

# Part III

# III

## Privacy Commissioner

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“The matter is too important to leave in the hands of any government. The Government is placing an independent party in that role - a man or woman of integrity - to ensure that the provisions relating to privacy that Government members regard as important are strictly observed and policed.”

- Hamish Hancock MP, Second reading of the Privacy Commissioner Bill, November 1991

“Data protection commissioners are a form of highly specialised ombudsmen with a more active part to play than the classical role of responding to individual complaints. It is not enough to respond to repeated grievances from a changing cast of individuals. The staff has to pursue systematic improvements in information handling practices by using a variety of methods.”

- David Flaherty, *Protecting Privacy In Surveillance Societies*, 1989

### 3.1 INTRODUCTION

3.1.1 Part III of the Act provides for the appointment of a Privacy Commissioner and sets out the Commissioner’s general powers and functions.

3.1.2 An independent supervisory body is a common feature in many privacy and data protection laws. European data protection laws typically create a data protection commission or commissioner whereas the title of privacy commissioner has been preferred in Canada and Australia.<sup>1</sup> Many countries have found the creation of an independent Commissioner a vital part of a credible regime for the protection of privacy. The absence of a Privacy Commissioner in the USA has, in recent years, been repeatedly cited as a shortcoming in the adequacy of American privacy arrangements notwithstanding the existence of some strong privacy laws.<sup>2</sup>

3.1.3 The report which preceded the Privacy of Information Bill described what was to become the Privacy Commissioner as a “statutory guardian for privacy interests”.<sup>3</sup> The Minister of Justice characterised the Commissioner as a privacy “watchdog”.<sup>4</sup> The remark was made when noting that the Privacy Commissioner Bill would confer upon the Commissioner functions then exercised by the Human Rights Commission. In fact, a number of the Commissioner’s

<sup>1</sup> The title usually adopted at provincial level in Canada is “Information and Privacy Commissioner”.

<sup>2</sup> Including one of the world’s oldest privacy laws, the Privacy Act 1974 (USA).

<sup>3</sup> Tim McBride, *Data Privacy: An Options Paper*, December 1987, paragraph 7.85.

<sup>4</sup> Privacy Commissioner Bill, second reading, 26 November 1991.

functions were formerly exercised by the Human Rights Commission, Ombudsmen, Wanganui Computer Centre Privacy Commissioner and Information Authority. Most of the other functions mirror those exercised by other privacy and data protection commissioners.<sup>5</sup> A few are unique to the New Zealand Act.

- 3.1.4 Part III comprises sections 12 to 26. I have reviewed all fourteen sections to see whether any amendment is necessary or desirable. I have, for example, considered whether:
- the provisions have operated satisfactorily in the last five years;
  - new functions would enable better protection of privacy or contribute to the reduction of compliance costs;
  - any of my functions would desirably be narrowed or removed.

## SECTION BY SECTION DISCUSSION

### 3.2 SECTION 12 - Privacy Commissioner

- 3.2.1 Section 12 provides for the appointment of a Privacy Commissioner by the Governor-General on the recommendation of the Minister of Justice. This is the normal approach taken in New Zealand legislation for the appointment of Commissioners. In some comparable jurisdictions the Commissioner is an Officer of Parliament and therefore the appointment is by, or with the concurrence of, the relevant legislature.<sup>6</sup>

#### *Officer of Parliament*

- 3.2.2 Amongst comparable independent entities, the Ombudsmen, Commissioner for the Environment, and Auditor-General, are each Officers of Parliament. The Wanganui Computer Centre Privacy Commissioner was an Officer of Parliament from 1976 to 1993. On the other hand, the Human Rights Commissioners and Race Relations Conciliator, are not.

- 3.2.3 There is no statutory definition or criteria established to identify an Officer of Parliament.<sup>7</sup> The status is one attached on an individual basis to particular positions as they are established. Nor is there any specific definition of what being an Officer of Parliament entails in respect of powers, duties and functions. However, typically one would expect the creation of an Officer of Parliament to be reflected in the appointment procedures, reporting arrangements and appropriation of funding.

- 3.2.4 The issue was considered by the select committee which studied the Privacy of Information Bill. That committee decided not to change the status of the Commissioner from that contained in the bill as introduced. Establishing the Commissioner as an Officer of Parliament is sometimes suggested as promoting the independence of the position. In my view, that concern is misplaced (except in the context mentioned in the next paragraph). I have not felt that my independence has been diminished by reporting primarily to the Minister of Justice rather than to a Parliamentary committee.<sup>8</sup> Indeed, I have, for the most part, found the present arrangements satisfactory and appropriate.

