adaptation of information from the National Innovation and Science Agenda[70]

Despite the large outlay, it should be emphasised the NISA package was significantly less than the 2015-2016 government spend of around $5.751 billion on the R&D Tax Incentive Scheme and higher education sector grant funding.[71] So, as noted by the IMF, the NISA was small-scale and short-term, but in terms of expenditure of public funds, it was considerable.

4.3 The Auditor-General's Report

The Auditor-General subsequently conducted a performance audit of the Department of Prime Minister and Cabinet (PM&C), the Department of Industry, Innovation and Science (DIIS) and Innovation and Science Australia (ISA), to report on the policy design and monitoring process for the NISA.[72] The report is careful to point out it does not purport to examine the merits of policy positions, nor government decisions. Nevertheless, the media was quick to discern its less than favourable assessment of agency policy-making.[73]

Auditors assessed policy briefing documents and submissions against agency guidance material, the APS Values,[74] APS Commissioner's Directions,[75] policy procedure manuals and the like.[76] In light of scale of expenditure and expected impact, auditors found the material did not provide effective benchmarks for the standard of analysis and evidence.[77]

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[71] In 2015-2016 the R&D Tax Incentive scheme cost $2.951 billion in tax foregone: The Centre for International Economics, *R&D Tax Incentive Review* (Final Report, 29 March 2016) 112. The government spent $2.8 billion in research sector grant schemes: NISA (n 4) 3.
[72] ANAO Report (n 15).
[73] See for example Primrose Riordan, 'PM's "Agile" Agenda Fails the Auditor Test', *The Australian* (Online News, 28 September 2017) <https://www.theaustralian.com.au/nation/politics/prime-ministers-agile-innovation-agenda-fails-the-auditor-test/news-story/9cfd806d3a08b22da624091be30adac0>.
[74] Section 10 of the PS Act (n 20).
[75] Commissioner's Directions (n 7).
[76] ANAO Report (n 15) 24.
[77] Ibid 24-25.

The speed with which the NISA was developed also raised concern. PM&C could not justify 1) the short timeframe, and 2) limited or entirely absent advice around implementation risks, governance, or evaluation. Indeed,

> … '[i]t was unclear how the timeframe … took account of the Department's own better practice guidance on the successful implementation of policy initiatives, which emphasises that implementation should be considered at every stage of policy development.'[78]

This over-responsiveness to the Prime Ministerial agenda contributed to subsequent problems. Auditors found a lack of evidence both for the four barriers/Pillars of NISA[79] and the measures to address these barriers. Much of the policy advice failed to answer even the most basic questions in policy development templates; it was:

> … general in nature and did not present quantitative or in-depth analysis of problems … A number of proposals that involved significant expenditure aimed at transforming parts of the innovation system relied on assertions rather than evidence.[80]

Evaluation problems then emerged. The NISA Taskforce did not include 'any modelling, forecasting or other analysis' of expected impacts in the design phase.[81] Moreover, PM&C conceded it would be hard to find any authoritative way of modelling given the disparate nature of the NISA measures.[82]

Ultimately, the DIIS produced a complex map of 'outcome chains' to measure impact, but acknowledged that many of the measures and effects were 'relatively small' and 'unlikely to be captured at a whole-of-economy (macro) level'.[83] PM&C also noted the NISA package would be 'too small, even in aggregate, for an economy-wide modelling or analytical framework to register an economic impact beyond the materiality thresholds used by the Treasury'.[84] These comments reflect the IMF's later assessment.[85]

Opacity was another significant issue. Consultation occurred for some NISA measures,[86] but in at least one instance time pressure impacted on consultation levels. The 'targeted consultation' was adequate only in light of the short timeframe and because some measures were canvassed in prior reviews and consultations. However, while drawing on prior consultations to reduce stakeholder burden may be appropriate, this presupposes a transparent link between stakeholders' views and the proposed measures.

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[78] Ibid 21-22.
[79] Ibid 26-27.
[80] Ibid 28.
[81] Ibid 27.
[82] Ibid.
[83] Ibid 41.
[84] Ibid 27.
[85] IMF Report (n 65) 20.
[86] ANAO Report (n 15), 23, 30-31, 37.

Several NISA measures were not those recommended in earlier reviews,[87] and the need for further consultation was flagged in relation to others.[88]

As the final bottom line, auditors made only two recommendations: that DIIS make proper evaluation and monitoring arrangements for NISA measures, and that both PM&C and DIIS revise their policy development material.[89] Recommendation 1(c) suggested that this improved policy material include mechanisms designed to ensure its consistent application moving forward.[90]

Arup's mechanisms thus appear to be less than effective. As to audits, as Arup (and the auditors) conceded, auditors must appraise agency performance and financial efficiency, not the merits of government policy.[91] In any event, the prospect of an audit does not appear to check peremptory policy-making conducted largely in secrecy. While the ANAO's audit program is an active one, it devotes only 2% of audits to policy development.[92]

As to procedural reform, the weakness in this mechanism is encapsulated in ANAO recommendation 1(c): even best practice policy development guidelines will be ineffective absent APS compliance, and provision of Ministerial advice that is quality, evidence-based, and fearless. Agency staff, under the administrative framework, are of course already required to do this;[93] but questionable selective policy continues in practice.

John Howard, long-time consultant to government on innovation policy matters, also advocates procedural reform via a 10-step 'business case' policy framework, on grounds that 'changing guidelines, processes and practices is usually easier than changing human nature'.[94] However, as '[t]he cookbook does not create the meal',[95] Howard advocates using the framework alongside measures such as APS capacity-building, a focus on systems and design thinking, inclusiveness, openness, and engagement with stakeholders and the wider community. Notably, if not with a level of irony, Howard's brief analysis of a predecessor policy to NISA is based only on a 'desktop review of known circumstances',[96] because it was 'unlikely [the agency] would disclose their internal documents and deliberations'. The downside of greater stakeholder collaboration with government, Howard cautions, is that it runs the risk of yielding evidence that is 'open

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[87] Ibid 31.
[88] Ibid 30.
[89] Ibid 10, 29, 51.
[90] Ibid 29.
[91] Arup (n 16) 295-296.
[92] ANAO, *Annual Audit Work Program 2019-2020*, (Web page, 1 July 2019) <https://www.anao.gov.au/work-program/overview>.
[93] The PS Act sets out the APS Values (s 10) and Code of Conduct (s 13), including the requirement to comply with applicable Acts, instruments, and directions by authorities (ss 13(4), 13(5)). Commissioner's Directions (n 7) require compliance with laws, standards and the Code (14(d)) and evidence-based, frank advice (17) (in 2013, Directions 1.3, 1.6; in 2004 2.5, 2.7).
[94] Howard (n 13), 25.
[95] Ibid, 4.
[96] Ibid, 17.

to question',[97] susceptible to capture, and system gaming.[98] In other words, the precise problems identified by Arup in the corporatist approach to innovation policy-making.[99]

The complex, dynamic, challenging nature of the innovation policy 'dance'[100] – like policy-making generally – necessitates a multi-faceted approach to reform.[101] Calls for procedural reforms, APS capacity-building, wider engagement, and (most recently) a growing focus on localism in policy solutions, are not only welcome but coincide with both design thinking and a systems approach to policy-making.[102] Nevertheless, it is posited that Howard's 'human nature' conundrum demands these initiatives be accompanied at all stages of policy-making by greater levels of scrutiny,[103] with audit being only one cross-check and point of accountability.

