USING COMPARATIVE STUDIES TO IMPROVE FREEDOM OF INFORMATION ANALYSIS. INSIGHTS FROM AUSTRALIA, CANADA AND NEW ZEALAND

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> Law in general is human reason, insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied. Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.
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> MONTESQUIEU, *The Spirit of the Laws*, 1748

I. INTRODUCTION

This paper brings together several different threads of my research over the last ten years.[1] The paper promotes the need and necessity to under-

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[1] The paper is a modified version of two earlier articles published in the *FoI Review* An Australian journal that published 114 issues between 1985 and 2004 and an uncompleted draft paper looking at how political spin and FOI interface. The two articles are "Administrative Compliance — evaluating the effectiveness of freedom of information"

take comparative FOI research. In particular it shows how a comparative approach has helped develop a very useful tool in FOI research —administrative compliance analysis—. The final section of the paper uses comparative material from Australia, Canada, New Zealand and the UK to try and understand the relationship between spin control and Freedom of Information.

Countries like Australia, Canada and New Zealand have had Freedom of Information legislation for over 20 years and therefore can provide useful insights into FOI best practice and lessons about how to avoid problems. The key lesson, for countries about to or have recently adopted FOI, is not to ignore or undervalue the importance of culture —political and administrative. A recent article on FOI in Israel made the following points (all confirmed by the experiences of Australia, Canada and New Zealand)—.

— The process of legislating the Freedom of Information Law should include as many mechanisms as possible that encourage assimilation, and should avoid mechanisms that inhibit assimilation.
— The initial years of implementing the Freedom of Information Law are critical for the creation of the public's faith in its ability to obtain information from the authorities.
— Public activity for freedom of information must continue after the legislation of the Law.
— No change in the practices of governmental authorities can be expected, unless pressure is brought to bear by supervisory administrative entities or by means of court judgments.[2]

In the absence of these principles, or the failure to implement supportive measures, then increasing non-compliance with the legislation will become a more significant feature of FOI administration as time goes on.

(2001) 93 *FoI Review* 26-32 and "Is there a role for comparative Freedom of Information analysis? Part 1" (2004) 113 *FoI Review*. These articles have been incorporated with only a few changes.

2 Rabin, Yoram and Peled, Roy, "Between FOI Law and FOI Culture: The Israeli Experience", *Open Government: A Journal on Freedom of Information*, Vol. 1, No. 2, June 2005.

II. Developing a comparative approach to freedom of information. A slow journey

In this section I want to briefly touch upon some of the key issues and areas of interest for comparative FOI study. In many areas the analysis will be incomplete or too sweeping in its generalisations. I beg the reader's indulgence and ask that you treat this more as an extended public talk than a carefully scripted academic contribution.

The core of this section comes from a public lecture I presented to the New Zealand Institute of Public Law in April 2002.[3] The talk was presented six years after my first significant foray into comparative Freedom of Information study and 8 months before presenting my first undergraduate course on comparative Freedom of Information at the University of Western Ontario Law School in 2003.

For many years, as editor of the *FoI Review*, I made calls for increased multi-disciplinary and comparative studies in FOI and information management. A number of contributors to the *FoI Review* such as Alasdair Roberts, Greg Terrill, Chris Berzins and Stephen Lamble have all made significant contributions in pursuit of this mission. In addition the number of single country case studies published in the *FoI Review* provided strong foundations for future comparative studies. This work is now being continued by the online journal *Open Government: A Journal on Freedom of Information*.[4]

1. *The beginnings*

My experiences with comparative FOI began innocently in April 1996 with a visit to New Zealand. In the traditional way, of most unsuspecting and unsophisticated comparativists I had naively decided to learn a little more about the New Zealand *Official Information Act*. I had come to New Zealand at the invitation of Paul Walker, the first Director of the New Zealand Institute of Public Law, to be the inaugural visiting fellow of the newly formed Institute.

3 "Why Australians and Canadians Can't Fathom the Official Information Act: Is There a Role for Comparative Freedom of Information Analysis?" presented to the New Zealand Institute of Public Law, 28th April, Wellington, 2002.

4 See *www.opengovjournal.org*.

Prior to my arrival I had read the small amount of readily available material on FOI in New Zealand. I had plotted out an intensive round of documentary research in conjunction with a range of interviews with key figures. At that point and for most of my stay in New Zealand the focus had been to understand the *Official Information Act* on its own terms and within its own context.

Paul Walker, now a QC in London, suggested that I present 2 lectures to his undergraduate public law students on FOI in Australia and New Zealand. I was mortified but too beholden to Paul's generosity (in the invitation) and nascent friendship (which has now extended to our spouses and children) to refuse. Yet how to compact 13 years of Australian FOI experience and federal/state differences into a single 50 minute lecture? Even more confronting how to present a lecture on New Zealand FOI when my understanding was still so primitive and barely informed?

In the end I simply followed the advice I had so freely dished out to my students. Namely when undertaking comparisons find criteria upon which to organise your comparisons on or around. The criteria I chose (the night before) for my first lecture were eventually used in a modified form in the article *Kiwi Paradox*.[5] At a later point Reitz in an instructive article about approaches to comparative law wrote:

> *Comparative law scholarship should be organized in a way that emphasizes explicit comparison*.
>
> Finally I come to the nitty-gritty detail of organization. I do not wish to dictate matters of form narrowly. Good writers find the organization that best fits their subject. However, I want to encourage the use of organization for comparative writing that emphasizes the comparative task being accomplished. There are all too many examples of comparative books and articles in which the comparative exploration of a subject (antitrust, for example) is organized in the following way: a detailed description of the antitrust law of country A, followed by a detailed description of the antitrust law of the country B, followed by a brief section that attempts to draw the chief comparisons. But this last section is inevitably too short and too lacking in detail to be effective comparison, not only because the writer has run out of steam at the end of the work, but also because, if he were to support his comparative analysis with all the rich detail, he would

5 "The Kiwi Paradox - A Comparison of Freedom of Information in Australia and New Zealand", *Federal Law Review*, Vol. 28, No. 3, 2000, pp. 575-616.

> have to repeat much of the first two sections. It is as if the writer said to the reader "Here is all the raw data about this subject in the two legal systems I am studying. Now you do the comparison according to these general guidelines I am giving you!"
>
> Instead of the simplistic, ineffective, and inefficient three-part approach, I advocate trying as much as possible to make every section comparative. For example, if the subject is antitrust law, one section might compare and contrast the development of antitrust law in each country, another the two countries' treatment of horizontal restraints of trade, another the vertical restraints, another the enforcement mechanisms and remedies, etc. Try to break the subject down into the natural units that are important to the analysis and then describe each country's law with respect to that unit and compare and contrast them immediately. Let the contrasts documented in each section build toward your overall conclusion. Of course, for certain subjects it may be necessary to describe the law of one country in a block before comparing it. This seems especially likely, for example, when what is being compared is the historical development of a field or legal system. But the shorter these blocks, the more effective will be the comparison.[6]

After my first lecture and before the second I accepted an invitation from Judge Anand Satayanand, one of the New Zealand Ombudsmen to join him and a few staff members for morning tea. That seemingly innocent invitation changed my thinking, my life, the type of career I have lead as an academic and added new dimensions to discussions about freedom of information reform in several countries. The ideas and insights generated from that invitation have flowed onto talks, and policy discussions in Canada, South Africa, United Kingdom, Ireland, Bermuda, Indonesia, Philippines and Malaysia. Discussion about FOI reform in Australia since 1996 have been heavily influenced by the lessons and insights derived from the New Zealand experience.

I turned up at the New Zealand Ombudsmen's Office to have my cup of coffee and a few biscuits, intrigued by the large number of staff gathered and the semi-formal seating arrangements. I was horrified when, as I finished my coffee I was asked to give my comparison between the Australian FOI Act and the Official Information Act with the provocative request from Judge Satayanand "and tell us which is the best and

6 Reitz, John C., "How to do Comparative Law", *The American Journal of Comparative Law*, USA, 1998, pp. 633 and 634.

why". I find it difficult to recall the detail of my impromptu 15 minute talk but I have no problem with remembering the galling (for an Aussie) conclusion — New Zealand's Official Information Act was the superior FOI Act in terms of performance and outcomes.