- 3.2.5 However, I have one concern bearing upon independence and which is not

<sup>5</sup> Particularly the Australian Privacy Commissioner since the Privacy Act 1993 is, in a number of respects, modelled upon the Privacy Act 1988 (Australia).

<sup>6</sup> This is the approach taken in most Canadian jurisdictions.

<sup>7</sup> Non-statutory attempts have been made to define when it is appropriate to confer on an official the status of "Officer of Parliament". See David McGee, *Parliamentary Practice in New Zealand*, 1994, page 55.

<sup>8</sup> In any case, I feel that I have developed with the Minister a satisfactory *modus operandi* whereby any reports that are concurrently of interest to a select committee are usually copied by the Minister's office to the relevant committee.

**“We believe that section 12 should be amended so that the Privacy Commissioner is appointed by Parliament rather than by the Minister so that they have more statutory independence and public and parliamentary accountability.”**

- AUCKLAND DISTRICT  
COUNCIL OF SOCIAL SERVICE,  
SUBMISSION G6

faced by Officers of Parliament. The funding to carry out my various statutory functions is procured by the Ministry of Justice as a small component of Vote: Justice. The Ministry concurrently makes the case for its own spending and a variety of Crown entities it has responsibilities for. Expectations of the privacy legislation are, to a degree, being thwarted through inadequate baseline funding. I am somewhat frustrated by the situation where the merits of my case are argued in my absence by a Ministry whose funding for its own projects will, in general, be diminished by any additional funding devoted to my office. I suggest that an arrangement should be made for independent Commissioners in my position to be able to put aspects of their case for funding directly to the Treasury and Ministers.



### RECOMMENDATION 37

**There should be provision for the Commissioner to put a case for funding directly to Treasury and relevant Ministers.**

#### *Crown entity*

3.2.6 Section 12(3) provides that the Commissioner is a corporation sole who has, for example, all the powers of a natural person. Section 12(4) establishes the Commissioner as a “Crown entity” for the purposes of the Public Finance Act 1989. “Crown entities” are a collection of public sector bodies which are at arms’ length from the Government, unlike departments, and brought together for the purposes of the Public Finance Act. They are not generally involved in trading activities. The functions of many Crown entities require a degree of independence from the Government.

3.2.7 One development in the last few years has been a debate over whether it is appropriate for Crown entities to enter into a contract with their respective Ministers. As this has been seen to impinge upon independence an alternative model has been developed involving the execution of Memoranda of Understanding (MOU) with Ministers. Before agreeing to my MOU I was very mindful of the possible effect upon the independence of the position and ensured that it was appropriately structured to avoid any problems.

### 3.3 SECTION 13 - Functions of Commissioner

3.3.1 Section 13 sets out the Privacy Commissioner’s principal functions. The list inevitably attracted criticism in some submissions on account of its length alone. However, I do not favour reformulation into a briefer, yet inevitably more vague, statement of functions. Although some of the functions appear to overlap with others, and a few have not been exercised, each fulfils an important purpose and should be retained. I am aware that in some jurisdictions the absence of a clear statutory function has meant that at critical times governments and agencies have been able to exclude projects from a Commissioner’s privacy scrutiny. On the other hand, for those people concerned at a Privacy Commissioner potentially going beyond an appropriate remit, the specificity of the functions gives good statutory guidance as to what a Commissioner may appropriately do.

#### *Function (a): Education and publicity*

3.3.2 My first function is to promote, by education and publicity, an understanding and acceptance of the information privacy principles and of the objects of those principles. The function interrelates with function (g) concerning education programmes.<sup>9</sup>

3.3.3 Education is essential for the protection of privacy in the 1990s and beyond. I am confident that all of my fellow Privacy Commissioners internationally would

<sup>9</sup> See paragraph 3.3.43 - 3.3.46.

**“The list of functions in section 13 is unusually long and does not give a sense of the core functions of the Commissioner.”**

