

THE OPEN ACCESS LAW BOOK IN AOTEAROA NEW
ZEALAND: RADICALISING THE FUNDING OF FUTURE
PUBLISHING

*James Mehigan**

ABSTRACT

The budgets of university libraries in New Zealand are being squeezed by the costs of subscriptions to works necessary for teaching. This article advocates for a different approach to funding such works. Drawing upon experience of developing an open access textbook on the criminal process it is argued that open access publishing is the best way to make the most of the funding that is available for legal research and scholarship. The funding model for academic publishing may need to be recalibrated, but perhaps not radically.

* Senior Lecturer in Law, University of Canterbury.

I INTRODUCTION

The legal textbook today lives in a world of uncertainty, yet this is a time when the textbook is perhaps more necessary than ever. With the diversity of sources of legal information and the proliferation of easily accessible content on law and legal affairs there can be great value in a solid text that brings the fundamentals of a subject together in one place. A book setting out the foundations of the subject can help teachers to design their courses more easily while also allowing researchers to go on and build the more in-depth and cutting-edge knowledge and analysis that develops that subject area.

This article outlines the challenges (particularly around funding) facing the legal textbook in New Zealand and proposes an open access ('OA') funding model to help overcome these challenges. It builds upon the work of Peter Suber, who has demonstrated that OA does not mean a reduction in quality of production, a diminution of peer review or an unnecessary infringement of copyright.¹ It is simply a change in the way publications are funded. The article looks at a current project to produce an OA undergraduate textbook on the criminal process using centralised funding from the Council of New Zealand University Librarians ('CONZUL').

This article discusses some lessons derived from the exercise and some of the problems that have so far arisen. It also discusses other ways in which OA can be progressed by looking at two overseas examples of successful changes in funding of publications so as to increase free access to research and ideas. The article concludes that OA may be a way to increase the proliferation of legal knowledge while also reducing, rather than increasing, costs to New Zealand's universities.

In previous times, textbooks were published as hardcopy books, and students, if they had the inclination and money, bought them to read as part of their coursework. University libraries bought a certain number of them and those students who did not wish to buy them could use them in the library to progress their studies. Many such books brought great benefits to their authors, who became pre-eminent in their field perhaps partly as a result of being the author of the textbook. Authoring a leading textbook appears to bestow an academic status, although which way the causal chain goes may be disputed: is an author eminent because they have written a textbook or have they written a textbook because they are eminent? New Zealand law does not move fast enough to need a textbook to be rewritten annually and indeed many are not subject to a new edition for many years.

This model of textbook funding worked reasonably well and had a traditional manufacturing sense to it. The publisher, as entrepreneur, produced the books and took the risk as to whether they would sell or not. However, that risk was reduced if the textbooks were made a requirement by major courses and universities. Meanwhile, the authors did the substantive work involved in researching and writing the books. Authors receive royalties, but these are

¹ Peter Suber, *Open Access* (MIT Press, 2012).

unlikely to be commensurate with the work involved in producing a textbook. Most authors of law textbooks in New Zealand are academics with permanent posts in one of the six law schools. Other authors are, usually, judges or practising lawyers. Most textbooks are written by people with salaries paid for by the state to do something else (teaching and researching at a university or working as a judge). Making one's primary living from writing legal textbooks is unusual.

The textbook in this traditional model is expensive. With a small market, there are fewer economies of scale and higher prices are, to some extent, to be expected. Not every student can afford to buy a textbook under this model. Even so, with or without an extended market comprising practitioners, the judiciary and law firms, it is clear that the publishers were able to make a profit from publishing these texts. However, making that profit is not so straightforward anymore.