Since that impromptu talk and the two undergraduate lectures I have been exploring the field of comparative FOI and trying to find the tools to exploit that exploration. In the words of Otto Kahn-Freund: "A comparative lawyer must make many decisions entirely for himself; decisions on the field he wishes to cultivate, and decisions on the tools and implements he wishes to use in cultivating it. More than that he must set out on a voyage of discovery to find the fields and on another voyage to find the tools".[7]

Since that first hesitant effort of trying to create a comparative analysis from scratch my primary mission has been to try and construct a comparative law research methodology in the general area of administrative law but in particular the areas of access to information and ombudsmen. My secondary mission has been to try and help in some minor way to shape, guide and inform reform attempts to existing FOI frameworks (Australia — Commonwealth and State and for countries like Canada) or jurisdictions intent on adopting FOI legislation (South Africa, Bermuda, United Kingdom, Indonesia and the Northern Territory of Australia) heavily influenced by my understanding of the differences between FOI in Australia and New Zealand.

By the time of my return visit to the New Zealand Institute of Public Law, this time courtesy of Professor Matthew Palmer, in April 2002 my thoughts and exposure to comparative FOI had more fully developed. Over the following 12 months I presented talks and/or taught courses in comparative FOI and administrative law in several countries.

2. *Taking the comparative path*

Can comparative FOI analysis can add anything to the rapid law reform process which is underway around the globe in relation to open government? Do the lessons of FOI in countries like Sweden, United States, Australia, Canada and New Zealand or Mexico have any rele-

7 O. Kahn-Freund, "Comparative Law as an Academic Subject", *Law Quarterly Review*, Vol. 82, 1966, p. 41.

vance to those countries seeking to build democratic and civic infrastructure and whether there is a need and/or movement towards comparative administrative law in general.

The comparative study of administrative law offers an interesting and informative means of studying and shaping one of the most rapid developments in legal policy transfer — namely the rapid uptake of Freedom of Information or Access to Information schemes. That rapid uptake has created a demand for information about the design, development and implementation and review of such access schemes. Information that to date is limited. FOI has only received limited study as marginal subject in a marginal field —administrative law—. Indeed FOI is rarely covered in administrative law courses (or at best receives a fleeting mention in the rush of other topics like Ombudsman that are given a few minutes at the end of a course for completeness sake) sometimes in media law units and increasingly in some journalism courses or occasionally in Information Management courses.

To what extent can a comparative/multi-disciplinary approach to FOI be undertaken? What can we learn from it? How can we apply the material gathered from Canada, Australia, United States, Sweden and New Zealand to the comparative study of FOI in countries like Ireland or in countries in transition? The field of comparative administrative law, let alone comparative FOI is relatively unexplored yet FOI is a particularly rich area of study due to:

— Number of jurisdictions - 60+.[8]
— Similar legislative architecture in many of the jurisdictions.
— Similar imperatives responsible for uptake —democratic, social and economic—.
— Similar outcomes/expectations (functions assigned / missions given).

Konrad Zweigert and Kotz argue that “function is the start point and basis of all comparative law”.[9] Therefore the potential for comparative

8 Privacy International in June 2004 reported that at least 57 countries had adopted Freedom of Information and that almost 100 countries either had FOI legislation or were in the process of adopting such legislation. See *www.privacyinternational.org*.

9 Zweigert & Kotz, *Introduction to Comparative Law*, 3rd ed., Clarendon Press, p. 42.

study in the area of FOI is high. However Harlow cautions that "law is seen not merely as a toolkit of autonomous concepts readily transferable in time and space, but as a cultural artefact embedded in the society in which it functions".[10]

3. *The need for comparative studies*

In a 2002 conference paper delivered in New Zealand Grant Liddell attempted a quick overview of developments in freedom of information, personal access and data protection law.[11] His paper highlighted the dramatic increase in the number of countries enacting data protection, privacy and FOI laws. In particular using the work of David Banisar, from Privacy International, Liddell pointed out that now 57 countries (as of March 2002) had enacted FOI laws or proposed and that 10 countries have enacted FOI laws since 2000.[12] Since that date a further at least 15 countries have adopted some form of FOI legislation.[13]

This outbreak of adoption of open government statutes is a surprising phenomenon. In the early 1990s there were only a handful of FOI laws on the statute books. Counting only national laws the figure stood at approximately 13 countries. Indeed some were willing to predict at the start of the 1990s that FOI had seen its heyday and that future adoption would be rare. In most countries there was a feeling as Liddell describes it, that these laws were "for past times". FOI laws were considered dated, under strain from government restructuring and policy failures in achieving anything other than a slow way of accessing personal information.

Yet we are now witnessing a frenetic round of activity that sees proposals for FOI being floated from countries at all corners of the globe. Liddell argues that it is the new democracies of Eastern Europe and elsewhere that "appear to be taking the greatest strides towards open government", whereas countries like the UK, Australia, Canada and the USA

10 Harlow, Carol, "Voices of Difference in a Plural Community", Harvard Jean Monnet Working Paper 03/00, USA, p. 3.

11 "Origins, Background and Scope of Freedom of Information, Personal Access and Data Protection Law: Convergence, Divergence or Parallel Tracks?" presented at International Symposium on Freedom of Information and Privacy, Auckland, 28 March 2002.

12 See *http://www.privacyinternational.org* (accessed 3 November 2004).

13 See *http://freedominfo.org/survey.htm* (accessed 3 November 2004).

(especially since September 11 2001) seem to be resiling from their already lukewarm warm flirtation with access laws.

On 22 April 2002, President Megawati of Indonesia opened an International Conference on FOI at the Presidential Palace. Her opening speech disappointed many Indonesians, especially those from NGOs, due to its refrain of yes we need FOI but we need to proceed cautiously and protect other values. Yet what is remarkable is that the President opened the conference and that there are two proposals for FOI being considered by the Parliament (one government bill and another presented by a number of parliamentary parties). In late September 2004 there was a gathering of NGOs and other civic society activists in Kuala Lumpur that passed a resolution requesting FOI laws for Malaysia.

Yet this flurry of legislative activity and conferences, like that in Indonesia, reveal a major deficiency in the construction of democratic and civic infrastructure namely a dearth of comparative studies. At the conference in Jakarta the Indonesians, whether NGOs, government officials, activists or the media were keen to explore the experiences of other countries like Thailand, Japan, South Korea, Sweden and Australia. Yet in the main the discussion was limited by the fact that most of the material was presented in singular country case studies. In part this deficit in comparative studies is a consequence of the rapid spread of FOI. Many Thai and Japanese academics have barely had time to realise that FOI legislation is now operational. Furthermore there is a general absence of comparative study in the area of administrative law. Reformers have a general optimism that open government just needs the right switch (legislation) to be flicked and that FOI is a readily transplantable law and therefore there is little need for analysis.

There is an urgent need for academics, postgraduates, government officials and NGOs to develop comparative studies in this area which include, but extend beyond, singular case studies or collections of case studies. These studies will not only inform the policy development processes of countries yet to adopt FOI legislation but will also feed back into reforms of veteran jurisdictions like Sweden, Canada, Australia, and the US.

Even the countries which appear to have the best track records on FOI —namely Sweden and New Zealand have seen strong demands for re-

form in recent years and comparative experience may provide some guidance to re-energising those jurisdictions.[14]

4. *The problem of rapid law reform*

The 57 plus countries that have adopted Freedom of Information regimes have done so from a limited range of models:

— USA.
— Australia - Canada.
— New Zealand.
— ARTICLE 19 Model Reforms.
— Sweden.[15]

Rarely is much time spent on understanding how these models work or do not work in their own legal and political environments before they are recast for a new set of operating conditions. Many of the models have a significant cadre of critics who have well justified concerns about the efficacy of parts or the entire dynamics of particular FOI systems.

The reforms are implemented with little consideration given to the way that state secrecy operates and the multi-dimensional impact of FOI which can provoke unexpected levels of non-compliance from those charged with administering the reform. A comparative perspective may allow a better understanding of what design choices, legislative architecture, administrative reforms and other steps that may be necessary to bed down a successful adoption of open government in the long term.

The US model, and more recently the ARTICLE 19 Model Reforms, have tended to be the dominant design models considered by countries when adopting FOI reforms. The US dominance came from a number of sources that have been carefully considered in a recent PhD thesis by Stephen Lamble.[16] The Westminster model (Canada and Australia) has received little comparative treatment and the New Zealand variant, until

14 See papers of International Symposium on Freedom of Information and Privacy, Auckland, 28 March 2002, at *http://www.privacy.org.nz/media*.

15 Which despite its longevity and apparent effectiveness is rarely credited as a primary source of design inspiration for countries adopting FOI legislation.

16 Lamble, Stephen, *Computer-Assisted Reporting and Freedom of Information*, Phd. Thesis University of Queensland, Australia, November 2003.

the mid 1990s, received little attention either within New Zealand or externally.