This approach can be seen in the 2019 call by Terry Moran (Chair of the Centre for Policy Development and former secretary, PM&C) to expand our notion of democratic institutions beyond public institutions to include 'private and community institutions' and also, importantly, to focus on the 'accountability of public administration and the institutions of which it is comprised.'[104] Driving heightened levels of scrutiny in this way delivers double value. At the policy front end, scrutiny incentivises APS capacity-building and compliance with procedural reforms, as well as enhancing citizens' trust in a more open policy process. At the implementation/delivery end, it promotes stakeholder (and public) efficacy by enhancing access to the information needed to assess performance and ask questions.

This approach also coalesces with a more corporatist policy-making framework around difficult areas such as innovation. If both participation and accountability are extended to early-stage agency policy work as well as later development of initiatives, selective measures may achieve greater legitimacy and citizen/stakeholder buy-in. Examination of the current operation of the FOI regime is thus required. As discussed subsequently, it faces significant practical challenges in delivering the requisite, intended levels of public scrutiny.

5. PUBLIC SCRUTINY OF POLICY-MAKING POWER

There is a 'complex tapestry' of statutory and non-statutory regimes regulating access to government documents,[105] including the Cabinet convention of secrecy, although the latter has been increasingly

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[97] Ibid, 31.
[98] Ibid, 32.
[99] Ibid, 16.
[100] Ibid, 5.
[101] Shergold (n 10) (discussed below); Howard (n 13); Commonwealth, *Independent Review of the Public Service* (Online Review Portal) <https://www.apsreview.gov.au/> ('APS Review Portal').
[102] Terry Moran, 'The Next Long Wave Of Reform – Where Will The Ideas Come From?', *The Mandarin* (Online News, 25 March 2019); Howard (n 13); Dodgson et al (n 59).
[103] Howard (n 13), 28 suggests all phases of policy-making 'be open, transparent, consultative and accountable', although these themes are not the focus of the paper; they are discussed in Attachment 1, 29-32.
[104] Moran (n 102).
[105] Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis, 2005) [1.2]; Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No. 112, December 2009).

questioned before the courts.[106] This section focuses on the FOI regime, which since 2010[107] has the object of providing Australians with a 'right of access to documents' to increase 'public participation in Government processes' and 'scrutiny … of the Government's activities'.[108] This right is qualified by a number of exemptions to allow Ministers and agencies to maintain (what has long been viewed as) a necessary level of confidentiality in Westminster-styled Cabinet government.

Under s 34 of the *FOI Act*, Cabinet documents enjoy a 'class' exemption from access if they have the dominant purpose of submission to Cabinet and were, or were proposed to be, so submitted.[109] This first exemption is formidable and reflects the long tradition of Cabinet confidentiality: it is not subject to a public interest test because the test is said to be 'implicit in the purpose of the exemption itself'.[110]

Policy documents are likely protected under s 34 given that all major policy initiatives are referred to Cabinet. Policy officers are therefore counselled by the PM&C to document the possibility of Cabinet consideration, to allow FOI decision-makers to assess the applicability of the exemption.[111] Purely factual material is not exempt, but if reports are 'shot through' with policy considerations the exemption may stand.[112]

The other exemption of interest is for 'deliberative matter'. Sections 11A(5) and 47C of the *FOI Act* comprise a 'content' exemption for documents disclosing matter involved in Ministerial or agency deliberations, including policy-making and implementation.[113] The 1979 Committee noted submissions indicating this exemption could harbour 'a vast potential for frustration' of the legislation.[114] It only 'reluctantly' concluded it be left in the Bill unchanged, placing great weight on proper application of its public interest test.[115] Accordingly, the Information Commissioner's Freedom of Information Guidelines ('FOI Guidelines') view it as confined to, for example, reflections on the 'wisdom and expediency of a proposal'.[116] Access must be provided unless contrary to the public interest.[117]

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[106] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615-616; Mark Rodrigues, *Cabinet Confidentiality* (Parliamentary Background Notes, 28 May 2010).
[107] *Freedom of Information Amendment (Reform) Act 2010* (Cth), Schedule 1.
[108] *FOI Act*, s 3.
[109] *FOI Act*, s 34(1)-(3).
[110] Commonwealth, *FOI Guidelines: Guidelines Issued by the Australian Information Commissioner Under s 93A of the Freedom of Information Act 1982* (January 2019) ('FOI Guidelines') [5.55]. However, the objects clause that stated exemptions were necessary to protect 'essential public interests' was repealed in 2010. New Zealand's publication of Cabinet documents suggests otherwise: Rodrigues (n 106) 8-12; Robert Hazell and Ben Worthy, 'Assessing the Freedom of Information' (2010) 27 *Government Information Quarterly* 352, 358.
[111] Department of the Prime Minister and Cabinet, *FOI Guidance Notes* (July 2011) 6-7.
[112] Section 34(6), see Kim Rubenstein, 'The Extended Reach of Cabinet Documents: Lessons from Victoria and Queensland' (1996) 3 *Australian Journal of Administrative Law* 134, 136.
[113] FOI Guidelines (n 110) [6.60].
[114] FOI Report (n 5) 213, 214.
[115] Ibid 218.
[116] FOI Guidelines (n 110) [6.57]-[6.58].
[117] Section 11A(5); FOI Guidelines (n 110) [6.4]-[6.27]; see Simon Murray, 'Freedom of Information Reform: Does the New Public Interest Test for Conditionally Exempt Documents Signal the Death of 'the Howard

Unlike other conditional exemptions no harm is specified in s 47C, but if no harm would eventuate, disclosure is unlikely to offend the public interest.[118] Also, the public interest test in s 11B does not specify factors weighing against disclosure. This concerns some,[119] but in practice the decision-maker must be guided by the FOI Commissioner's comprehensive list.[120] Factors favouring access include that it would promote the objects of the Act, inform debate on a matter of public importance, or promote oversight of expenditure. Irrelevant factors include embarrassment to government, risk of misinterpretation, and causing confusion or unnecessary debate.