Students are beginning to question the academic value and value for money of textbooks in New Zealand.² This questioning coincides with legal publishing going through substantial changes driven by the digital revolution. Students no longer tend to buy textbooks in any great numbers. This is something that had been noticed before the Covid-19 pandemic. It is a trend that predates the pivot to home learning that took place at the height of lockdown in semester one of 2020. This may be part of a greater trend towards a cultural expectation that digital content be freely accessible. Those who work in journalism or other content-driven fields will recognise this problem. The digital provision of journalism has seen many publications trying to recalibrate their funding models from those relied on in the print era.³

How do you keep quality content produced (that is to say, paid for) while allowing the consumer to access it for free? In the case of the university the answer is that the digital revolution has allowed textbooks to go online where it is free to the student. The payment is the subscription paid by the university library. This, when it works smoothly, is good news for the student and good news for equality of access to teaching resources. However, the potential improvements in access are not always met with an increase in university library funding. Alternative ways of funding textbooks, perhaps by charging extra fees directly to students to fund increased subscription costs, have potentially serious implications for equality of access.

The end result of this for universities is that they inevitably have to cover the costs demanded by the multinational companies that publish the legal textbooks. The model described has been in place for decades, predates the digital revolution and has a storied and surprisingly colourful history.⁴ It is a system involving corporate interests in academic research that has been called

² Sarah Stein et al, 'Student Views on the Cost of and Access to Textbooks: An Investigation at University of Otago (New Zealand)' (2017) 9(4) *Open Praxis* 403.

³ Robert Picard, 'Funding Digital Journalism: The Challenges of Consumers and the Economic Value of News' in Bob Franklin and Scott A Eldridge II (eds), *The Routledge Companion to Digital Journalism Studies* (Routledge, 2016) 147.

⁴ George Monbiot, 'Academic Publishers Make Murdoch Look Like a Socialist', *Guardian* (online, 29 August 2011) <<https://www.theguardian.com/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist>>.

‘unethical’⁵ and ‘bad for science’.⁶ One particular problem with academic publishing is that research that should benefit humanity is not freely available to everyone. Research has traditionally been published by private companies, although the research itself has been paid for by universities and other state agencies (such as government research agencies). The consumers of this toll-access material are those same universities that conducted the research in the first place. The publisher then is taking free content and selling it back to those who produced it. Of course, they provide valuable services such as typesetting, copy-editing, marketing and distribution. The question is whether their high profits can be justified when the net effect of the process is to publish publicly funded work that is not freely accessible.

The OA movement provides an alternative to this publishing model. OA allows for work to be published, often online, in a format that is freely accessible to everyone. As Suber points out, OA does not mean that there is a change in quality, or peer review. Nor does it mean that copyrights need to be infringed. It is a simple proposition that by redirecting the funds that are already in place research can be made freely accessible, possibly even with the same publishers who work on this research already.⁷

II UNDERSTANDING THE PROBLEM: UNSUSTAINABLE TEXTBOOK SUBSCRIPTIONS

Not every publisher works on this basis and the publishing model for textbooks is different in some ways to the publishing model for toll-access journals.⁸ Toll-access journals are usually paid for by subscription, whereas textbooks were traditionally paid for individually. OA journals and textbooks both need to be paid for by means other than a toll on the end user. For the purposes of this article, it is useful to look at three examples of the problems that arise in the funding model chosen by publishers who supply content to the School of Law at the University of Canterbury. Each of the three publishers has a different pricing model, but the outcome is the same; students do not buy the books and therefore the university has to pay the fees. All of the books are written or edited by academics working at the University of Canterbury. The following is the experience of the university library with these publishers. The experience may be different at other universities, as each university library negotiates separately with each publisher.

The first publisher, a commercial publisher that is part of a multinational corporation, publishes a law book for a core course. Under the system where hard copies of the book cost NZD150–200 per book, and the library obtains 10 books for students to use, the outlay amounts to NZD2,000. Given that books need to be updated every four to five years this is an expenditure

⁵ Richard Smith, ‘The Highly Profitable but Unethical Business of Publishing Medical Research’ (September 2006) 99(9) *Journal of the Royal Society of Medicine* 452.

⁶ Stephen Buranyi, ‘Is the Staggeringly Profitable Business of Scientific Publishing Bad for Science?’, *Guardian* (online, 27 June 2017) <<https://www.theguardian.com/science/2017/jun/27/profitable-business-scientific-publishing-bad-for-science>>.

⁷ Suber (n 1).