- NZ LAW SOCIETY PRIVACY WORKING GROUP, SUBMISSION G22

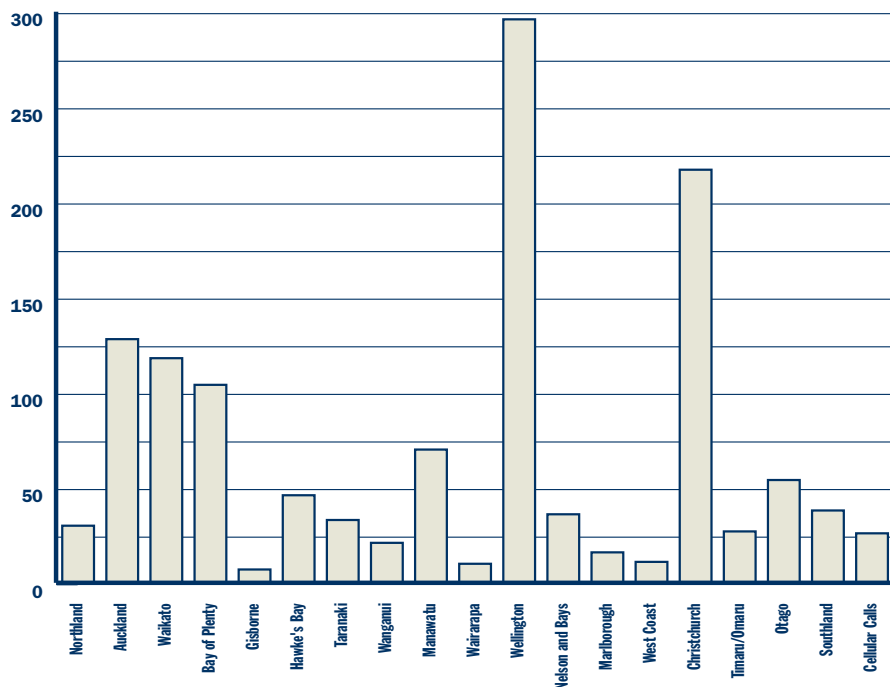
agree that the education of citizens and agencies about privacy risks and solutions is an absolutely essential part of the job. Given the new issues that continue to arise, and the rapid pace of technological development, it is vital that privacy issues be raised for public debate.

- 3.3.4 It may be valuable at this point to give something of an overview of the activities my office has undertaken in relation to carrying out the education and promotional functions. In the space available I can only point out some of the principal endeavours. Further details can be obtained from my annual reports.

#### *Privacy hotline*

- 3.3.5 Since 1993 I have operated a freephone privacy hotline staffed by 2, and later 3, officers who have in the main been legally qualified. This provides equitable access to the resources of my office throughout the country. The following graph shows the typical geographical spread of calls over a two month period.<sup>10</sup>

Figure 2: **Geographical spread of 0800 calls received in June/July 1997**



- 3.3.6 In a typical year my enquiries team handle over 8,000 telephone enquiries. The privacy hotline also acts as an entrance point to other resources of my office. For example, the enquiries team:
- distributes to enquirers many of the printed materials available from the office;
  - is often a contact point for consultations on codes of practice.

#### *Written enquiries*

- 3.3.7 All my professional staff are involved in responding to written enquiries from agencies and the public. However, the bulk of the general work is concentrated with my enquiries team which, during 1996/97, received 595 written enquiries.
- 3.3.8 As with the privacy hotline, written enquiries are an important entry point into other aspects of the office's work. For example, enquiries are made as to whether there are valid grounds for a complaint. In many cases, through the actions of the enquiries team problems are "headed off" so as to avoid a complaint. The office tries through responding to enquirers to give individuals and agencies the tools and information they need to sort out problems themselves.

<sup>10</sup> Note that the graph displays calls into the 0800 number. It does not cover calls to the enquiries team on other numbers - such as those originating in Auckland.

**"The Privacy Commissioner clearly needs more resources to train and inform agencies, so that they can comply more readily and more cheaply."**

- AUCKLAND COUNCIL OF SOCIAL SERVICE, SUBMISSION WX8

*Written publications*

3.3.9 My office has an active publication and information dissemination policy. Key series of publications include:

- *fact sheets*: a series of short flyers outlining the key aspects of the legislation;
- *issues sheets*: canvassing topical matters and exploring issues under the privacy law;
- *compilations of materials*: speeches, reports, articles and the like, are brought together in a series of compilations which make them easily available. The eighth volume brought this up to December 1997. A series of specific compilations touch upon a variety of matters ranging from employment to information matching.<sup>11</sup>

A variety of other series exist such as the Privacy Issues Forum conference papers and guidance notes on various matters. A number of one-off publications have been released, such as *Private Lives? A Discussion Paper on Disability and Privacy Issues*, and a set of Mental Health Guidance notes.

*Newsletter*

3.3.10 I have released *Private Word* approximately ten times a year since December 1995. Amongst other things it publicises the work of the office, advertises the availability of workshops and resources, reports on topical privacy issues, and provides a vehicle for responding to misinformation that may have appeared in the news media concerning the application of the Act.