5. *The state of academic research. The transition from descriptive overviews to comparative studies*

In an earlier talk I identified several progressive steps in the analysis of FOI in Australia and Canada.[17] A recent article on the development of FOI in Israel reflected many of these early steps.[18]

- An initial descriptive analysis of the legislative framework.
- Case by case analysis examining the text of the first key cases.
- An interest in sponsoring test cases to establish more precedents for open government.
- Encouragement of judicial or legislative change to make the legislation more authoritative in the interpretation of exemptions.
- Detailed examination of the legislative architecture.

The appearance of case studies and empirical research examining the impact of time delays, fee charges, etc.

Comparative studies

Academic research has an important if not vital role, albeit it not the prime role, to play in the Freedom of Information process. Our level and quality of understanding about freedom of information is still at a relatively simplistic level at both the research and law reform level. However significant advances have been made in FOI research over the last 5-10 years.

To a significant degree this research has stemmed from the law reform process (often as a by-product) rather than the research directing and shaping that law reform process. FOI research is inherently interesting. It

17 Snell, R., "Freedom of Information in the Age of Spin Doctors — A Reform Destined for Failure? Lessons from Australia, New Zealand and Canada", *Paper Delivered to the Law School*, Middlesex University, London, June 2001, 2.

18 See Rabin, Yoram and Peled, Roy, "Between FOI Law and FOI Culture: The Israeli Experience", *Open Government: A Journal on Freedom of Information*, Vol. 1, No. 2, June 2005.

is an area where the expertise and interest of several disciplines overlap or intersect, the activities of several professions — lawyers, journalists, parliamentarians, public servants, information managers intermingle in a range of environments from the useful and complementary to the highly adversarial and confrontational.

There are several important questions to be resolved. Is it simply an optional linear law reform measure that is expected to have an important but transitory impact or a much more complex, variable and transformative process (is it a Dog Control Act or one akin to the Human Rights Act?). Does the fact that FOI deals with information —one of the basic fundamentals of any political, legal, economic and social system— elevate its importance?

Does the fact that FOI addresses the basic information settings in a society *i.e.* helping to determine, or at the very least reflect, the informational settings between

- Open source / closed source.
- Secrecy / openness.
- Privacy / disclosure.
- Spin / deliberative dialogue.

Answers to any or all of these questions make our study and understanding of FOI a critical activity. Comparative studies provide us with the ability to refine our analysis and to apply our insights across jurisdictions.

III. Using comparative studies to better understand the differences in administrative compliance

The level, type and frequency of administrative compliance is a useful measure of the efficacy and well being of a freedom of information regime. Studies, like those of Roberts, have transformed the traditional and static portrayal of administrative compliance into a more sophisticated model of analysis.[19] The compliance focus has moved from a concentra-

19 Roberts, Alasdair, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Freedom of Information Research Project, April 1998, School of Po-

tion on raw rejection rates, processing times and anecdotes of shredders and sticky labels to an analysis that allows for variance in compliance in terms of agency, time, requesters and types of requests. More importantly a focus on administrative compliance may take us closer to the promise of freedom of information than previous areas of academic concentration, such as the search for an ideal system of external review or an ideal exemption interpretation, in this field.

The major players in jurisdictions where FOI has recently been introduced will mark the celebration of it's first anniversary in different ways. The FOI Unit in a central government department (varying from the Premier's to Justice Department with an occasional residency in the Treasury portfolio) will be upbeat and quietly pleased at its relative smooth introduction. The external review body (be it Information Commissioner, Ombudsman or Tribunal) will be content that the first array of decisions have generally free of controversy and avoided major criticisms from both applicants and agencies. Academics have started to shift through the Reviewer's decisions, to catch a hint of the likely jurisprudence and wordplay that will be necessary, to understand the exemption provisions. The press, citizens and opposition MPs will be in the throes of dealing with a mixed bag of wins and losses from their first applications under this new access to information legislation.

Yet the accounts of the following years will generally be wide sweeping generalisations that cannot account for the failure to deliver on the promising start evident at that first anniversary. This paper argues that attention needs to turn towards a monitoring and understanding of administrative compliance in the operation of access to information regimes. The Australian, Canadian and New Zealand experience is a story of persistence, and in recent years a significant shift in the magnitude and type of, non-compliance. The picture in Australia has been described as one of "frustration, delay and the haphazard provision of information".[20]

licy Studies, Queen's University, pp. 47-50. Available at *http://faculty.maxwell.syr.edu/asroberts*.

20 Snell, R., "Issues Paper Submission 31" cited in ALRC/ARC Report No. 40, *Open Government: A Review of the Federal Freedom of Information Act 1982*, paragraph 2.8, foot note 24.

The first section examines why administrative compliance appears so problematic in access regimes like Canada, Australia and to a lesser extent New Zealand. The question of, and problems about, administrative compliance has perplexed, to varying degrees, law reform and monitoring institutions in all three jurisdictions. The legislative architecture, intention and committed policy positions of the political and bureaucratic leadership seems to leave little option other than administrative compliance at the very least and active compliance as the norm.

Roberts's analysis is used in the second section of the paper, with a significant upgrade in terms of variables and focus, to examine the nature of administrative compliance. Roberts has transformed the previous simplistic approach to the study of compliance with freedom of information legislation. This paper adds further dimensions to the model developed by Roberts.

1. *Administrative compliance*

In any access to information regime administrative compliance, the adherence to the letter and spirit of freedom of information legislation, should be a non-contentious issue. Requests should be processed in a timely fashion by a bureaucracy committed to achieving the maximum disclosure possible in the circumstances prevailing at the time of the request. Decisions on release should be on the merits of the request and free of political and other considerations not specified in the legislation. Public interest considerations as opposed to more narrow political and bureaucratic interests should be the key determinants in the decision making process.

There is not the potential for any doubt about what the default level of administrative compliance should be in these three jurisdictions. The legislation received full and vigorous endorsement by all parliamentary parties and the second reading speeches declared to the world a 100% commitment to the principles of open government. The legislation in each jurisdiction is specific — the objective is greater openness and discretion is to be exercised in favour of release. The exemption structure was hotly debated and carefully designed to be limited and each provision is narrowly worded. The formal training provided to public officials in each jurisdiction was, and continues to be, calculated to encourage release and

foster an attitude that exemptions were to be applied in a limited fashion and as a last resort. Agencies in each jurisdiction are keen to be on the public record as not only endorsing freedom of information but promoting the strategies they have adopted to release information outside of the legislation.

Yet in each jurisdiction there is a constant stream of official reports, public statements by formal review bodies and academic studies that depict an alarming level and magnitude of non-compliance. The level and type of non-compliance varies within and between the three jurisdictions. On a sliding scale of concern Canada would occupy the highest level of concern. Australia would occupy the next slot although displaying an increasing drift towards a general state of non-compliance. New Zealand would occupy the zone of least concern due to a number of factors contributing to compliance covered in the final section of this paper. These factors include the legislative architecture, history and nature of the freedom of information constituency in New Zealand.[21]

2. *The Roberts model of administrative non-compliance*

Roberts analysis has added a powerful dimension to an understanding of freedom of information legislation in practice. Roberts has argued that administrative compliance in freedom of information can be divided into three categories namely malicious non-compliance, adversarialism and compliance.

Malicious non-compliance is defined by Roberts as "a combination of actions, always intentional and sometimes illegal, designed to undermine requests for access to records".[22] Examples of this type of non-compliance would include the destruction of records subject to a FOI request, avoiding responding to the request or manipulating or removing compromising information from files.[23] In Table 1 a number of other practices have been included under the heading of malicious non-compliance including the use of yellow sticky labels, the deliberate non-recording of information and the deliberate manipulation of administrative practices

21 See Snell, R., "The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand", *Federal Law Review*, Vol. 28, No. 3, 2000, pp. 575-616.

22 Roberts, *Limited Access*, 10.

23 *Ibidem*, gives documented Canadian examples on 10-11.

to ensure information, which would normally be releasable under FOI, is covered by an exemption.[24]

The second category of administrative compliance can be "described as adversarialism; a practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected".[25] Roberts indicates that adversarialism can manifest itself in several ways including where

> Officials may adopt very broad interpretation of exemptions and exclusions, or use several exemptions or exclusions to defend the withholding of the same material, with the expectation that information commissioners or ombudsmen will narrow the exemptions and exclusions down to their appropriate scope when the request is appealed.[26]

Further examples of adversarialism used in Table 1 include; the automatic resort to exemptions instead of trying to facilitate some degree of access, a "us versus them" mentality, deliberate delays until towards the end of mandatory time limits, poor or non-existent statement of reasons, rejection of fee waivers and an agency perspective that views the external reviewer as an adversary. New Zealand is not immune to this type of non-compliance. In 1989 the then Leader of the Opposition, Jim Bolger complained about extensive time wasting and other practices that showed: "the Government can, and does, flout the intention of the Act with appalling regularity… There is a growing, almost sinister secrecy associated with government departments and especially SOEs ['State Owned Enterprises]".[27]

The third category adopted by Roberts is administrative non-compliance, in which public bodies undermine the right of access because of in-

24 An example of this practice can be seen in *Snell v Department of Premier and Cabinet*, 1998 Unreported Decision, Tasmanian Ombudsman, dated 30 May 1998. A case study of this case is contained in "The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand".