⁸ ‘Toll-access’ is Suber’s term to describe material that must be paid for to be read: *ibid*.

for a prolonged period, which means the annual costs are lower. The current digital subscription costs the library NZD7,000 a year. That is a 1,400% increase. Digital subscriptions may have advantages such as search functions and ease of updates, but the consensus among librarians and academics is that these are not value for money in the context of such a staggering cost increase.

The second example has some similarities with the first, in that the second publisher is also a multinational corporation. In this case the textbook is for an optional course with fewer students than in the first example. Under the paper book model, only one or two books would be bought for the smaller optional course. This publisher charges NZD1,500 for three user licences, but with a class of about 75 it is clear that you would need a significantly larger number of licences than three. Licences can be bought with greater access, but the library is unable to afford them.

The final example is of an edited volume used extensively for teaching core and optional courses. It was edited by two members of staff, with many contributions from colleagues in the institution. It is published by a university press — not the press at the editors' institution, the University of Canterbury — but the digital rights have been sold on to an online distributor. The University of Canterbury must pay for access at a price based on the number of downloads, which need to be paid for in advance. When the maximum has been reached, access stops. Study habits being what they are, this maximum has been reached a number of times in the run-up to exams, which has led to delays in students accessing the material at highly stressful times.

In every case, the university paid for the research when it was done as part of the authors' contracts as academic staff. The university is therefore paying again to have access to that work, although in the third example a university press is benefitting from the profits associated with the funding model. Certainly the publishers have added digital searching facilities to these publications, but can these changes justify such price increases?

Alongside these enormous increases in costs, there is no matching increase in the university's library budget. Academics are regularly asked to consider costs of materials before prescribing texts, as the costs are unsustainable.

III A MODEL FOR CHANGE: THE OPEN ACCESS TEXTBOOK

While it is not known what the contractual arrangements between publishers and other universities are in New Zealand, it is not unreasonable to suspect that similar things are happening in the way they are paying for access to these and other textbooks. There are six law schools in New Zealand and each is within a publicly funded university. The money to pay for textbooks is coming from the state and going to the publishers. This article argues that this model needs to change. In making that argument, it draws on the author's experience trying to produce a criminal process textbook as an OA project funded centrally by CONZUL.

The project arose from the fact that there is a genuine need for textbooks like this. The authors of the textbook, Mark Wright and James Mehigan, teach about the criminal process, as opposed

to the substantive criminal law or technical criminal procedure, to undergraduate criminal justice students. There is no useful textbook for these courses. The last one from New Zealand, while excellent, is almost 15 years old.⁹ There is a similar style textbook for England and Wales from 2019,¹⁰ but that is not satisfactory for use in New Zealand. In the course of discussions with our librarians, it became clear there was a way in which this need for a textbook could be joined with an experiment in developing an OA textbook.

This is when OA publishing begins to be tested in practice. It is one thing to say you would like to publish an OA textbook; it is another thing to actually fund it. However, it is important to remember that most of it is already paid for. The work required to write it is paid for as part of the salary of the authors (who are university lecturers). Most legal textbooks do not require expensive research costs such as labs or fieldwork, so the overheads (such as library access and office space) are already covered. There is no marginal cost to this project in terms of producing the substantive material. The only outstanding outlay is the cost associated with publishing. These costs would include copy-editing, design or layout, printing and the labour of librarians working to ensure that the final OA material is as widely available and searchable as possible. This latter cost is already paid for by universities as part of library workloads. Once the book is freely available online, a print-on-demand model could minimise the costs associated with publication and distribution. There may be a loss of royalties from the sale of the book for the university press and the authors compared to keeping it toll-access. However, this is unlikely to be significant.

This means that the missing piece of the funding puzzle is the production cost, although this need not be staggering. In commencing this project, it was calculated that the most this would cost would be NZD30,000. This is based on a previous OA book by the same publisher that cost slightly less than that amount.¹¹ That book was finished to an unusually high standard for an academic monograph, was in A4 format and ran to some 580 pages. A textbook on the criminal process would be substantially cheaper to produce. It is smaller in format and number of pages, thus reducing the editing and typesetting costs. Although the final figure will not be known until the textbook is published, it is expected to be closer to NZD20,000. This is the equivalent of three years' subscription to a core textbook for one university. If this is scaled across all six New Zealand law schools then the cost per textbook is much reduced compared to the traditional print model.