*Privacy Issues Forum*

3.3.11 Since 1994 I have convened a series of Privacy Issues Forums. The emphasis is on discussion of privacy issues rather than a series of lectures from privacy experts. However, I have been delighted to host a series of eminent experts from New Zealand and abroad. Notable at the most recent Auckland forum was the participation of Justice Michael Kirby of the High Court of Australia. Justice Kirby, one of the world's foremost privacy experts, chaired groups which prepared OECD guidelines in 1980 and 1992. A valuable series of papers is one legacy of the Forums.

**FIGURE 3. PRIVACY ISSUES FORUM**

Year	1994	1995	1996	1997	1998
City	Auckland	Wellington	Christchurch	Auckland	Wellington
Attendance	134	170	185	158	170

*Case notes*

3.3.12 Currently my office receives over 1000 new complaints each year. The results of individual complaints are not generally made public. However, anonymised case notes are prepared for a selection of cases which raise interesting or important issues. I release these case notes individually, or in small batches, during each year so that they may be appropriately reported in the news media (generally and in trade journals in relevant sectors). The case notes are available free of charge on an individual or annual basis from my office and I place them on my website. I encourage their publication elsewhere and they are, for example, republished in Butterworths' *Privacy Law and Practice*. There is now a degree of guidance on a selection of cases upon which I have rendered opinions which helps understanding of the Act and the approach that I have taken.<sup>12</sup>



Three Australians: Cementing trans-Tasman privacy links are Justice Michael Kirby of the High Court of Australia, Nigel Waters of the Australian Privacy Commissioner's Office and Victor Perton MP of the Victorian Parliament, at the 1997 Privacy Issues Forum. PHOTO: OFFICE OF THE PRIVACY COMMISSIONER

<sup>11</sup> The range includes, for example, compilations on privacy impact assessment, archives and libraries, information matching and electronic road tolls.

<sup>12</sup> These case notes do not have a "precedent" value in legal terms but offer a guide as to how the Commissioner is likely to approach a similar case.

*Internet*

- 3.3.13 Launched at the 1995 Privacy Issues Forum, my Internet site is now an important part of my office’s dissemination of information.<sup>13</sup> Most key documentation produced from my office can be obtained from the web site as an alternative to seeking printed copies. The site was used in the consultation process which led to this report. People could browse my site to read or download copies of the 12 discussion papers released in 1997. There was also a facility for lodging submissions by email.

*Participation in conferences*

- 3.3.14 I frequently speak at conferences, seminars and workshops, as do some of my staff. Where written addresses are produced for conferences these are brought together and republished in compilations so as to enhance the availability of that resource.

*Co-operation with commercial publishers and journals*

- 3.3.15 Private sector publishers have shown an interest in privacy issues. I have been able to contribute to several publications material which has been prepared for conferences or other purposes. An active association exists with three journals of particular relevance to privacy issues:

- *Privacy Law and Practice* - to which key documents are made available for republication;
- *Human Rights Law and Practice* - for which the office is identified as a specialist contributor; one of my staff acts a consulting editor;
- *Privacy Law & Policy Reporter* - the Assistant Privacy Commissioner is on the editorial panel.

Such publications contribute to better understanding amongst agencies and the public of the Privacy Act and privacy issues generally.

*Code commentary*

- 3.3.16 I have put considerable effort into preparing explanatory commentary for the codes of practice I have issued. Especially notable is the extensive commentary to the Health Information Privacy Code.

*News media*

- 3.3.17 There is no hard and fast line between education and publicity but the limitations of the news media mean that such activities fall more towards the publicity end of the scale. Although only brief messages can be usually given in the news media, their value is important as the publicity can reach vast audiences. Frequently, news media work arises in respect of particular issues and involves my being interviewed for TV or radio. Media activities also interact with function (h) which I discuss below.<sup>14</sup> Some particular initiatives that I have taken in order to publicise the work of my office, and promote discussion and understanding of privacy issues:

- when visiting cities with talkback programmes I have made myself available to be interviewed on topical or local issues;
- during 1996 I wrote a weekly column in the *Sunday News* entitled “Privacy Matters” canvassing topical privacy issues in under 350 words;
- in 1997/98 I presented a monthly 20 minute RNZ National Radio discussion on privacy issues entitled “Speaking privately”;
- occasionally I have contributed 4 minute talks to “Sunday Supplement” on National Radio;
- I have made frequent contributions to *Employment Today* and written occasional features in newspapers.

*Function (b): Audit of personal information*

- 3.3.18 The international literature on data protection and the protection of individual

<sup>13</sup> <http://www.privacy.org.nz>

<sup>14</sup> See paragraphs 3.3.47 - 3.3.49.