25 Roberts, *Limited Access*, 11.

26 *Idem*.

27 Morrison, Alastair, "The Games People Play: Journalism and the Official Information Act", in Legal Research Foundation, *The Official Information Act: Seminar Papers General Overview of Official Information and the Official Information Act*, February 1997, 30.

adequate resourcing, deficient record-keeping, or other weaknesses in administration.[28] See Table 1 for further indicators of this type of non-compliance.[29]

3. *A shifting focus of academic attention*

For a number of years, after the introduction of the legislation, academic analysis of freedom of information in the three jurisdictions was restricted to a study of the text of recent court or tribunal decisions. A new decision would be raked over in the search for interpretational insights and further limitations or exceptions to operation of exemption provisions.[30]

In the next wave of academic interest this case analysis format was supplemented by reference to raw figures dealing with release rates of information, trends in application of exemptions and time taken to process requests. A further layer of studies was devoted to case studies and/or responses to proposed changes or reviews of the legislation.[31] Other studies started to focus on the type, models and methods of external review.[32]

In the 1980s and early 1990s academics like Zifcak and Ardagh[33] started to seek an understanding of how freedom of information was operat-

28 Roberts, *Limited Access*, 11.

29 See Morrison, "The Games People Play", for New Zealand examples 32-34.

30 Eagles, I. *et al.*, *Freedom of Information in New Zealand*, Auckland, Oxford University Press, 1992. See Snell, R. and Townley, H., "The Cabinet Information Exemption: Theoretical Safeguards Exposed by a Tasmanian Case Study" (1993) 46 *FoI Review*, 42-45; Cossins, Anne, "Uranium Mining, Cabinet Notebooks and Redundant Amendments to the Commonwealth FoI Act" (1994) 52 *FoI Review*, 42-44; Cossins, Anne, "Paving the Way for Less Open Government in Victoria: Amendments to the Cabinet Documents Exemption" (1993) 45 *FoI Review*, pp. 27-30.

31 For an example see Finn, Chris, "Getting the Good Oil: Freedom of Information and Contracting Out", *Australian Journal of Administrative Law*, Vol. 5, 1998.

32 Rowat, Donald C., "Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand", *Australian Journal of Public Administration*, Vol. 52, No. 2, 1993 at 218-219. Sheridan, Helen and Snell, Rick, "Freedom of Information and the Tasmanian Ombudsman 1993-1996", *University Tasmania Law Review*, Vol. 16, No. 2, pp. 107-159.

33 Zifcak, Spencer, "Freedom of Information: Torchlight but not Searchlight", paper presented at National Conference on Administrative Law (1991), 66 *Canberra Bulletin of*

ing in relation to different types of requested information. Their studies showed a differential outcome in FOI requests dependent on whether the information being requested was information relating to the personal affairs of the applicant or was non-personal affairs information such as policy documents. Access to the former was timely, unproblematic and generally successful whereas access to the latter was delayed, contested and rarely successful.

Once the variance in outcomes and performance was established the focus changed to a search for the causes and reasons for the differences. Some authors argued that the attainment of an interpretational holy grail would make a fundamental difference.[34] Their argument was that if the judiciary and external review bodies (Ombudsman and Information Commissioners) took a leaning, or pro-disclosure approach, towards interpretation of FOI cases the administration of the legislation would shift towards greater compliance.[35] Whilst the influence of the "leaning" argument has been variable, especially at a judicial level in Australia, it can

Public Administration, 162; Ardagh, Anne, "Freedom of Information in Australia: a Comparative and Critical Assessment", paper delivered at ALTA Conference, Western Australia, 1991, reprinted in Douglas, Roger and Jones, Melinda, *Administrative Law: Cases and Materials*, The Federation Press, 1993, pp. 137-147 at 145.

34 Snell, Rick, "The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited", *Australian Journal of Administrative Law*, August 1995, pp. 197-216. Cossins, Anne, "Revisiting Open Government: Recent Developments In Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law", *Federal Law Review*, Vol. 23, No. 2, 1995, pp. 226-276 at 263. Zifcak, Spencer, "Freedom of information: Torchlight but not Searchlight", paper presented at National Conference on Administrative Law (1991), 66 *Canberra Bulletin of Public Administration*, p. 162.

35 This was a view endorsed in ALRC/ARC, "Open Government", at para 4.4-4.6 and external review bodies in Queensland, Western Australia and Tasmania see *Aboriginal and Islander Affairs* (1994), 1 QAR 60, Office of the Information Commissioner (WA) *Re Read and Public Service Commission*, Unreported Decision Ref D00194, 16 February 1994, *NSW Ombudsman Guidelines* issued in December 1994, at 3. Tasmanian Ombudsman in *Snell v Tasmanian Development and Resources*, 10 April 1995, Decision 95030080. However, Australian Courts and tribunals have continued to reject this approach see *News Corp Ltd v National Companies and Securities Commission* (1984) 52 ALR 277, *Arnold v. State of Queensland* 13 ALD 195, *Searle v. PIAC* (1992) 108 ALR 163. Lunn J, *Ipex Info Tech v Dept of Info Tech Services SA*, unreported District Court South Australia, 16 June 1997, 7-10. A view endorsed by Trenorden, J. in *Sheppard v. the SA Minister for Health*, unreported District Court South Australia, 8 December 1997, pp. 4 and 5.

be effective[36] and is viewed by many reformers as a vital first step in revitalising FOI.[37]

Prior to the 1998 study, of Canadian access legislation by Roberts, compliance issues such as time delays, document destruction and yellow sticky slips were largely relegated to marginal notes or anecdotal accounts. The criticism of administrative agencies and their compliance practices was blunt, unrefined and easily dismissed as an isolated lapse in an otherwise exemplary performance pattern. The attempt to study FOI practice encountered a difficulty in reconciling an array of conflicting findings. In a previous paper I argued that there was the paradox of high level commitment to the principles of FOI by FOI officers and agencies coexisiting with what the Canadian Information Commissioner described as, a confrontationial relationship between agencies and requesters.[38]

4. *The Roberts compliance model transformed*

The Roberts analysis allows a consideration of the magnitude, duration and history of administrative compliance and non-compliance. The distinction of malicious non-compliance and adversarialism has also permitted a more sophisticated and accurate discussion to eventuate about administrative compliance. Previously the debate would list a catalogue of administrative sharp practices but fail to differentiate between minor problems (substandard reasons for decisions) and serious practices (document tampering and deliberate delays).

36 See *Local Government Association of Queensland v Information Commissioner* [2001] QSC Unreported where Atkinson J. endorsed the concept that FOI was beneficial, remedial legislation which should be interpreted in cases of ambiguity in a way to achieve its purposes at page 3.

37 Legislative Review Committee of South Australia, *The Freedom of Information Act 1991*, Adelaide, September 2000; Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland, Discussion Paper No. 1*. Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001.

38 Information Commissioner of Canada, Annual Report — Information Commissioner 1993-1994, at 7. See Snell, Rick, "Rethinking Administrative Law: A Redundancy Package for Freedom of Information", in Kneebone S. (ed.), *Administrative Law and the Rule of Law: still Part of the Same Package?*, AIAL, Canberra, 1999, pp. 84-108.

In Table 1 a series of further refinements and dimensions are added to the analysis suggested by Roberts. These refinements include two further categories, namely administrative compliance and administrative activism, to cater for those agencies who have achieved the default level of administrative practice in the area of freedom of information.

These two additional categories not only recognise the positive performance of many agencies but also highlights the aspirational difference between technical compliance and a pursuit of the objectives and spirit of the legislation. This wider spectrum of administrative compliance may also allow for an analysis which can track compliance performance over time. Studies like those of Roberts and this paper have focused on compliance standards in the three jurisdictions 10-15 years since the inception of the legislation. If compliance was examined over time across and within agencies would any pattern or trends emerge? Could a thesis be sustained for Australian FOI practice at the Commonwealth level that there has been a general drift on the compliance spectrum from an active compliance status in 1983 to a general adversarial norm in 2001?