There is of course a question of scalability. Would all law schools want the same textbook for each course? The beauty of academia is the diversity of opinions on what to teach and how to teach it, as well as what to research. So this model of 'single-payer' OA textbook publication may be argued to be a constraint. Having said that, the market in New Zealand is not awash with legal textbooks. There are, for example, two criminal law textbooks and this appears to

⁹ Julia Tolmie and Warren Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis, 2007).

¹⁰ Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 5th ed, 2019).

¹¹ Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

satisfy the needs of the teachers of core subjects and practitioners. In the present example of a textbook on the criminal process, CONZUL was satisfied that there was sufficient interest across the law schools to ensure that it was worth investing in the textbook, which would be hosted by the publisher and accessible to all, regardless of university.

The numbers stack up for OA textbooks, but there remains a sticking point. Somebody, or some institution, has to pay the upfront costs. With OA there is a problem akin to the well-known philosophical dilemma known as the ‘free-rider problem’.¹² If there is going to be an OA textbook, why should we be the ones to pay for it? Why should we not be the ‘free rider’ and let other users pay for it?

The answer to this has to come from collaboration between interested institutions. In this case, the organising has come through CONZUL. This is a representative body of librarians from each of the eight universities. It works to ‘act collectively to enhance the value and capacity of New Zealand University libraries’.¹³ CONZUL has done significant work on OA publishing in the New Zealand context. It therefore decided to fund this project with a NZD30,000 grant as part of that work. The idea is experimental, but the hope is that by producing a successful OA textbook this can be used as a template for future textbook production, at least in law but potentially in any discipline. As the output will be entirely OA, any reader in the world with internet access can benefit from the work, whatever their academic affiliation (if any).

The project will use Canterbury University Press (‘CUP’)¹⁴ to publish the textbook in time for semester two of 2023. The choice of a university press is important because, in the case of CUP, a small publishing house owned by the university, the financial target is to break even every year. The income from the book has to cover the cost of publication (review, editing, layout, printing, distribution) and e-publication (digital hosting, online layout) and does not need to include a profit margin. The cost structures are built in such a way that the exact same quality control mechanisms (including peer review) that would be used with a toll-access publication remain in place.¹⁵ The only difference is that, instead of paying for the book by selling copies or demanding subscriptions from universities, the costs are covered, without profit, within the university library system. If a successful textbook is produced commercially, it would be the university library system that would pay for it, and it would usually only be university library subscribers who would have access to it. By going OA, the same libraries pay for the book, but it is also open to anybody interested in the subject matter. Additionally, research indicates that OA publications get greater levels of citations than toll-access

¹² Russell Hardin and Garrett Cullity, ‘The Free Rider Problem’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Winter 2020 ed, 2020).

¹³ ‘Council of New Zealand University Librarians (CONZUL)’, *Universities New Zealand* (Web Page, 2021) <<https://www.universitiesnz.ac.nz/about-universities-new-zealand/unz-committees-and-working-groups/council-new-zealand-university>>.

¹⁴ ‘Canterbury University Press’, *University of Canterbury* (Web Page, 2021) <<https://www.canterbury.ac.nz/engage/cup>>.

¹⁵ Suber (n 1).

publications.¹⁶ This applies to both OA journal articles¹⁷ and books.¹⁸ The reach of a book beyond the academy is likely to be significantly enhanced by publishing in an OA format.

Although this is a small project, it may be a useful pilot scheme to help demonstrate the viability of OA textbook publishing in New Zealand and beyond. The only way that OA publishing will be expanded is through communal action. This communal action must involve rethinking the way that money goes from the major funder of research (the state) to those who do the work for research and publication. Rethinking the payment scheme could move away from individualised payments (where individuals or universities pay for the book or subscription) towards a centralised system (where libraries pay upfront for the cost of publication). It does not need to be a massive conceptual jump to go from one to the other, and the potential benefits in cost savings and improved access to knowledge are huge.