These 'irrelevant' factors abrogate some of the public interest factors weighing against disclosure in *Re Howard and the Treasurer*.[121] However, two Howard factors – development of policy, and inhibition of frankness and candour – remain.[122] Discussion of these controversial factors is often intertwined, but candour is unlikely to be upheld as the sole basis for non-disclosure.[123] The FOI Guidelines state –

> Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times *and that obligation will not be diminished by transparency of government activities*. … In particular, the *FOI Act* recognises that Australia's *democracy is strengthened when the public is empowered to participate in Government processes and scrutinise Government activities* (s 3(2)). In this setting, *transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished*.[124]

The 1979 Committee voiced similar sentiments, adding that increased scrutiny would lead to greater recognition of the effectiveness of the APS, reduce distrust, and possibly lead to greater appreciation of the role of public servants.[125] It would also go some way towards countering Arup's legitimacy questions

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Factors'?' (2012) 31(1) *The University of Tasmania Law Review* 58, 77; J R Henman, 'The Urgent Need for Reform of Freedom of Information in Australia' (Conference Paper, Public Right to Know Conference, University of Technology Sydney, 21 August 2004).

[118] FOI Guidelines (n 110) [6.55]-[6.56].

[119] Shergold Report (n 10) 22.

[120] FOI Guidelines (n 110) [6.20]-[6.22]. Under s 11B(5) of the *FOI Act* agencies/Ministers 'must have' regard to the FOI Guidelines.

[121] [1985] AATA 100.

[122] FOI Guidelines (n 110) [6.78]; Stewart (n 23) 114.

[123] Candour must be related 'to some particular practice, process, policy or program': FOI Guidelines (n 110) [6.81] (and authorities cited there), but for s 47C candour may *'possibly'* be the sole factor if the public interest is 'clearly, heavily weighted' against disclosure or it impedes 'efficient functioning of government': at [6.82] (no authorities cited). Candour must be approached 'cautiously' in accordance with ss 3 and 11B: at [6.85]. The 'sole factor' concession was added in 2016. The 2011 Guidelines at [6.77] stated that both the policy and candour grounds were '*not, in those terms, consistent with the new objects clause* … and the list of public interest factors favouring access'. The 1979 Committee's view was that, after *Sankey* (n 38), candour must be 'seriously question[ed]' as a public interest consideration: FOI Report (n 5) 63, 221; Justice Mason in *Sankey* said the possibility that disclosure would adversely impact candour was 'so slight it may be ignored' (at 40).

[124] FOI Guidelines (n 110) [6.83]-[6.84], emphasis added. They clarify (to some extent) Bannister's concerns: Judith Bannister, *Accountability or Participation? Disentangling the Rationales for FOI Access to Deliberative Material* (Adelaide Law School Research Paper No. 2016-12).

[125] FOI Report (n 5) 26.

around corporatist innovation policy-making. Unfortunately, a narrow view of disclosure in the 'public interest' persists in the senior APS, drawing on Westminster notions of responsible government, collective responsibility, and anonymity.[126] Chancellor Professor Shergold is a strong advocate of confidentiality in this regard.[127]

If these FOI exemptions do not apply, there are other avenues to refuse access to policy documents. Agencies may rely on the 'practical refusal' ground in s 24(1) of the *FOI Act*, if the disclosure exercise would 'substantially and unreasonably divert the resources of the agency'.[128] Controversially, this ground was recently used to excuse agency non-compliance with its own mandatory disclosure log requirements.[129] Otherwise, fees for access may be a sufficient deterrent for many seeking access to policy documents.[130] Henman discusses one notable example of a quoted charge of $605,284.72 for a single application which, after negotiation, was reduced to $284.[131] There is a reported increase in the number of applications withdrawn for agencies with high quoted fees, with the suggestion that high quotes are used as a deterrent.[132] In 2017-2018, the government notified FOI fees of $383,531, but collected less than one third ($115,863).[133] Stewart notes that agencies prefer to rely on high fees rather than 'practical refusal', but Moon notes these provisions may be used consecutively, causing significant delays.[134]

Timeliness itself is another problem, given the media (with its time-critical deadlines) is instrumental in raising awareness of policy issues. The *FOI Act* requires a decision on access or review of refusal to be made within 30 days,[135] but this does not apply to reviews by the Information Commissioner. In 2018-2019, the Commissioner received 928 applications for review (up 82% since 2015-2016);[136] of the completed reviews a significant 61.7% of agency decisions were set aside[137] (up from 37% 2017-2018;[138] 22% in 2016-2017[139]). Average time to complete was 7.8 months[140] (up from 6.7 months 2017-18; 6.2

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[126] Stewart (n 23) 114-115.
[127] Shergold (n 10) 15-24, discussed below.
[128] FOI Act, s 24AA(1)(a)(i).
[129] Stephen Easton, 'The Department of Energy Has Been Breaching the FOI Act for 10 Months Now', *The Mandarin* (Online News, 16 October 2019).
[130] See ss 8D(4)-(5) 29, s 94; *Freedom of Information (Charges) Regulations 2019* (Cth).
[131] Henman (n 117) 63; Easton (n) discusses a quote from the Department of Defence for $2,515 to disclose costs of ministerial travel; searching for 45 hours, deliberating for 97 hours. Cost was ultimately reduced to zero.
[132] Henman, ibid; Peter Timmins, 'Submission to Allan Hawke' (Submission to the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* ('Hawke Review'), 1 July 2013) 19 <https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/Hawke%20review.pdf>.
[133] Commonwealth, *Freedom of Information Statistics: FOI Requests, Costs and Charges 1982-2018* <https://data.gov.au/dataset/ds-dga-b0771c28-09cc-4c4e-9e61-9a96f6e3d040/details>.
[134] Stewart (n 23) 146; Danielle Moon, 'Freedom of Information: User Pays (and Still Faces Delays)' (2018) 43(3) *Alternative Law Journal* 192, 193-195.
[135] *FOI Act*, ss 15(5)(b), 15(6) and (8), 15AA, 15AB and Part VII.
[136] OAIC, *Annual Report 2018-2019* (12 September 2019) ('OAIC 2019 Report') 77.
[137] Ibid 78.
[138] OAIC, *Annual Report 2017-2018* (17 September 2018) ('OAIC 2018 Report') 77.
[139] OAIC, *Annual Report 2016-2017* (14 September 2017) 86.
[140] OAIC 2019 report (n 136) 14.

months 2016-2017[141]). In 2017-2018, complaints rose 72%.[142] They remain at this level, but are taking longer to resolve (average 7.2 months, up from 5.8 months); 18% take more than 12 months.[143] Complaints focus on charging, practical refusal, timeliness, and poor service – most commonly a failure to reply to correspondence.[144] Pro-access commentators agree that the timeliness problem strikes at a key tenet of the regime to facilitate informed representative democracy.[145]

Early 'bureaucratic prophesies of doom' regarding the *FOI Act*[146] have not crystallised. Despite significant revisions in 2010,[147] the Act offers ample scope to maintain confidentiality of non-personal information such as policy documents. In 1995, the ALRC noted FOI requests for policy information are the 'real test' of whether the regime increased government accountability and citizen participation – but its costs, inconvenience and frustration resulted in few applications.[148] In 2018-2019, there were 4,585 requests for non-personal information (15.2% of all requests). Of these, 40% were refused, 22.8% were granted in full, and 37.2% granted in part.[149] This represents an improvement on the 54.1% refusal rate in 2017-2018,[150] but little has changed over a five-year horizon. Despite the small proportion of non-personal requests, the 'deliberative matter' exemption was fifth most frequently claimed.[151] So, while the *FOI Act* may 'work well' to facilitate access to personal information, this is not so for policy-related information.[152]