Further dimensions have been added to Roberts' basic model to accommodate the type of requester and type of information requested. In previous papers it has been argued that agencies and jurisdictions seem to have variable responses to different applicants and the types of information being requested.[39] This marked differential in FOI performance could be seen as a complicated interrelationship between several factors.

Design principles X type of administrative compliance X type of requester = extent to which FOI applications dealt within accordance to

39 Campbell, Madeline and Arduca, Helen, "Public Interest, FOI and the Democratic Principle — A Litmus Test", paper presented at INFO 2, 2nd Australian National Conference on Freedom of Information, Gold Coast, March 1996. *First Annual Report of the Office of the Information Commissioner WA 1993-1994*, 26. Zifcak, S "Freedom of information: torchlight but not searchlight", paper presented at National Conference on Administrative Law (1991) 66 *Canberra Bulletin of Public Administration*, 162. Ardagh, Anne, "Freedom of Information in Australia: a Comparative and Critical Assessment", paper delivered at ALTA Conference, Western Australia 1991 reprinted in Douglas, Roger and Jones, Melinda, *Administrative Law: Cases and Materials*, The Federation Press, 1993, pp. 137-147 at 145. Snell, R., "Hitting the Wall: Does Freedom of Information Have Staying Power?", in Argument, Stephen (ed.), *Administrative Law: Are The States Overtaking the Commonwealth?*, Australian Institute of Administrative Law, 1996.

objects of legislation.[40] Agency responses often seem dependent upon whether the request is from certain applicant categories such as journalists, members of parliament, non-government organisations or individuals and whether the information being requested is personal affairs information or more contentious information in terms of its political or administrative sensitivity. In New Zealand it appears that the government and bureaucracy have engaged in gamesmanship and information management to offset the effectiveness of FOI for politicians and journalists.[41]

5. *Administrative compliance an inherent dysfunction of FOI?*

Terrill provides an insight into why compliance is such an unexpected variable in FOI administration.[42] FOI, according to Terrill, operates in all three dimensions of government information namely political, bureaucratic and legal.[43]

The other major components of the "new administrative law" package (Ombudsman, administrative appeals and judicial review) all tend to operate predominantly within the legal dimension of a citizen's relationship to government. Whereas FOI in Terrill's thesis crosses the boundary into the political and bureaucratic strands.[44]

40 This interrelationship is explored in more detail in Snell, Rick, "Rethinking Administrative Law: a Redundancy Package for Freedom of Information", in Kneebone, S. (ed.), *Administrative Law and the Rule of Law: still Part of the Same Package?*, AIAL, Canberra, 1999, pp. 84-108.

41 See Morrison, "The Games People Play", for New Zealand examples 32-34.

42 The material from this section is drawn from four major works by Terrill. First his thesis G. Terrill, "Secrecy and Openness. Publicity and Propaganda: The Politics of Australian Federal Government Communication, 1960-1976", dissertation submitted for the degree of Doctor of Philosophy at Queensland University of Technology. Second his book Terrill, Greg, *Secrecy and Openness — from Menzies to Whitlam and Beyond*, Melbourne University Press, 2000. Third, his article "Individualism and Freedom of Information Legislation" (2000), 87 *FoI Review*, 30-32 and fourthly an unpublished paper "Democratising Secrecy? The Characteristics and Context of Freedom of Information Legislation", this paper formed the basis of "Individualism and Freedom of Information Legislation", but contained a number of other interesting insights about FOI which did not make it into the published version.

43 Terrill, "Democratising Secrecy? The Characteristics and Context of Freedom of Information Legislation"; see also Snell, "Kiwi Paradox", at 615.

44 Thesis at 232-233.

TABLE 1. ADMINISTRATIVE COMPLIANCE AND FREEDOM OF INFORMATION

	Malicious non compliance	*Adversarialism*	*Administrative non compliance*	*Administrative compliance*	*Administrative best practice*
	Shredding	Automatic resort to exemptions	Inadequate resourcing	Requests handled in a co-operative fashion	High priority given to processing requests
	Deconstruction of files	Us versus them mentality	Deficient record management	Objective is maximum release	Objective is maximum release outside FOI
	Relabellin of files	Sitting on requests	Cost recovery or minimisation major factor	Timely decisions	Information identified and available in public interest - without FOI requests
	Sticky labels	Significant delays in processing	Low priority attached to processing of requests	FOI officers key decision makers about release	FOI officers key actors in agency information management
	Pre-emptive exploitation of exemptions	Non-existent or very poor statement of reasons even at internal review stage	Adequate reason statements but often missing aspects (number of documents being withheld, etc.)	Exemptions only applied as a last resort and to the minimum extent possible	Exemptions waived if no substantial harm in release
	Fee regimes manipulated to discourage request	Fee waivers rejected	FOI officers play a processing role		

	Malicious non compliance	*Adversarialism*	*Administrative non compliance*	*Administrative compliance*	*Administrative best practice*
	Internal reviews uphold original decision 90% + of times	Internal reviews uphold original decision 75% + of times	Internal review seen as preparing a better case for external review	Internal review new decision	Internal review an opportunity to refine information handling
	External reviews avoided	External reviews depicted as a battle against external reviewer	External review findings not fed back into decision making process	External review decisions used as future guide	Adverse external review seen as a quality control check
Type of information					
Personal				✓	✓
Mid level policy			✓	✓	
High level policy	✓	✓	✓		
Type of requester					
Individual				✓	✓
Active Group			✓	✓	
Journalists	✓	✓	✓		
Opposition MPs	✓	✓	✓	✓	

An inherent capacity to operate in all three dimensions gives FOI its problematic status in the eyes of its administrators. In contrast to the other parts of administrative law, according to Terrill, FOI is not primarily used to bring disputes to closure (a determination in a tribunal or finding by the Ombudsman) nor is its use predictable or limited to a small and identifiable range of parties (individuals affected by a decision, a small number of non-government organisations, reporters on a specific round ie courts or the Canberra press gallery).[45]

In particular FOI has a number of specific attributes which have the capacity to provoke negative or non-compliant responses from administrators. First it grants a legally enforceable right, in theory only limited by a narrow range of exemptions, to citizens and therefore diminishes the capacity of Saul's systems men from controlling access to power.[46] A simple denial of access or assertion by government officials of a pre-emptive ownership of information can no longer be relied on to control; access.

Second, the unpredictable nature of FOI requests in areas of timing, applicant and future application is a nightmare in the age of spin doctors and political management tailored to a public relations agenda. A request may enter the scene a decade after a Minister was reassured that a damaging controversary was now under wraps. A request by an academic interested in understanding the path followed by a particular policy process may fuel front page headlines. A series of requests that initially seemed unrelated (in terms of content, applicant and outcomes) across several; departments may transform into a well informed and comprehensively briefed campaign against a wood chip mill. Every single request has an unknown potential to cause unexpected disruption to a policy process or cause an unplanned roadblock for a particular policy direction.

Third, many of the normal information management techniques of spin doctors and PR specialists have the potential to be counter-productive or back-firing in the "rights-democratic" charged atmosphere of FOI legislation. The tactics of denial, delay and spin carry the risk of producing headlines such as "The Secret State", "Access Denied", "The Truth

45 Terrill, "Democratising secrecy? The Characteristics and Context of Freedom of Information Legislation".

46 Saul, J. R., *The Unconscious Civilization*, Penguin Books, Melbourne, 1997, p. 44.

Behind the Cover-up". Many information management techniques used to counter an FOI request lend themselves to cartoons, which visualise the process as poor serfs on the outside seeking informational treasures from their lords and masters or attempts at gaining access to the locked cabinet or the presence of an overworked shredder.

Fourth, the key gatekeepers in determining access, FOI officers, operate in an environment of diminishing training, resources and increasing pressures to settle for levels of non-disclosure at odds with the legislative requirements of the FOI Act or at the very least its ethos. FOI officers, generally recruited from the lower levels of the bureaucracy or junior middle ranked positions, find themselves torn between their clear legislative requirements and the more pressing and immediate perceived requirements of their bureaucratic and political leadership. Furthermore the internal review process directs the more controversial requests, because they now have become contested decisions, to areas of the administration which are even more keenly attuned to the policy sensitivities and ramifications of releasing certain types of information. At the very least these sensitivities and ramifications make certain compliance approaches more tempting. Roberts, in the context of Canada, goes further and argues that "Restructuring has provided an opportunity for political executives and public servants to increase their autonomy by strengthening their ability to implement policy without close scrutiny by many nongovernmental actors, including the media, advocacy groups and public-sector unions".[47]

By using the Terrill analysis to take into account the potential for FOI to cause disruption across the three dimensions —bureaucratic, legal and political— and the particular attributes of FOI that amplify this potential for disruption the variable response to FOI requests in terms of degree and types of administrative compliance is understandable. Terrill also suggests that "the design of the legislation creates the space for government to engage in passive or even active resistance".[48] On the one hand the FOI process seems designed to be "the sum of atomised actions by

47 Roberts, A., "Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law", *Public Administration Review*, Vol. 60, No. 4, July-August 2000, p. 317.