**“The discussion paper outlines initiatives taken by the Privacy Commissioner to inform and educate agencies and the public. Those measures are well intentioned but tend to mask the inadequacies of the legislation itself, especially its complexity, its drafting style, its organisation, and the lack of clarity in its relationship with other statutes.”**

- NZ LAW SOCIETY  
PRIVACY WORKING GROUP,  
SUBMISSION WX12

privacy identifies the audit function as being of particular importance. Despite this, I have not yet found it possible to undertake audits pursuant to the function. I recount here some of the uses and benefits of auditing as an effective tool for privacy, the approach of some overseas laws and commissioners, and some of the constraints upon my undertaking audits.

*Canada*

- 3.3.19 In 1989 Professor David Flaherty, published *Protecting Privacy in Surveillance Societies*.<sup>15</sup> This was the outcome of a number of years study of the data protection laws, and the work of the data protection agencies, in Germany, Sweden, France, Canada and the United States. One of the strong threads amongst Professor Flaherty's conclusions was the significant value of audits carried out by data protection agencies. The following gives a flavour of the conclusions:

“Data protection commissioners are a form of highly specialised Ombudsmen with a more active part to play than the classical role of responding to individual complaints. It is not enough to respond to repeated similar grievances from a changing cast of individuals. The staff has to pursue general systematic improvements in information-handling practices by using a variety of methods.

“The conduct of audits is one of the most important and least developed aspects of controlling surveillance. The Federal experience in West Germany and Canada demonstrates their centrality for the pursuit of statutory objectives. Both countries have created separate units for inspections to assist the staff members who specialise in particular types of systems.”<sup>16</sup>

- 3.3.20 Many Privacy Commissioners would share Professor Flaherty's views as to the value or potential of auditing. The under-resourcing of my office to handle the volume of complaints has meant that I have been unable to undertake certain discretionary functions conferred upon me, including auditing.
- 3.3.21 Professor Flaherty has left academia for a term as Information and Privacy Commissioner of British Columbia.<sup>17</sup> Commissioner Flaherty has had the opportunity to put the ideas of Professor Flaherty into practice. Although the British Columbia Commissioner has strong powers of audit<sup>18</sup> this does not mean that a heavy handed approach is taken. Commissioner Flaherty has, for the most part, chosen to do audits in a relatively informal manner involving on-site inspections. Commissioner Flaherty has described what is involved in a site visit:

*Format for a site visit*

“For the most part, site visits are conducted informally. Typically, the Commissioner and/or members of his staff make a pre-arranged visit to a public body to discuss freedom of information and privacy issues and to tour the facilities. The focus is on viewing and understanding the information flow processes and policies of the public body, particularly within its manual and computerised record areas.

<sup>15</sup> David H Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada and the United States*, 1989.

<sup>16</sup> *Ibid*, page 400.

<sup>17</sup> In that capacity I invited him, as keynote speaker, to the Privacy Issues Forum held in Christchurch in 1996.

<sup>18</sup> Freedom of Information and Protection of Privacy Act (British Columbia), sections 42(1)(a) and 44.

**“The present functions of the Commissioner should be maintained, with extension to others, such as audit, when resources are obtained.”**

- ROYAL NZ COLLEGE OF  
GENERAL PRACTITIONERS,  
SUBMISSION G4

“Site visits have three primary goals:

1. To meet the head of the public body and the records and information management personnel;
2. To view how public body personnel collect, use, store, disseminate, and dispose of the personal information in their custody or under their control; and
3. To address any immediate concerns regarding the privacy, security, and accessibility of records held by the public body.

“The office can report that no public body visited so far has been in serious breach of the information practices required under the Act. However, where the Commissioner and/or his staff have uncovered specific concerns, the office has discussed those concerns with the public body immediately and conducted follow up activities to ensure compliance.

“Site visits have proven to be one of the most effective and immediate approaches to raising a public body’s awareness about its legislative obligation to handle records in accordance with requirements of the Act. This is especially important with respect to public bodies that collect and store highly sensitive and potentially stigmatising personal information.”<sup>19</sup>

- 3.3.22 Auditing has been used successfully by various commissioners, including the Australian Privacy Commissioner.<sup>20</sup> However, the experience, successful though it has been, of the commissioners in Australia and Canada does not necessarily directly translate into a suitable model for New Zealand given that, unlike theirs, my jurisdiction covers both public and private sectors.<sup>21</sup> It is probably for this reason that function (b) is written so that audits may only be undertaken “when requested by an agency”. The consensual model has reassured people that a heavy handed commissioner will not unnecessarily get involved in the affairs of individual businesses. Instead, the Act anticipates that agencies themselves will request an audit<sup>22</sup> or the Commissioner may ask an agency to agree to be audited. It may be useful to note the position in two jurisdictions in which the law covers the private sector.