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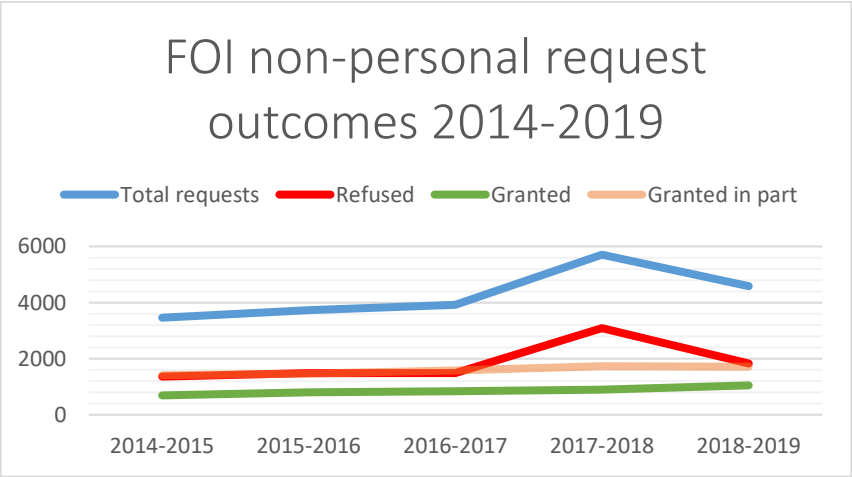
[141] OAIC 2018 Report (n 138) 14.
[142] Ibid 83.
[143] OAIC 2019 Report (n 136) 15.
[144] Ibid 84.
[145] Murray (n 117) 58, 77; Henman (n 117) 62, 63; Stephen Easton, 'FOI Laws: Fixing the Chilling Effect on Frank Advice', *The Mandarin* (Online News, 18 June 2015), citing Peter Timmins' view that, in view of timeliness and other FOI issues at federal level 'it's pretty dark days … about FOI generally, and we're yet to see a penny drop with the government that this is a cause of real concern' <https://www.themandarin.com.au/40043-abbott-takes-secrecy-new-heights-public-servants-care/>.
[146] Ernst Willheim, 'Recollections of An Attorney-General's Department Lawyer' (2001) 8 *Australian Journal of Administrative Law* 152, 157; see also Stewart (n 23) 97-98.
[147] The 2010 legislation (n 107) revisions included a new objects clause, amended Cabinet documents exemption, recasting of other exemptions; the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) removed conclusive certificates.
[148] Open Government Report (n 22) [2.11].
[149] OAIC 2019 Report (n 136) 173.
[150] OAIC 2018 Report (n 138) 160.
[151] OAIC 2019 Report (n 136) 176-178.
[152] Stewart (n 23) 149.



One further difficulty is that the FOI regime is generally reactive. Critical policy decisions will usually predate FOI requests. Made against existing non-disclosure provisions, formulating successful FOI requests may become a de facto 'needle in a haystack' exercise. As an important counterpoint, the information publication scheme was broadened in 2010 to move the FOI regime towards proactive 'agency driven publication'.[153] Publication is mandatory for a range of material, to facilitate access to information and potentially reduce the number of FOI requests.[154] Yet, counterintuitively perhaps, the scheme has narrowed requirements for publishing policy-related information: agencies now need only publish sufficient details to allow public comment on 'specific policy proposals'[155] rather than, as previously, details of 'any arrangements that exist' for public participation by way of consultations, representations 'or otherwise' in an agency's policy work.[156] This appears out of step with the general move to encourage early stage public engagement in the policy process.

On a practical level, then, we have a cloistered policy-making environment. To the political scientist and many Senior APS Executives this is entirely appropriate, given the turbulent context of policy development. As Althaus, Bridgman and Davis note, '[t]he policy dance is sometimes seemingly random … The interplay of politics, policy and administration is a hurly-burly, pulling sometimes this way, sometimes that'.[157] Policy success 'is often built on paradox and good fortune'[158] – conventions and secrecy simply allow the executive the necessary flexibility to deal with the exigencies of 'political patterns'.[159]

For the public lawyer and the electorate witnessing the growing number of large-scale policy failures, however, the position may be more concerning. The next section examines a major and well received[160]

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[153] Explanatory Memorandum, *Freedom of Information Amendment (Reform) Bill 2010* (Cth) 6.
[154] Hawke Review (n 132) 98. Section 8(2) lists mandatory material; s 11C complements the IPS, mandating publication of 'disclosure logs' of material accessed under the FOI regime (cf. Easton's concerns (n 129)).
[155] Section 8(2)(f).
[156] Section 8(1)(a)(ii) of the 1982 legislation.
[157] Althaus, Bridgman and Davis (n 27) 52; Luetjens, Mintrom and 't Hart (n 11) 10.
[158] Althaus, Bridgman and Davis (n 27) 248.
[159] Ibid 21.
[160] Luetjens, Mintrom and 't Hart (n 11) 19.

2015 report on large-scale policy failures, and the traditional Westminster-styled response, that policy deliberations 'need to be kept in confidence'.[161]

6. THE SHERGOLD REPORT

The Shergold Report, *Learning from Failure*, was commissioned to consolidate the lessons from the HIP and NBN failures.[162] Regarding the HIP 'disaster',[163] Shergold notes 'mistakes were manifold: … flawed program design, rushed implementation and inadequate monitoring. … [T]he advice provided by public servants to ministers was, in many instances, poorly given, poorly received and poorly communicated. Consultation … was all but absent.'[164] The Cabinet process was subverted, and the rush led to 'crucial and material compromises' in design and implementation.[165] The NBN failures also involved 'closed-door' policy design, no consultation with industry, no cost-benefit analysis or business case and poor understanding of risk.[166]

Shergold makes 28 recommendations,[167] many of which provide a keen vision for a more open, collaborative, innovative APS. Of most interest for present purposes is Shergold's discussion of the APS' failure to provide robust policy advice. On this issue, Shergold highlights the need for 'analytically rigorous' evidence-based policy-making, which should be informed by multiple perspectives, and that implementation issues must not treated 'as an afterthought'. He suggests consultation is often conceived 'far too narrowly', and encourages policy 'co-design'.[168] However, Shergold's discussion of frank and fearless advice, and the need for confidentiality, raises concern.