48 Terrill, "Individualism and Freedom of Information Legislation", 30.

unconnected individuals"[49] yet in a playing field which delivers a number of significant institutional advantages to the government player: "The structure of FOI is thus not formally neutral, but creates positions of relative advantage and disadvantage. Governments have the advantage of institutional memory, specialised expertise, and have a longer-term interest in influencing the evolution of case law".[50]

6. *Compliance analysis in the understanding of FOI*

Compliance analysis will take us a step closer to understanding the complex matrix of factors which help to determine the efficacy of any access to information regime. An analysis that allows for variance in compliance (between and within agencies, across time and in relation to types of requesters and information requested) allows for a more precise identification of problem areas than the traditional league table approach.[51]

Hopefully compliance analysis may encourage some researchers to revisit the key cases of the past and not just recount the final words of learned judges but analyse how the request was handled and evaluate the outcomes in terms of quality and quantity of information released. More importantly it focuses attention on the way FOI has been received, adopted and responded to by those who have had the duty and obligation to implement this very problematic reform in governance.

In addition compliance analysis demands and legitimises a greater level of multi-disciplinary and cross disciplinary approaches to FOI study than has previously existed in jurisdictions like Australia, New Zealand and Canada. In terms of this paper the contributions of non-legal academics and authors like Roberts and Terrill have added a far sharper and perceptive focus than the traditional legal academic approach.

Finally a compliance analysis turns attention towards the crafting of reforms that address not only the legislative architecture or interpretational/enforcement problems revealed in litigation but the key areas of

49 *Idem*.

50 *Idem*.

51 Focusing on numbers of requests received, rejected, delays and the occasional battle story or case study.

attitude and culture. Three key parliamentary inquiries in Australia in the last 12 months have pinpointed the areas of culture and compliance as prime targets of reform.[52]

7. *Steps towards addressing administrative compliance shortfalls*

Kearney and Stapleton have observed in the context of Ireland that "on reflection, the single critical factor overlooked by us when first approaching FOI was that it was a change process, not just a legislating matter".[53] Canadians and Australians had paid lip service to this concept but always deep down believing that a magic mix of watertight exemptions, the right interpretative approach and an appropriate mechanism of judicial review would suffice. If necessary a degree of training might complete the process.

It is likely then that Ireland will, like New Zealand, be ideally placed to achieve a higher and more lasting degree of administrative compliance than experienced in Australia and Canada. The key policy dynamic associated with the implementation of right to know legislation is how a radical culture shift for officials is to be implemented and then maintained in terms of short and long term administrative compliance with the legislation.

Several steps can be taken to assist with compliance. The first is leadership endorsement of the letter and intent of the legislation. The circulation of the Reno Memo, endorsed by President Clinton, produced a significant cultural change in the handling and determination of US FOI requests. The leadership support needs to be from both the political and administrative branches of government.

The second step is a careful consideration of the level and type and power of the position to which FOI decision making is assigned to within

52 Legislative Review Committee of South Australia, *The Freedom of Information Act 1991*, Adelaide, September 2000; Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland, Discussion Paper No. 1.* Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001.

53 Kearney, Gerry and Stapleton, Aine, "Developing Freedom of Information Legislation in Ireland", in McDonald, A. and Terrill, G. (eds.), *Open Government: Freedom of Information and Privacy*, Macmillan Press Ltd, 1998, pp. 167-179.

an agency. The allocation of FOI duties to low level officers, with little status or experience and no career path is a recipe designed to foster weak compliance. The decision of where to place FOI functions needs to be based on the internal dynamics, operations and culture of each agency. In some agencies the FOI function will mesh ideally with records management. In other agencies where record management is a dead end file handling function such an assignment will consign FOI to a marginal position.

Third, the position of an FOI officer should be gazetted or have explicit statutory delegations of authority. The exercise of decisions on release or non-release should be the responsibility, and seen as such, of statutory powers by an independent officer. An FOI officer should be empowered and be under a statutory obligation to say to a Minister's minder "Yes I will let you know what requests for information have been made to this agency. No I will not forward the request to your office to be decided and I will make my own judgement on release".

Fourth, publicly and awareness of FOI should not be seen as a short term necessity but as a long term strategic commitment by governments to the legislation. Most Australian jurisdictions have assigned these functions to small dedicated units, within the bureaucracy, who had an enormous positive impact but had a very limited operational tenure. Western Australia has ensured the longevity of these functions by placing the awareness and education functions with the Information Commissioner.

Fifth, the training and resourcing of FOI officers must be done on the basis that the original corps of officers will eventually be replaced. The experience in most jurisdictions has been a heavy outlay in terms of training and other resources to a cadre of motivated and enthusiastic officers with little systematic follow-up. Training and FOI officer development in Australia has become ad hoc, optional and a low priority consideration for public sector managers.

The Office of the Information Commissioner in Western Australia has demonstrated what can be achieved in compliance terms when the education and development of FOI officers is treated as a continuing function and necessity. In May 1998 the Information Commissioner, in conjunction with the FOI co-ordinator's network in that state, conducted a workshop which produced a series of "FOI Standards and Performance Measures" designed to achieve 3 aims:

a) *Leadership*

— That the WA public sector becomes a leader in applying the processes required by FOI legislation and the objects and intent of the Act.

b) *Community Respect*

— To enhance the profile of each agency and the WA Government within the community.
— To demonstrate to the community and staff in agencies that FOI is taken seriously.
— To focus on the customers of public sector agencies.
— To demonstrate accountability, credibility and integrity.

c) *Continual improvement*

— To achieve best practice.
— To introduce consistency so that meaningful comparisons of performance can be made.
— To understand the factors that underpin the success of FOI in agencies, including resources, education and policy issues, and to identify changes to the legislation that may be required.

To support these three major aims the Western Australian FOI officers developed a series of performance standards and measures under four key activities that included managing the FOI process, assist and advise parties, agency policy and education and evaluation of performance. The importance of this development is that the FOI officers have developed and articulated performance standards against which their, and the agency's, compliance with FOI can be judged. A number of the standards are clearly linked to compliance concerns including processing times, adequacy of searches, decision-making process consistent with the objectives of the legislation and adequacy of reasons.

The sixth step would be the adoption of the Australian Law Reform Commission and Administrative Review Council proposal for an "auditing" or monitoring role to be undertaken by an independent body to the

agency.[54] This monitoring role would include audits of the handling of previous FOI requests. In addition the ALRC/ARC felt that such a body could also work as a circuit breaker where FOI requests have deteriorated into adversarial disputes. The Queensland Information Commissioner commented in regards to this circuit breaker function that:

> Generally speaking, I favour the concept of a facilitator. I have seen many cases where there has been a lack of trust exhibited by an applicant for access toward an FOI administrator who was attempting to negotiate to narrow, so as to make more manageable, the terms of an FOI access application: the participation of an 'honest broker' may resolve an impasse to the benefit of all parties.[55]

The final step would be to institute an annual awards program that publicly rewarded or recognised significant agency achievements in compliance and active pursuit of the objectives of an FOI Act. Australian agencies have displayed a surprising responsiveness to non-monetary award programs (for instance annual report standards). In this area the adoption of an approach like the UK Campaign for Freedom of Information annual awards would be a positive step access to the information they need.

Further thoughts on compliance[56]

Authors like Terrill and Roberts are leading us from dry, sterile debates and slanging matches about which government is more secretive to a deeper understanding about the wider political, policy and legal dimensions of access to government information. Roberts forces us to concentrate on enhancing and expanding the quality of Australia's informational commons.[57] The greatest tragedy, associated with the non-response by

54 ALRC/ARC, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No. 77 at para 6.16.

55 *Ibidem*, para 6.17.

56 This section draws on the introductory comments I made in a briefing paper presented to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, in March 2001.

57 That intangible "pool of information about community [and political affairs] which must be publicly accessible for citizens to engage intelligently in the act of self-govern-

the Australian Federal Government to the Australian Law Reform Commission and Administrative Review Council reforms released in 1996, is that an increasingly dilapidated, antiquated and flawed *Freedom of Information Act 1982* (Cth) continues to diminish that commons.

In the long term it is imperative that we return to a consideration of the design principles, legislative architecture, administrative practice and objectives of an access to official information scheme at a national level in this country.[58] The focus should be on reforms designed to increase positive administrative compliance under the FOI Act. The delay in implementing the ALRC/ARC reforms and consequential side effects has meant the increase likelihood of administrative compliance practices deteriorating into non-compliant practices.