IV OVERSEAS COMMUNAL ACTION FOR OPEN ACCESS

New Zealand is a small jurisdiction, with a relatively small legal community. Yet it has a thriving culture of legal debate and analysis and a healthy body of legal professionals contributing to a system with a high respect for the rule of law. The question for OA advocates is how we can organise in such a way as to keep this legal debate as open to contributors and consumers as possible. The answer has to be in communal action, whether it involves all publishers and consumers of legal texts, or just a few. This can be demonstrated with two examples from overseas that have lessons for the New Zealand legal community: one from the University of California, and one in the field of particle physics. The first is raised as an example of the power of universities themselves to drive OA publishing, and the second is raised as an example of a field or discipline driving the reordering of the funding model for academic publishing. Both are good examples of where communal action has made it possible to move research into an OA format without increasing financial outlay in the process.

The University of California system is a public research university with 10 campuses across the state. It has an annual budget of USD41.6 billion and approximately 285,000 students.¹⁹ In 2019 the University of California pulled out of its contract with one of the world's largest academic publishers, Elsevier.²⁰ It had subscriptions to some 7,000 journals through the contract. For two and a half years there was a stand-off between the university and the publisher and it was not clear that the contract would be renewed. Academics at the university had to obtain journal articles through other means, such as by contacting the author of a paper directly

¹⁶ Heather Piwowar et al, 'The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles' (2018) 6 *PeerJ* e4375.

¹⁷ Xianwen Wang et al, 'The Open Access Advantage Considering Citation, Article Usage and Social Media Attention' (2015) 103 *Scientometrics* 555.

¹⁸ Christina Emery et al, 'The OA Effect: How Does Open Access Affect the Usage of Scholarly Books' (Springer Nature Open Research White Paper, November 2017).

¹⁹ University of California, 'University of California at a Glance' (Information Sheet, February 2021) <https://ucop.edu/institutional-research-academic-planning/_files/uc-facts-at-a-glance.pdf>.

²⁰ Jeffrey Brainard, 'California Universities and Elsevier Make Up, Ink Big Open-Access Deal', *ScienceInsider* (Web Page, 16 March 2021) <<https://www.sciencemag.org/news/2021/03/california-universities-and-elsevier-make-ink-big-open-access-deal>>.

to ask for a copy, or by looking to repositories for earlier versions (so-called ‘Green OA’).²¹ In general, staff were supportive of the move and understood the difficult position that the publisher had put the library in. The university was contributing huge amounts of research to these publications, but this research was not freely available to those members of the public and the academy who did not have expensive Elsevier subscriptions.

In the end, the contract was renewed. Financially, the fees payable remained the same, but in real terms amounted to a 7% reduction in costs.²² The larger benefit, beyond California, was that academics from the university will publish OA in Elsevier journals. They will pay a processing charge for this, but it will be less than before the deal was struck.²³ The overall effect of the deal is, according to a UC Berkeley librarian who was involved in the negotiations, to ‘convert subscription payments into payments for open access publishing’.²⁴

This marked a huge victory for the OA movement. It demonstrated that the major consumers of research-based publications did not need to always accept the financial terms of the publishers. In some ways this is a special case. The University of California is huge, with academics supplying significant amounts of content to the journals in question. Not all universities will be able to negotiate such a deal with a powerful publisher. However, if one thinks about the University of California as a union of 10 universities (each of the 10 campuses would potentially be a stand-alone university in most jurisdictions) then the power of uniting against exploitative commercial interests becomes clearer.

The second overseas example looks not at universities combining to restructure the funding of publication, but at communal action taking place at the level of a field or discipline. The leading example of this approach comes from particle physics (also known as high-energy physics). CERN,²⁵ the European Organization for Nuclear Research based in Switzerland, may be most famous for its giant underground particle accelerator. However, it is also the home of the world’s largest OA initiative, the Sponsoring Consortium for Open Access Publishing in Particle Physics, more commonly known as SCOAP. SCOAP commenced operation in 2014,²⁶ and has since supported the publication of over 44,000 peer reviewed journal articles.²⁷ The articles are now freely available on the SCOAP repository; prior to 2014 those articles would

²¹ Suber (n 1) ch 3.