#### *UK and Hong Kong*

- 3.3.23 The UK Data Protection Bill introduced into Parliament in early 1998 confers upon the Data Protection Commissioner a function very much like the one contained in the Privacy Act. Clause 49(5) states:

“The Commissioner may, with the consent of the data controller, assess any processing of personal data for the observance of good practice and shall inform the data controller of the results of the assessment.”

- 3.3.24 The Hong Kong law was preceded by a Law Reform Commission report which commented that on-site inspections:

“... are referred to in other countries as data protection ‘audits’ but, as that term might appear overly negative, we prefer

<sup>19</sup> Office of the Information and Privacy Commissioner for British Columbia, *Annual Report 1996-97*, pages 98-99.

<sup>20</sup> Privacy Commissioner of Australia, *Ninth Annual Report, 1996/97*, 89-99, discusses the exercise of audit powers.

<sup>21</sup> However, the Australian Commissioner *does* audit privacy sector credit reporting agencies.

<sup>22</sup> None have yet done so.

‘verifications’. However described we consider them a vital function for an effective data protection body.”<sup>23</sup>

- 3.3.25 The Law Reform Commission noted evidence received from the German Data Protection Authority. In Germany inspection teams attend sites for between 1 and 2 weeks, no disruption had been caused, or claimed to have been caused, to the activities of the inspected organisations.<sup>24</sup> The Law Reform Commission considered the audit power as applicable to the private sector and notes its application to the banking sector.
- 3.3.26 The Hong Kong Personal Data (Privacy) Ordinance includes an inspection power which does not distinguish between public and private sector agencies. It states:

*“Inspections of personal data systems*

Without prejudice to the generality of section 38 [which concerns investigations by the Commissioner on a complaint or where the Commissioner suspects a contravention], the Commissioner may carry out an inspection of:

- (a) any personal data system used by a data user; or
- (b) any personal data system used by a data user belonging to a class of data users,

for the purposes of ascertaining information to assist the Commissioner in making recommendations:

- (i) to:
  - (A) where paragraph (a) is applicable, the relevant data user;
  - (B) where paragraph (b) is applicable, the class of data users to which the relevant data user belongs; and
- (ii) relating to the promotion of compliance with the provisions of this ordinance, in particular the data protection principles, by the relevant data user, or the class of data users to which the relevant data user belongs, as the case may be.”<sup>25</sup>

It is also too early to judge the operation of the Hong Kong provision since it has not been fully implemented yet. An inspection methodology is currently being developed.

*NZ auditing*

- 3.3.27 It is problematic that the New Zealand auditing power has not been able to be utilised and, on present indications, is unlikely to be. Problems include:
- I have no spare resources to devote to developing expertise and systems in this area of work;
  - while public sector agencies might be amenable to being audited, it may be difficult to obtain agreement that the cost fall entirely upon the agency being audited (the only practical option I have without annual resourcing to cover this function).
- 3.3.28 I am also concerned that independent auditing is not being used in areas where the public ought to be given an assurance that everything that is being undertaken in secret is “above board”. I have in mind the sort of audits formerly undertaken for the Wanganui Computer Centre Policy Committee and copied to the Wanganui Computer Centre Privacy Commissioner. Another example would be

<sup>23</sup> Law Reform Commission of Hong Kong, *Report on Reform of the Law Relating to the Protection of Personal Data*, 1994, paragraph 16.73.

<sup>24</sup> *Ibid*, paragraph 16.74.

<sup>25</sup> Personal Data (Privacy) Ordinance (Hong Kong), section 36.

compliance with conditions upon warrants to intercept private communications.<sup>26</sup>

- 3.3.29 A change in the law to remove consent would send an unnecessarily worrying signal that I am intent upon forcing agencies to be audited which is *not* the case. Any Privacy Commissioner with legal powers to do so, undertakes only a tiny number of very carefully prioritised audits. The audits are usually done on the basis of policy and strategic considerations but an element of chance may also play a part in selection. The audits themselves are usually scheduled months in advance and notice given before arrival at any premises.
- 3.3.30 Although the potential of auditing to enhance privacy, and to ensure compliance with the Act, has not been able to be fulfilled I do not recommend a change to the Act at this stage to create mandatory powers of audit. Instead, I hope that it may be possible to explore various options for the undertaking of audits pursuant to existing provisions. For example, the undertaking of internal audits, the results of which are reported to me, has already been successfully incorporated into conditions on approvals in the information matching sphere.<sup>27</sup> If the funding can be arranged to enable the development of a methodology and expertise, and the undertaking of some audits, I will be in a better position to judge whether the present voluntary arrangements for audits are satisfactory. By the time of the next review of the operation of the Act, it will also be possible to look to the new Hong Kong and the UK experience. Experimentation with less rigorous models such as “site visits” or “on-site surgeries” to flush out, and advise on, problems, could also be explored.