As a longstanding proponent of confidentiality in aid of frank advice, Shergold believes sufficient accountability is achieved via Parliamentary committees, audits, the wider administrative law framework, and the *FOI Act*.[169] Controversially, his use of the old conclusive certificate process to prevent access to deliberative matter went before the High Court.[170] In *Shergold v Tanner*[171] the High Court considered whether the Federal Court had jurisdiction to review Shergold's decision to sign certificates *after* a date

[161] Shergold Report (n 10) 3.
[162] Ibid.
[163] Ibid 11.
[164] Ibid 8.
[165] Ibid 9.
[166] Ibid 12.
[167] Ibid iii-xi.
[168] Shergold Report (n 10) 16-17; compare the Commissioner's Directions (n 7) on APS Values.
[169] Stewart (n 23) 129-130.
[170] Under old s 36(3) (and s 33A(2)) of the *FOI Act*, abolished in 2009 (n 147).
[171] *Shergold v Tanner* [2002] HCA 19.

for review by the AAT of the decision to deny access had been fixed.[172] It was determined that it did, although it was a pyrrhic victory.[173] Tanner later withdrew from the dispute due to costs and delays.[174]

In setting the context for confidentiality in the report, Shergold details the difficulties for public servants in providing frank and fearless advice. Expediency under ministerial pressure may be appealing, but the expectation that the APS serve the public interest requires 'steely resolve' – although, he adds, obstructionism is not an option, either.[175] He notes that Ministers should create the environment conducive to encouraging and receiving the best possible advice,[176] which should be written,[177] and Secretaries should be responsible for policy quality.[178] And then – in a seemingly ambitious attempt to wind back advances in the notion of open government – Shergold suggests the APS should be the beneficiary of amendments to the *FOI Act* to increase the level of secrecy for agency advice.[179] To this end, Shergold makes a number of arguments around Westminster-style government that require closer analysis.

First, Shergold discusses the fragile trust between public servants and ministers, and the need to distance the theoretically apolitical public servant from political debate (neutrality argument). Frankness in sensitive policy advice, Shergold contends, is made much harder if public accessibility is part of the equation (candour argument).[180] If disclosure occurs, advice becomes a political issue, trust is eroded, and public servants are dragged into a public political debate (need for anonymity argument). Public servants will thus temper their advice and/or provide less considered oral versions away from public scrutiny.[181]

Clearly these are valid points of concern but they were also ones that were considered and directly rejected for articulated reasons by the Senate Committee in 1979.[182] There appears to be little reason to now doubt the validity of either this body's reasons or conclusion, even with the passage of time.

On neutrality, the 1979 Committee noted that no submission or witness had suggested the FOI legislation would have any significant impact, and it shared this view.[183] Subsequently, neither the 1995 ALRC Report[184] nor the 2013 Hawke Review[185] suggested the FOI legislation impacted adversely on neutrality. To the extent comparisons may be made with the United Kingdom, Hazell and Glover's 2011 study of the

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[172] Ibid [8]. Earlier, the ALRC advised this practice was 'an abuse of the certificate provisions': Open Government Report (n 22) [8.20].
[173] *Shergold v Tanner* [2002] HCA 19, [40]: 'the content of a requirement to provide natural justice to the person aggrieved by the decision may be very limited'; see also Judith Bannister, 'Case Notes: *McKinnon v Secretary, Department of Treasury*' (2006) 30(3) *Melbourne University Law Review* 961, 970.
[174] Bannister (n 173) 970.
[175] Shergold Report (n 10) 18.
[176] Ibid 19.
[177] Ibid 18, 19.
[178] Ibid 19.
[179] Ibid 20-22.
[180] Ibid 20.
[181] Ibid. Although this would contravene APS requirements in the broader administrative law framework.
[182] FOI Report (n 5) 44-55, 214-218.
[183] Ibid 46.
[184] Open Government Report (n 22).
[185] Hawke Review (n 132).

impact of FOI legislation on Whitehall confirms that civil service impartiality 'has remained largely intact.'[186]

As to anonymity, Shergold's arguments were similarly made by witnesses before the 1979 Committee, who posited a strained relationship between ministers and officials[187] and tempered or reduced quality advice.[188] The Committee nevertheless resolved that 'the political reality has far outdistanced the pristine theory [of Westminster system anonymity]'.[189] The names and views of many senior officials were aired before parliamentary committees, and appeared in the media daily.[190] Contemporary media practices and senior bureaucrats' increasing willingness to speak out on topical issues make this even more true today.[191]

The 1979 Committee also discounted candour as a convincing argument for non-disclosure under what is now the deliberative matter FOI exemption.[192] While disclosure may entail a more tempered *style* of advice, and it may be less *agile*, the 'specious or expedient advice … may well vanish',[193] thereby improving quality.[194]

Indeed, the candour/confidentiality argument loses some of its force if the need is for quality advice rather than blunt or 'frank' advice. Directions 13-17 of the APS Commissioner's Directions now oblige the APS to provide quality advice. The header reference in Direction 17 to 'frank' advice is not repeated in the substance of the clearly drafted provision, which requires that advice be, among other things: non-partisan, objective, evidence-based, relevant, comprehensive, unaffected by 'fear of consequences', and which does not withhold 'important facts or bad news'.[195]

In the same vein, the 2013 Hawke Review noted that while candour/confidentiality was not ruled out as a consideration in the s 11B(4) public interest test for disclosure of s 47C deliberative matter, 'officials should be happy to publicly defend any advice given to a minister' – if not, they should rethink it.[196] One caveat in this respect was extended to exemptions for incoming government briefs.[197]

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[186] Robert Hazell and Mark Glover, 'The Impact of Freedom of Information on Whitehall' (2011) 89(4) *Public Administration* 1664, 1672-1673.
[187] Ibid 50.
[188] Ibid 51.
[189] Ibid 49.
[190] Ibid 49-50. See also Hazell and Glover (n 186) 1672.
[191] Cf. OAIC, *Disclosure of Public Servants' Names and Contact Details* (Discussion Paper, July 2019); Kieran Pender, '"Silent Members of Society"? Public Servants and the Freedom of Political Communication in Australia' (2018) 29 *Public Law Review* 327.
[192] Ibid 216-218.
[193] Ibid 53, 216.
[194] Ibid 216.
[195] Commissioner's Direction 17(e) (n 7).
[196] Hawke Review (n 132), 48.
[197] An exemption was recommended for incoming government and minister briefs, question time and estimates hearings briefings: Hawke Review (n 132), 49. In *Crowe and Department of the Treasury* [2013] AICmr 69 a candour submission for an incoming government brief, for a party unable to form government, was upheld. Influential factors included the 'unique' context of needing to establish immediate agency/ministerial rapport, the immediate responsibility of an incoming minister for their portfolio, and the 'special feature' of a document written

Distilling the candour/confidentiality argument to its core contention better balances this debate. The bottom line question is not whether, under the guise of Westminster tradition, the comfort of increased secrecy will help public servants better negotiate political pressure to deliver better policy outcomes: history seems to deny this given the present high level of confidentiality in policy-making, and continued policy failures. Rather, the question is whether an increased prospect of disclosure might incentivise public servants to comply with their administrative and procedural obligations, emboldening them to refuse expediency in the face of ministerial pressure.[198] Better policy outcomes arguably may flow as a consequence along with, as noted, potentially greater trust and appreciation by the public.[199]

Shergold's second argument revolves around inconvenience. He says openness and transparency must be subject to the government's requirement for confidentiality in policy-making because: '[n]ot to do so burdens ministers and their advisers in a way that other decision-makers are not.'[200] Shergold draws support from the fact that CEOs are not required to disclose board deliberations, nor are courts expected to circulate draft opinions or discussions prior to final judgment.