²² Gretchen Krell, ‘UC’s Deal with Elsevier: What It Took, What It Means, Why It Matters’, *University of California* (Web Page, 18 March 2021) <<https://www.universityofcalifornia.edu/news/uc-s-deal-elsevier-what-it-took-what-it-means-why-it-matters>>.

²³ Lindsay McKenzie, ‘Big Deal for Open Access’, *Inside Higher Ed* (Web Page, 17 March 2021) <<https://www.insidehighered.com/news/2021/03/17/university-california-reaches-new-open-access-agreement-elsevier>>.

²⁴ Krell (n 22).

²⁵ Free dissemination of research is part of CERN’s mission and indeed it is part of the organisation’s convention. CERN’s convention states: ‘The Organization shall have no concern with work for military requirements and the results of its experimental and theoretical work shall be published or otherwise made generally available’: ‘Our History’, *CERN* (Web Page, 2021) <<https://home.cern/about/who-we-are/our-history>>.

²⁶ Alexander Kohls and Salvatore Mele, ‘Converting the Literature of a Scientific Field to Open Access through Global Collaboration: The Experience of SCOAP3 in Particle Physics’ (2018) 6(2) *Publications* 15.

²⁷ ‘What Is SCOAP3?’, *Sponsoring Consortium for Open Access Publishing in Particle Physics* (Web Page, 2021) <<https://scoap3.org>>.

have been toll-access and available only to subscribers. Under the system, a partnership of over 3,000 institutions work together to redirect funds previously used for journal subscriptions.²⁸ Instead of spending the money on subscriptions to the publisher, each participating institution pays a subscription to SCOAP. This communal money is then paid to the publishers as article processing charges that go towards funding the publication costs of such work. The benefit of this system, which is universally accepted as being a success, is that by pooling the resources of more institutions you are able to pay for the publication costs of research more equitably. It ensures that the research (much of which has been paid for by states through their university research budgets) is available for the benefit of all humanity, regardless of subscription budgets. Again, as with the University of California example, the important thing is the communal action to bypass the model of corporate interests demanding individual payments. It is only through this communal action that we can increase the amount of OA publication and open up knowledge generated by the academy.

There is no reason that a version of this communal action cannot be achieved even in a small jurisdiction such as New Zealand. Although it is diffused among many actors, the ultimate source of the funding of most legal publications in New Zealand is the state. Through university libraries, civil service departments, the judiciary and many private practitioners working in publicly funded areas such as criminal or family law, books or other legal resources are paid for using money that effectively comes from the state. It is submitted that if the vast amount of money spent on legal resources is paid for by the New Zealand taxpayer, then the New Zealand taxpayer should be able to freely access those resources. The only reason this is not currently possible is because we are trapped in a paradigm of paying for the production of research on New Zealand law, while private overseas corporations control the sale and distribution of most of that research. This could be changed forever. If we can move beyond this individualised payment structure towards communal payment for legal resources, we can move towards a situation where those resources can be made more freely available.

V CONCLUSION

In the final analysis, the role of the public university should be, among other roles, to distribute knowledge as widely as possible. Hiding research behind subscription paywalls is a direct barrier to the achievement of that goal. The OA movement has slowly started to break down these barriers by rethinking the way in which we fund the publication of research. The model that currently operates in the law libraries of New Zealand is no longer sustainable. Paying subscriptions for materials including journal articles, monographs and textbooks that have been written by the university's own staff as part of their role appears to be a form of double payment for legal research and analysis.

This article has described a possible way forward by using the communal resources of New Zealand's university library budgets to fund the publication of a much-needed textbook on the criminal process. Although this project is in its early days, it has some of the characteristics of

²⁸ Ibid.

successful overseas OA projects, such as those in particle physics and at the University of California. The most important of these characteristics is the centralisation of budgets to create a single purchaser to fund the publication costs. If this model can be successfully executed in this case, it may prove to be the way in which textbooks are written in future. Indeed, it may even start the legal community thinking about whether all legal resources could be centrally funded. That next step is for all of us in the New Zealand legal community to take together.