Compliance analysis will help identify if unacceptable practices are the fallout effect of government restructuring (cost cutting, focus on outputs versus processes) or the insidious and undesirable penetration of political gamesmanship into the determinations about access to government information. Using this type of analytical model we can better understand the counterattack provoked by the Canadian Information Commissioner because he decided that a policy of zero tolerance would apply to "late responses to access requests; a new pro-openness approach to the administration of the Access Law… and that the full weight of the Commissioner's investigative powers would be brought to bear to achieve these goals".[59] The Commissioner reported threats to future careers of staff[60] and that "[w]hen the Commissioner's subpoenas, searches, and questions come too insistently or too close to the top, the mandarins circle the wagons?".[61] Another factor it seems that we might need to add to

ment" see Roberts, A., "The Informational Commons at Risk", School of Policy Studies, Working Paper 8, September 2000 at 2, accessible at *http://faculty.maxwell.syr.edu/asroberts*.

58 My general thoughts in this area are covered in the following papers "The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand", *Federal Law Review*, 2000, pp. 575-616. "Rethinking Administrative Law: A Redundancy Package for Freedom of Information", in Kneebone, S. (ed.), *Administrative Law and the Rule of Law: still Part of the Same Package?*, AIAL, Canberra, 1999, pp. 84-108 and with Tyson, Nicole, "Back to the Drawing Board: Preliminary Musings on Redesigning Australian Freedom of Information" (2000), 85 *FoI Review*, pp. 2-6.

59 Information Commissioner of Canada, *Annual Report 1999-2000* at 9.

60 *Ibidem*, 11.

61 *Ibidem*, 9.

the matrix in determining administrative compliance is the attitude/type of approach adopted by the external review body. What happens, with administrative compliance, when the external review body switches from an explicit trust in the good faith of those administering the legislation to a determination to see the spirit and letter of the law applied in favour of greater access?

IV. Spin control and freedom of information. The volatile end of the compliance spectrum

Recent work in the area of comparative compliance studies has focused on the interaction between political spin, information control and management with FOI.[62] These studies highlight the "tension between the FOI and its own call for a more centralized and better coordinated system of government communication".[63] Other studies warn that 'their impact on FOI has become potentially greater and more negative' or that there is evidence of patterns of non-compliance in the handling of politically sensitive requests, followed by 'the use of a series of tactics to kill, swamp or divert attention away from the newsworthiness of any story or public use of released information'.[64]

1. *Media and FOI. The early analysis*

Early predictions about the use of FOI placed the media at the forefront of groups expected to maximise the benefits of this democratic reform for

62 Roberts, Alasdair, "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada", *Public Administration*, 83.1 (Spring 2005), pp. 1-23; Snell, Rick, "Contentious Issues Management — The Dry Rot in FoI Practice" (2002), *FoI Review*, pp. 62-65 and Snell, Rick, "Freedom of Information and the Delivery of Diminishing Returns or How Spin Doctors and Journalists Have Mistreated a Volatile Reform", *The Drawing Board: An Australian Review of Public Affairs*, Vol. 3, No. 2, March 2002, pp. 187-207.

63 Roberts, A., "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada", at 23.

64 *Ibidem*, 20; quoting Snell, "Freedom of Information and the Delivery of Diminishing Returns" at 193 and 194.

providing "wide and deep dissemination of government information".[65] As an institution that had considerable interest in the (internal) operations of government, the media was expected to utilise FOI legislation as an investigative tool to further its 'fourth estate' role. Since its inception in Australia, New Zealand and Canada, media use of FOI has disappointed some commentators.[66] In particular, criticism has been levelled at journalists for: low request rates; failure to initiate external review proceedings; and dropping lines of inquiry when confronted with government-bureaucratic resistance.[67] However, academic analysis has highlighted the potential barriers for the media to use FOI.[68] A number of critiques have been made about FOI, across different disciplines with academia, law reform bodies and other interested parties. Several areas pinpointed for concern include the:

- Legislative foundations.
- Inherent design features.
- Administrative practices.
- Administrative compliance and
- The positioning of FOI within the administrative body.

Some criticisms have exhibited a common deficiency; arguments are predicated on an assumption of neutrality — neutrality within the administration of the Act and that a requestor is on an even level with the government. Two exceptions are Terrill's analysis of structural imbalance and Roberts Administrative compliance model. A more accurate analysis would conclude that non-neutrality within the information request process could be triggered through several variables (including spin or the exercise of discretion).[69] Early literature examining FOI exhibited a fundamental distrust of government when evaluating the request experience.

65 Access Reports: Freedom of Information, "When media isn't the media", 28(3), February 13, 2002, pp. 3-5.

66 Snell, R., "In Search of the FOI Constituency: Case 1 - The Media", *FoI Review*, No. 78, pp. 81-84.

67 Coulthart, R., "Why the FOI Act is a Joke", 81 *FoI Review*, pp. 43-46.

68 Snell, R., "In Search of the FOI Constituency: Case 1 - The Media".

69 Roberts, A., "Administrative Discretion and the Access to Information Act: An Internal Law on Open Government?", *Canadian Public Administration* 45.2 (Summer 2002), pp. 175-194.

Inevitably it missed the evidence that FOI received considerable support at political, bureaucratic and public levels. Furthermore, through the work of FOI Officers, some applicants have received considerable support and assistance from an 'insider', traditionally considered to be a hindrance to access.[70] Because FOI, and the ability to manage the flow of information, is closely connected with political power, it is inevitable (or unsurprising) that attempts to access information that creates politically sensitive stories should meet government opposition. Stephen Lamble has used a comparative study to great effect to demonstrate why there is such a wide difference in the way the media has used FOI in 5 jurisdictions (US, New Zealand, Australia and Canada).[71]

2. *A changing focus in the studies*

Recent analysis has depicted political agendas as the major determinant in whether these barriers are erected by governments and bureaucracies to restrict access to sensitive information.[72] This has been achieved through the manipulation of the weak legislative foundations of FOI that is consistent with the communication techniques of information management and 'spin-doctoring', designed to influence the news agenda with a view to minimising negative media coverage. In three Westminster systems, two of which have implemented FOI laws (Australia and Canada), spin has received some, yet deficient attention until Roberts recent 2005 study. The conflict between FOI and spin is another potential catalyst for the volatile relationship between the media and government. Spin has occupied a stronger position in the political system in Western liberal democratic systems, especially the UK.[73] Increasingly elections campaigns, and politics itself, have become a media affair where professional experts in marketing, advertising and PR are inserted into the

70 See Snell, R., "FOI Officers - A Constituency in Decline?" (2002), *FoI Review*, pp. 69-72.

71 Lamble, S., "Media Use of FOI Surveyed: New Zealand puts Australia and Canada to Shame" (2004), 109 *FoI Review*.

72 Terrill, G., "Individualism and FOI Legislation"; Coulthart, R., "Why the FOI Act is a Joke", 81 *FOI Review*, pp. 43-46.

73 Miller, D. and Dinan, W., "The Rise of the PR Industry in Britain, 1979-98", *European Journal of Communication*, Vol. 15(1), 2000, pp. 5-35.

"central planning of campaign communication activities".[74] However this concentration upon communications and media personas inevitably requires the spin-doctor to maintain a "half antagonistic, half symbolic" relationship with the media.[75]

Recent analysis has questioned the accuracy of this picture, where the media's investigative power through FOI is dependent upon the government willingness to create significant barriers (contrary to the spirit of FOI). Snell has argued that while a structural imbalance does exist in the FOI request process that can be utilised to undermine the working of the act, a more co-ordinated and sustained approach by journalists does reveal that the "legislation offers the capacity for journalists to limit... the influence of spin".[76]

A research paper produced for the Canadian Access to Information Review Task Force (ATIRTF)[77] collated the reported experiences of several journalists, thereby outlining the shared deficiencies of the Act and barriers to its usage (cost, delays etc). A consensus among the Canadian journalists interviewed was that FOI is a valuable journalistic tool for obtaining raw information to contribute to an investigation by creating leads or paper trails. The legislation had less utility as an instrument for independently uncovering instances of government misbehaviour, rorts, policy decisions etc. Hence FOI is a powerful investigative tool but rarely an independent generator of public interest stories.

3. *Contemporary portrayal of spin in government-public communication*

A cross section of recent Australian, Canadian and British articles examining spin reveal two main approaches to discussing the subject. Firstly, articles by Ward and Zawawi[78] have examined the impact of pub-

74 Esser, F. *et al.*, "Spin Doctoring in British and German Election Campaigns", *European Journal of Communication*, Vol. 15(2), 2000, pp. 209-239, esp. 212.