Although superficially compelling, such comparisons are fundamentally distinguishable on accountability grounds from the position of the APS. Shareholders have a statutory remedy for inappropriate Board conduct via ss 232 and 233 of the *Corporations Act 2001* (Cth). Disappointed litigants have access to appellate courts. Ministers are (at least theoretically) accountable to Parliament. Agency policy development, in contrast, has little in the way of practical accountability.[201] Although Shergold's answer is to consider the quality of departmental advice in a Secretary's performance review,[202] time limitations cast doubt on the depth of examination possible.[203]

Shergold's stance on the FOI 'burden' resonates with many senior bureaucrats.[204] Following the Report, one agency head publicly noted they would be in a better position to 'manage' the FOI process if exemptions were widened, particularly to ward off media requests: 'most of them are from journalists looking for a story, which I think is *not misusing the FOI Act, but is that its original intent?*'[205]

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for a one-person audience that would be less useful if released simultaneously to the public at large (at [85]). See also *Cornerstore Legal* [2013] AICmr 71, upholding a candour argument for external administrators' incident reports. In both cases, it was held candour arguments will not be accepted *simpliciter*; 'class' claims must be contextualised by the particular documents at issue.

[198] FOI Report (n 5) 26, 53.

[199] Ibid 26, 218.

[200] Shergold Report (n 10) 20, emphasis added.

[201] Particularly given the demise of individual ministerial responsibility for agencies: FOI Report (n 5) 25-26, 39.

[202] Plus strengthened ministerial responsibility, and adherence to Cabinet process: Shergold Report (n 10) 19.

[203] Stephen Bartos, 'The Shergold Report: Freedom from Political Mischief Can Trump Freedom of Information', *The Sydney Morning Herald* (Online News, 27 February 2016) <https://www.smh.com.au/public-service/the-shergold-report-freedom-from-political-mischief-can-trump-freedom-of-information-20160227-gn5e6q.html>.

[204] Stephen Easton, 'Lonely Voice Challenges Top Mandarins Over 'Open By Default'', *The Mandarin* (Online Public Sector Forum, 13 April 2016) <https://www.themandarin.com.au/63147-lonely-voice-challenges-top-mandarins-open-by-default/>.

[205] Ibid, emphasis added.

Media use of the FOI system as part of publication chains is well known, as is its anathema status for the more risk averse ranks of senior APS, who may be tempted to 'wrongly' label the system 'a diversion'.[206] The media, however, is often the principal awareness-raising mechanism[207] for a public that typically has less time, money and motivation to spend negotiating a system that is often fraught with delay and obfuscation. Indeed, the Australian media has initiated a Right to Know campaign calling for FOI reform, which is 'unusual' in both its scale and broad-based support.[208] Any further restriction of access to non-personal information by amending an FOI system already facing significant challenges in achieving its intent is, at least for the public lawyer, problematic.

The bureaucratic commentary above also raises further considerations. Firstly, the fact that senior bureaucrats feel free to publicly articulate this tends to conflict with Shergold's argument on the need for historical Westminster system anonymity and shielding from public debate. Second, it defeats Shergold's point that a government policy decision once made devolves to the public servant's role of implementing, not questioning: 'even if the Secretary believes the government is acting unwisely, the answer is necessarily, 'Yes, Minister''.[209] As Timmins notes, FOI 'is still the law and public servants should respect it as such'.[210]

On the issue of inconvenience, it is sufficient to note the 1979 Committee's compelling conclusion:

> The political system, whatever its form or nature, should exist to one end only: *not the convenience of the government, but the service of the people*. To this end, *no views about the supposed nature of the Westminster system should prevent the strengthening of the accountability* of all parts of the government to the people from being achieved …[211]

Nevertheless, Shergold concludes the post-2010 *FOI Act* is a 'significant barrier to frank written advice'[212] – even though both HIP and NBN occurred prior to the 2010 revisions.[213] He suggests a statutory 'rebalancing' exercise,[214] including within the Act variables such as a list of factors weighing against disclosure (including candour), and/or an explicit candour exemption, and/or clarification of the harm that the s 47C deliberative matter exemption is intended to avoid.[215] Shergold draws some support from the

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[206] Hawke Review (n 132) 85.
[207] Ibid 105.
[208] David Crowe and Jenny Noyes, 'Campaign for the Right to Know Fights the Darkness' *The Sydney Morning Herald* (Online News, 20 October 2019) <https://www.smh.com.au/politics/federal/campaign-for-the-right-to-know-fights-the-darkness-20191020-p532gq.html>.
[209] Shergold Report (n 10) 18.
[210] Peter Timmins' views, reported in Easton (n 204).
[211] FOI Report (n 5) 55, emphasis added.
[212] Shergold Report (n 10) 21.
[213] Ibid.
[214] Ibid 22. On the dangers of the 'balancing' concept in the FOI context, see *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, [19] (Gleeson CJ, Kirby J).
[215] Ibid.

Hawke Review on the latter point although, as noted above, any wider support from that Review is doubtful;[216] his position also conflicts with the conclusions of the 1979 Committee.

Shergold concedes that 'placing restrictions on freedom of information is extraordinarily sensitive', but his solution is revealing: that a 'bipartisan group of *former ministers*, together with *former Secretaries*' be appointed to investigate and report to government on options and approaches.[217] Such proposals lend weight to Hazell and Glover's concerns, that:

> FOI can be seen as a 'general interest' reform … Its benefits occur to a diffuse group (the public) and the costs affect a concentrated group (civil servants). Following this logic, it is 'remarkable' that FOI was enacted, but likely that it will not be 'durable', as the concentrated interest will mobilize more effectively than the diffuse interest.[218]

The Shergold Report, and its positive reception among senior public servants, suggests that the prevailing view of bureaucrats on confidentiality around policy-making has not changed much since the Committee's 1979 report. One can sympathise to some extent with the public servant's plight in the face of difficult Ministerial pressure and the exigencies of party politics. Divided loyalties to government and the national interest have long been cited as the breeding ground for ambivalence towards the FOI regime.[219]

However, given the significant level of practical confidentiality already available, the risk of large-scale public policy failure like HIP and NBN – or on a lesser scale in the innovation sector, the NISA – will not be diminished by increasing statutory options for agency secrecy. New mechanisms to maintain the status quo will not produce change. As Grube and Howard observe:

> In a sense, Westminster has always acted as something of a façade – a veil behind which to hide all the complexity, duplicity, and political difficulties of a parliamentary government.[220]

Perhaps polemically to Westminster traditionalists it is posited that the 1979 Committee's analysis still holds true. Increased public scrutiny and a greater commitment to open government must form part of the strategy for better innovation policy-making. It is not contended here that FOI reform is a panacea for all policy-making ills. The complex and challenging nature of policy-making – or at least innovation policy-making – demands a multi-faceted approach. The many reviews and reports to date in this area demonstrate the magnitude of the challenge.