***Function (c): Monitoring use of unique identifiers***

- 3.3.31 I have been given the function of monitoring the use of unique identifiers and to report to the Prime Minister on the results of such monitoring from time to time. I have not exercised that function formally as yet as other priorities have taken precedence. I have nonetheless kept an eye on a variety of unique identifier issues. For example, three of the codes of practice I have issued have addressed unique identifier issues.<sup>28</sup> Such issues have also been identified in reports on certain legislative initiatives.<sup>29</sup> Issues about the use of unique identifiers also arise in the context of information matching - with the starting presumption that unique identifiers are not permitted to be used.<sup>30</sup>
- 3.3.32 It is desirable to retain this function since it may be necessary to monitor the position more closely in the future. I have, for example, had some unease in the last year or so over the possibility of the existing National Health Index number being used as the building block for a nationwide medical population register - a project which would carry significant privacy risks.<sup>31</sup> I have also been concerned at the possibility of the new driver licence becoming a national unique identifier.<sup>32</sup>

<sup>26</sup> I recommended that an audit function, modelled on Australian law, be established in respect of compliance with the requirements of laws governing the interception of private communications and the conditions imposed on warrants. See my report to the Minister of Justice on the Harassment and Criminal Associations Bill, Interception of private communications, April 1997.

<sup>27</sup> See approval by the Privacy Commissioner under rule 3(1) of the information matching rules, 25 June 1996, conditions 7 and 8. Internationally there has been considerable interest in internal audit. The Canadian Standards Association has developed a model privacy code and is seeking to implement a certification arrangement including, in larger organisations, appropriate forms of compliance audit. The International Standards Organisation has also been considering the matter in the context of a possible technical or management standard.

<sup>28</sup> Health Information Privacy Code 1994, Superannuation Schemes Unique Identifier Code 1995 and Justice Sector Unique Identifier Code 1998.

<sup>29</sup> See Report to the Minister of Justice on the Taxation (Remedial Provisions) Bill, August 1997.

<sup>30</sup> See information matching rule 2.

<sup>31</sup> See Robert Stevens, *Medical Records Databases: Just what you need?*, report prepared for the Privacy Commissioner, April 1998.

<sup>32</sup> See Report to the Minister of Justice on the Land Transport Bill: Photo ID Driver Licences, March 1998.

**Function (d): Directories of personal information**

3.3.33 I discuss the function of maintaining, and publishing, directories of personal information in relation to section 21 at paragraph 3.11.

**Function (e): Monitoring compliance with public register principles**

3.3.34 I have not, as yet, attempted to systematically monitor compliance with the public register privacy principles. However, I have been alive to public register issues in the carrying out of my other functions. For example, I took the opportunity of the Parliamentary inquiry following the 1996 general election to prepare a report in relation to one of the most significant public registers, the electoral roll.<sup>33</sup> In 1995 my staff undertook a small project asking the agencies maintaining public registers about the search references in use and for their views on the purpose for which the registers are maintained.<sup>34</sup>

3.3.35 The present exercise has provided an opportunity to review the public register principles. In doing so, I have, as directed in section 13(1)(e), had particular regard to the Council of Europe Recommendations on Communication to Third Parties of Personal Data held by Public Bodies.

**Function (f): Examination of proposed information matching provisions**

3.3.36 Under (f) I have the function of examining any proposed legislation which provides for the collection or disclosure of personal information which may be used for the purposes of an information matching programme. Most of the existing programmes were authorised in 1991 and there was a lull for over three years before the next proposal came forward. Accordingly, it was in October 1995 that I first examined proposed new information matching legislation in the Electoral Reform Bill.<sup>35</sup>

3.3.37 Information matching - or data matching as it is called overseas - is an application of computer technology which carries particular privacy risks. It therefore warrants careful scrutiny. The policy adopted in New Zealand involves the obtaining of legislative authority for government information matching programmes. On the introduction of the Privacy of Information Bill the Minister of Justice stated that:

“It is entirely proper that this be approved by Parliament and not authorised simply by Executive fiat”.<sup>36</sup>

3.3.38 The legislative proposal is examined by the Privacy Commissioner pursuant to function (f) and judged by reference to six information matching guidelines.<sup>37</sup> Government processes leading up to the introduction of any bill also ensure scrutiny of a proposal in terms of the information matching guidelines.<sup>38</sup> The Bill is further studied by a select committee. The report of the Commissioner’s examination provides a scrutiny independent of the Executive and Legislature. It is, of course, open for Parliament to enact an information matching provision regardless of concerns that might be expressed in the report. A resulting information matching provision provides statutory authorisation for any match and this prevails over any inconsistency with the information privacy principles.<sup>39</sup>

<sup>33</sup> See Report to the Minister of Justice in relation to the Electoral Act 1993, April 1997.