75 *Ibidem*, p. 209.

76 Snell, R., "FOI and the Delivery of Diminishing Returns".

77 Attallah, P. and Pyman, H., "How Journalists Use the Federal Access to Information Act", Report to the Access to Information Review Task Force, January 2002.

78 Ward, I., "Who Writes the Political News", *Australian Journalism Review*, Vol. 13, 1991, pp. 52-58; Zawawi, C., "Sources of News — Who Feeds the Watchdogs?", *Australian Journalism Review*, Vol. 16, No. 1, January-June 1994, pp. 67-71.

lic relations specialists or spin doctors on the final outcome of news stories. These articles have predicted the strength of spin in influencing the ultimate type of story that is contained in print or broadcast media by examining the source for news stories (whether they are media releases, the influence of PR) and expressed them as a percentage.

The second type of story has limited itself to outlining how spin operates, and how it has influenced the news agenda in isolated, anecdotal scenarios/cases.[79] These articles do not exhibit any coordinated attempt to comprehensively assess the strength of spin, more to illustrate with some examples how the communications 'game' is played.

Roberts has traced and evaluated the move towards more centralisied governmental control over information in Canada and the UK. In particular Roberts has detailed how the micro and policy/political sensitive management of information requests under the Access to Information Act in Canada has undermined attempts at achieving open government.

4. *The media's role*

In a democratic system, the media operates as the main vessel through which the government and public communicate with each other. The "dialogue between the public and their political representatives is maintained primarily through the mass media".[80] Ideally, the media is granted a certain level of freedom to report on political and public affairs, free from any bias, or external forces that would influence the content of news, so that the citizenry is able to form a rational decision on the performance of the party in power. FOI increases the public's knowledge by disclosing government-held information to the public which otherwise may have been kept secret by the Executive. It is thus designed around a premise that Executive governments have the capacity to avoid disclosure of information/facts etc to the public, or at least are able to influence the information-disclosure process to minimise any political damage. Commonly recorded complaints about using FOI to access sensitive po-

79 See McWilliams, E. "Airport Policy: Public or Private?", *Reportage*, Summer 1996-1997, pp. 16-19; McGregor, J., "Spin and the Scottish Devolution Poll", *British Journalism Review*, Vol. 10, No. 4, 1999, pp. 60-66; Grattan, M., "The Politics of Spin", *Australian Studies in Journalism*, Vol. 7, 1998, pp. 32-45.

80 Smith, P., "Political Communication in the UK: A Study of Pressure Group Behaviour", *Politics*, Vol. 19(1), 1999, pp. 21-27, esp. 21.

litical information have centred around the protracted nature of the process, the potential for delays, the broad nature of the exemption categories that are initially applied by public agencies, the cost associated with the request process (both resource wise and the fees applied by the bureaucracy) and the adversarial reception from some agencies. The media is at a particular disadvantage because of the institutional realities of news production: the competition for a new story, the need for immediacy when reporting etc.

5. *Towards a better understanding of the impact of spin*

The depiction of FOI as a journalistic investigative tool has concentrated on the ways in which public agencies or media-management units have used the structural imbalance of the Act to stymie the media's successful use.[81] The impression given is that the media is effectively powerless against a government, motivated enough by the potential damage of negative publicity, to exploit the weaknesses of the Act (cost, exemptions, delay) when faced with a request that potentially could cause embarrassment or reveal incompetency and mistakes.[82] Furthermore, a lack of exposure from the formal political sphere has ascribed less value to the consideration of the media and informational democracies. For instance law reform reports (with the notable exception of the Access to Information Review Task Force, Canada) rarely, if ever, have considered the unique role of the media.

Government or bureaucratic influences have a strong correlation with the outcomes of FOI requests. Research suggests that the more politically sensitive the information that is requested, attracts more attention from government information managers, thereby creating less chance that the information will be released. This implicitly recognises the existence of information management within political affairs. What has received less analysis is the relationship between information management practices and the increasing influence of political 'spin' or control.

In some liberal democratic systems, especially the UK, the implications of 'spin' in modern politics have been explored to a limited degree.

81 See Terrill, G., "Individualism and Freedom of Information Legislation", 87 *FoI Review*, 2000, pp. 30-32.

82 See Coulthart, R., "Why the FOI Act is a Joke", 81 *FoI Review*, pp. 43-46.

Spin, essentially is about "distorting the news and undermining journalist's jobs".[83] It undermines the independence of the journalist by generating the source of news stories, in an endeavour to get the most politically beneficial message across to the public. This trend has been noted in Australia.[84] Hence information is treated as a political commodity to be used in the political arena to the most advantage. A previous PR officer has confirmed recent controversy regarding government media units been informed of FOI requests.[85] The injection of spin doctors or communications officers into the information request process suggests attracting positive spin has usurped the foundations of FOI laws.

The consequence of spin has been to detract from the quality of information available to the public. Image, simplification and damage control have replaced intelligent rational debate (although image and simplification have always been evident in politics).

Spin has a strong foothold in modern government. Information management at the formal political level, such as in Westminster systems, is a well-established practice.[86] Parliamentary traditions that incline towards official secrecy have resulted in Executive governments maintaining control over the public release of information, including the form and timing of the information.[87] Accountability mechanisms, both parliamentary (parliament question time inquiries) and administrative (FOI, Ombudsman) are partially designed to balance this power. Spin is the converse arrangement for the government-media relationship.

In his article Roberts concluded

> The lessons from Canada are sobering. The promise of increased openness has been undercut by the development of administrative routines designed to centralize control and minimize the disruptive potential of the FOI law.

83 McGregor, J., "Spin and the Scottish Devolution Poll", *British Journalism Review*, Vol. 10(4), 1999, pp. 60-66, esp. 61.

84 See Ward, I., "Who Writes the Political News", *Australian Journalism Review*, Vol. 13, 1991, pp. 52-58.

85 Snell, R., "Contentious Issues Management — The Dry Rot in FoI Practice", *FoI Review*, 2000, pp. 62-65.

86 See Terrill, G., "Individualism and Freedom of Information Legislation", 87 *FoI Review*, 2000, pp. 30-32.

87 See Snell, R. and Upcher, J., "Freedom of Information and Parliament: Limited Accountability Tool for a Key Constituency?", *FoI Review*, 2002, pp. 34-41.

> Special procedures for handling politically sensitive requests are commonplace in major departments. Information technology has been adapted to ensure that ministers and central agencies are informed about difficult requests within days of their arrival. Communications officers can be closely involved in the processing of these requests, developing 'media lines' and other 'communications products' to minimize the political fallout of disclosure.
>
> These practices are largely hidden from public view. Nevertheless, they play an important role in shaping the substance of the right to information in Canada. As statistical analyses in this paper will show, requirements for the approval of 'disclosure packages' by ministerial offices or central agency staff often produce unjustified delays in the release of documents. These procedures also enhance the capacity of government officials to anticipate and minimize the damage that may be done by disclosure of information.[88]

V. CONCLUSION

This paper has argued that comparative FOI studies are not only urgently needed but have much to offer. Proposed reforms to the legislation in Canada and Australia have been stimulated by considerations not only of the legislative architecture of the New Zealand Official Information Act but more importantly by the way the bureaucratic and political culture was transformed in that country during the first two decades. Unfortunately there is mounting evidence that even in New Zealand the art of managing and sustaining the tensions between open government and other policies is a continual one rather than a reform that can be achieved by the simple stroke of a pen.

After attending an information conference in Mexico in November 2000 Philip Doty, a US academic considered that FOI poses 4 major riddles or paradoxes for those keen to make the legislation effective.[89] These 4 riddles or paradoxes were:

88 Roberts, A., "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada", at 4.

89 Doty, P., "Freedom of Information in the United States: Historical Foundations and Current Trends", November 10, 2000, Universidad Iberoamericana, Primer Congreso Nacional de Derecho de la Información, pp. 18 and 19.

— Riddle 1 - The relationship of FOI to the nature of the state.
— Riddle 2 - Relationship among the main actors is marked by "mutual cooperation and mutual scepticism and is both adversarial and collegial.
— Riddle 3 - Understanding the relationship between citizen and information.
— Riddle 4 - Managing the unrealistic expectations.

These 4 riddles/paradoxes would be a good starting point to accommodate Reitz's (first section of this paper) requirement for points of comparison especially when used in conjunction with the findings of Rabin and Peled. Compliance analysis adds a further series of comparative points. Finally as Roberts demonstrates in his Canadian/UK study a study of spin control or the way the media interacts with FOI offers further useful territory to explore.