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[216] Hawke Review (n 132) 48.
[217] Shergold Report (n 10) 23, emphasis added.
[218] Hazell and Glover (n 186) 1666.
[219] Open Government Report (n 22) [4.13].
[220] Dennis C Grube and Cosmo Howard, 'Is the Westminster System Broken Beyond Repair?' (2016) 29 *Governance* 467, 478.

7. GOVERNMENT, APS REVIEWS

The Shergold Report is just one in a long history of calls for APS reform. The ALRC's 1995 Open Government Report advocated, among other things, more action to 'dismantle the culture of secrecy' in the APS.[221] Successive reviews have envisioned a revitalised APS, allowing citizens to become active participants rather than passive recipients,[222] but as the Government 2.0 Report noted, this requires '[l]eadership and policy and governance changes … to shift public sector culture and practice to make government information more accessible and usable, make government more consultative, participatory and transparent'.[223]

In 2010 the Gillard Government responded to the Government 2.0 Report with its Declaration of Open Government, promising strengthened rights of access to information, a pro-disclosure culture, and a collaborative government.[224] FOI reforms followed that year, but as noted the regime still faces significant challenges, particularly regarding a pro-disclosure culture.[225] While the Open Government Partnership recently reported on the need for greater public participation in government deliberations,[226] and a proposed Engagement Hub is to 'inform' the government's commitments in its *Second Open Government National Action Plan 2018-2020*, there will be no central repository of government-commissioned or conducted research, due to 'varying policy and program priorities'.[227]

Similarly, the collaborative, evidence-based and accountable policy development culture may be embedded in the administrative law framework, but policy development efforts such as the NISA indicate it has not yet translated broadly into practice. As the Government 2.0 Report noted, there is now no shortage of 'invitations' for citizen involvement; the problem is the lack of agency response in ways that actually demonstrate appreciation of public involvement.[228] As to procedural reform, both the Scales Review and NISA audit noted the mere existence of guidance documents 'does not provide an assurance

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[221] Open Government Report (n 22) 7.
[222] Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (March 2010) ('Moran Review') 38; Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (22 December 2009) ('Government 2.0 Report') 2. At least 18 reports have issued 2003-2018, which informed the 2019 APS Review: Department of the Prime Minister and Cabinet, *APS Review: Priorities for Change* (19 March 2019) ('Priorities for Change Paper') 54-55.
[223] Government 2.0 Report, ibid.
[224] Lindsay Tanner, *Declaration of Open Government* (media release, 16 July 2010) <https://www.finance.gov.au/blog/2010/07/16/declaration-open-government/>.
[225] Stewart (n 23) 151.
[226] Open Government Partnership Practice Group on Dialogue and Deliberation, 'Deliberation: Getting Policy-Making Out From Behind Closed Doors' (The Deliberation Series Volume I, May 2019) ('OGP Deliberation Series') <https://www.opengovpartnership.org/wp-content/uploads/2019/06/Deliberation_Getting-Policy-Making-Out_20190517.pdf>.
[227] Commonwealth, *Australian Government Feedback on Commitment Ideas for Australia's Second National Action Plan 2018-20* (Government Response, September 2018) 5; PM&C, 'Enhance Public Engagement Skills in the Public Service', *Second Open Government National Action Plan 2018-2020* (Government Commitment Dashboard) <https://ogpau.pmc.gov.au/commitment/enhance-public-engagement-skills-public-service>.
[228] Government 2.0 Report (n 222), 2.

of their use' (especially in the absence of fearlessness bolstered by scrutiny). Again, cultural change is required.[229]

The most recent review of the APS,[230] chaired by David Thodey, was launched in 2018. The Thodey Review's *Priorities for Change* report acknowledged the APS is still perceived as a risk-averse closed book.[231] Consultation participants 'overwhelmingly' indicated that the overarching purpose of the APS is serving both the public interest and the government of the day, developing and implementing evidence-informed policy, and that APS interactions with the public should be 'transparent, ethical and accountable'.[232] The Review explored ways to empower senior officers to 'lead by example in setting an "openness by default" culture',[233] but as one stakeholder commented, "'[o]penness by default' is completely antithetical to the mindset of senior officers'.[234]

Early concerns were raised regarding the independence of the Review's panel; it was housed within PM&C and its head was a Deputy Secretary appointed by the PM&C Secretary.[235] The panel was to be 'shadowed by an advisory group of current ministers', and it was to report not directly to the Prime Minister but to him through PM&C.[236] Gourley put it in 'starker terms': it was like the Banking Royal Commissioner Kenneth Hayne being assisted by senior officers from the banks under investigation.[237]

FOI concerns were then raised when the Thodey panel stated it would explore 'the extent to which the FOI regime is helping the APS balance openness with the importance of providing frank and fearless advice to government'.[238] This of course implies that fearless advice requires secrecy, in the time-honoured Westminster tradition. The Shergold Report informed the review process.[239]

In response, a submission by two respected former secretaries suggested that claims about the negative impact of FOI 'seem to be exaggerated', and that the Review should carefully examine whether the risk averse APS attitude was due more to pressures from Ministers and advisers than to concerns about the

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[229] Bill Scales, *Independent Audit: NBN Public Policy Processes* (Audit Report, 25 July 2014) 68.
[230] Thodey Review (n 10).
[231] Priorities for Change Paper (n 222) 46.
[232] Inside Policy, *An Independent Review of the Australian Public Service: A Detailed Consultation Report* (Stakeholder Consultations Report, 3 December 2018) 3, 6.
[233] Ibid.
[234] Anonymous (Stakeholder comment, 21 March 2019) <https://contribute.apsreview.gov.au/transparency-and-accountability/list>.
[235] Paddy Gourley, 'The "Independent" Review So Botched it Will Need to be Reviewed', *Sydney Morning Herald* (online news website, 4 June 2018) <https://www.smh.com.au/politics/federal/the-independent-review-so-botched-it-will-need-to-be-reviewed-20180531-p4zio7.html>. See the leadership and governance arrangements outlined in the Thodey Review (n 10) 15.
[236] Gourley, ibid.
[237] Ibid.
[238] Priorities for Change paper (n 222) 46.
[239] Ibid 54.

FOI Act.[240] Terry Moran (former secretary, PM&C) went further, suggesting the FOI regime be reviewed to reduce exemptions, and mandate publication of policy 'business cases'.[241]

Moran's suggestions are consistent with Howard's earlier proposals and merit further consideration. In particular, the existing mechanism of the 'proactive' information publication scheme represents a potential way forward that may mitigate the seemingly intractable cultural change issue within the APS, decrease the need for 'reactive' policy-related FOI requests, and clear the way for more open, inclusive, and engaged policy-making.

However, such suggestions were not discussed in the Thodey Review's final report, which recommended: 1) establishing a Charter of Partnerships, to set expectations around public engagement and 'promote an open APS';[242] and 2) a review of FOI, privacy and record-keeping arrangements.[243]

The first recommendation suffered from a number of problems. While talk of government partnerships is 'powerful and evocative',[244] the 'language of partnership has multiple applications in policy rhetoric'.[245] It can describe command and control arrangements, or informal networks and collaborations.[246] Unfortunately, such arrangements generally do not operate as partnerships in practice.[247]

Another difficulty was that, while the Review acknowledged work on a different APS-wide engagement framework by the DIIS (not PM&C), and launched a month earlier,[248] the Charter of Partnerships would have duplicated or replaced that project. Accordingly, the government did not accept the Thodey recommendation.[249] The APS will apply the DIIS framework, which was built on solid research undertaken to fulfil a government commitment in the *First Open Government National Action Plan 2016-*

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[240] Andrew Podger and Helen Williams, 'Response to APS Review "Priorities for Change"' (Submission to APS Review, 26 April 2019) <https://contribute.apsreview.gov.au/submissions/view/sbm093823c039df683ea4965>.
[241] Terry Moran (n 102). Moran also advocates for a new integrity commission to examine maladministration and deficient policy advice.
[242] Thodey Review (n 10) 122.
[243] Ibid.
[244] Myles McGregor-Lowndes, 'Is There Something Better Than Partnership?' in Jo Barraket (ed), *Strategic Issues for the Not-For-Profit Sector* (New South Wales Press, 2008), 68.
[245] Jo Barraket, 'Introduction' in Jo Barraket, ibid 8, citing Stephen H Lindner, 'Coming to Terms with the Public-Private Partnership: a Grammar of Multiple Meanings' (1999) 43(1) *American Behavioral Scientist* 35. See also Geert R Teisman and Erik-Hans Klijn, 'Partnership Arrangements: Government Rhetoric or Governance Scheme?' (2002) 62(2) *Public Administration Review* 197.
[246] Barraket, ibid.
[247] See generally McGregor-Lowndes (n 244), Teisman and Klijn (n 245).
[248] Thodey Review (n 10) 118, Priorities for Change Paper (n 222) 46; Department of Industry, Innovation and Science, *APS Framework for Engagement and Participation* (2019) ('APS Engagement Framework') <https://www.industry.gov.au/data-and-publications/aps-framework-for-engagement-and-participation>. See also submission by Damian Carmichael, 'Submission' (Submission to Thodey Review) <https://www.apsreview.gov.au/your-ideas/submissions/damian-carmichael>.
[249] Commonwealth, *Delivering for Australians, A World-Class Australian Public Service: The Government's APS Reform Agenda* (2019), 17.

2018.[250] Time will tell whether, and to what extent, the DIIS framework can drive better APS engagement practices.

As to the second recommendation, the Thodey Review simply accepted the Shergold contention that 'the Commonwealth FOI laws now present a significant barrier to frank written advice',[251] citing anecdotal evidence by 'former ministers and senior public servants'.[252] The Review concluded it was 'critical' to make APS advice supporting the government's deliberative processes confidential, and to provide an exemption from release under FOI legislation.[253] The recommendation of an FOI review naturally followed. Commentators have noted the lack of any detailed examination of evidence by the Thodey Review;[254] the same sentiments were aired following release of the Shergold Report.[255]

The government has not enlivened the calls for an FOI review, responding that its 'principal focus' was to ensure that agencies effectively implement current requirements and address practical problems. However, it did not close the door on FOI amendment in future, noting that '[a]ny further reform … would be considered separately.'[256]

Thus it seems as though the 40-year battle for acceptance of the FOI regime and its place in facilitating public scrutiny of, and engagement in, Australian policy-making is not over yet. Against the Thodey Review's most recent call for further confidentiality, the media's Right to Know campaign and Moran's suggestions provide salient counterpoints. Ultimately, if the NISA in the innovation sector is any indication (along with the HIP, NBN), increased secrecy for the APS is not the answer to better policy outcomes.

8. CONCLUSION

Experience over the last decades has evidenced that Australian executive policy-making power operates in a cloistered environment. From a political science perspective this arguably aligns with the British Westminster style of Cabinet government. Given the growing list of large-scale public policy failures, however, public lawyers and the electorate may be concerned that the checking mechanisms in this area may benefit from reconsideration. As has been argued, the *FOI Act* and other elements of the administrative law framework are operating neither optimally nor in the manner intended, undermining

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[250] Commonwealth, *Australia's First Open Government National Action Plan 2016-18* (2016) 10, 59-61. A review of the new *APS Engagement Framework* is beyond the scope of this paper. See also Carmichael (n 248); OGP Deliberation Series (n 226).
[251] Thodey Review (n 10) 121.
[252] Ibid.
[253] Ibid.
[254] Peter Timmins, 'Government Quick to Hose Down Thodey Call for FOI Reform', *Open and Shut* (blog, 13 December 2019) <http://foi-privacy.blogspot.com/2019/12/government-quick-to-hose-down-thodey.html#.XlOo9c4zY2y>. See also the submissions by Podger and Williams (n 240).
[255] Paddy Gourley, 'The Shergold Report: No Hollywood Adaptation for this B-grade Script', *Sydney Morning Herald* (online news website, 27 February 2016) <https://www.smh.com.au/public-service/the-shergold-report-no-hollywood-adaptation-for-this-bgrade-script-20160226-gn4kt1.html>.
[256] Commonwealth (n 249) 17.

the levels of public scrutiny that may have benefitted policy-making functions around initiatives such as the HIP, NBN and NISA programs.

The innovation sector provides a useful case study to highlight this issue. In 2015, Prime Ministerial speeches emphasised innovation as a central economic policy focus, and also drew a clear connection between poor economic policy design, captain's calls, and a closed government. However, innovation policy-making continued its corporatist trajectory observed more than 25 years ago by Arup. The NISA continued the small-scale, selective intervention approach, and the agencies conceded little benefit would be registered from its disparate measures. The NISA audit revealed the now-familiar policy-making deficiencies elucidated by the HIP and NBN program failures. The case study, set against the context of the current operational problems in the FOI regime, and the Shergold and Thodey Reports calling for increased secrecy, is concerning. Secrecy in innovation policy-making is an enduring policy problem, not a cure.

In 1979, the Committee concluded that the Public Service Board's approach to the ministerial-public servant relationship in the Westminster system meant the *FOI Act* would:

> … only be effective if the public service as a whole, and especially at senior level, is prepared to adopt attitudes which are more conducive to the free exchange of information than has been the case in the past.[257]

Nevertheless, it also observed that the Westminster system 'is neither so rigid nor so weak that it has failed to accommodate change … we have seen the system changing in helpful ways.'[258] It is hoped that the DIIS' new engagement framework will spur positive steps forward in this evolution. In any future review of the FOI system, Moran's reduction of exemptions deserves serious consideration, along with amendment of the information publication scheme to require release of an agency's policy 'business cases', as a further means to forge a way forward.

[257] FOI Report (n 5) 46.
[258] Ibid 26.