<sup>34</sup> Office of the Privacy Commissioner, *Public Register Search Reference Project*, 1995.

<sup>35</sup> See Report of the Privacy Commissioner to the Minister of Justice on the Electoral Reform Bill, Information Matching of Electoral and Immigration Information, October 1995.

<sup>36</sup> Hon Douglas Graham (Minister of Justice), Introduction of Privacy of Information Bill, NZPD (5 August 1991) 3850.

<sup>37</sup> Privacy Act, section 98.

<sup>38</sup> See *Cabinet Office Manual*, August 1996, Chapter 5, paragraph 5.26, 5.29 and 5.58 and Appendix 6, Standard Format for Legislation Submissions.

<sup>39</sup> Privacy Act, section 7.

- 3.3.39 The result is, so far as I am aware, a unique process for the authorisation of information matching although it draws upon features from the Australian experience. It brings together governmental, legislative and independent, scrutiny which results in a high level, and robust, authorisation for permitted programmes. It involves a very explicit examination, and balancing, of key features including the financial costs and benefits. Built into the process are checks to ensure that proper data protection practices will be observed.
- 3.3.40 I have now undertaken a number of examinations of proposed new information matching provisions.<sup>40</sup> In my first report I noted that there would be clear advantage in having a thorough analysis of the proposed information matching programme, couched in terms of the information matching guidelines, completed by the proposing department at an early stage, ideally preceding Cabinet approval. Accordingly I have required departments to submit to me an assessment of their proposed programme so as to enable the examination to be carried out. I issued a guidance note on preparing the information matching privacy impact assessment document (IMPIA).
- 3.3.41 I have found the legislation to be satisfactory in respect of examination of proposed information matching provisions although I suggest elsewhere several modest amendments to the information matching guidelines.<sup>41</sup> The difficulties that I have encountered have not been with the legislation but with certain practical factors. Principal amongst these is timing. A recurrent experience has been that departments have given me the necessary information so late in the development of a proposal that I have had to conduct a hurried examination. This is particularly problematic when the IMPIA is supplied after the introduction of a bill into Parliament.
- 3.3.42 I see no need to amend the provision although I do intend to further refine the examination processes so that they identify the key issues in respect of a proposal at the earliest time and so that the IMPIA provides a helpful step towards compliance with the statutory requirements once the match is authorised.

***Function (g): Educational programmes***

- 3.3.43 Paragraph (g) provides that I have the function:

“for the purpose of promoting the protection of individual privacy, to undertake educational programmes on the Commissioner’s own behalf or in co-operation with other persons or authorities acting on behalf of the Commissioner”.

- 3.3.44 Clearly there is something of an overlap in this function with paragraph (a) which empowers me to promote, by education and publicity, an understanding and acceptance of the information privacy principles and the objects of those principles. The two aspects that I would stress for function (g) here are the nature of educational *programmes* and the aspect of *co-operation*.
- 3.3.45 An education *programme* suggests a series of events, actions or things which have continuing or repeated use. Without attempting a comprehensive survey of the last 5 years I offer the following illustrations of programmes carried out pursuant to this function:

*Seminar series with NZ Law Society*

With the coming into force of the Privacy Act I participated in a nationwide series of seminar/workshops run under the auspices of the NZ Law Society

<sup>40</sup> See Appendix F in which I list the reports submitted to the Minister of Justice. The full reports are reprinted in Office of the Privacy Commissioner, *Examination of Proposed Information Matching Programmes*, March 1998.

<sup>41</sup> See recommendations 122, 123 and 124.

continuing legal education programme. The published seminar notes was a valuable resource in the first year of the Act when there was otherwise very little published on the Act of a substantial nature. In 1997 I participated in a follow-up NZLS seminar series. A useful resource book was published and is still available.

*Seminar series with other organisations*

On occasion, I have participated in series of seminars or workshops which are repeated in several locations around the country. One such initiative was run by a private trainer for the benefit of the health sector which I co-presented with the Health and Disability Commissioner. Another series of workshops was organised for senior journalists in conjunction with the Newspaper Publishers Association.

*Seminars and workshops*

From the outset my staff and I responded to numerous requests to speak to organisations. The office developed various formats for presentations. An overview seminar needed about 60 minutes with a more interactive workshop at least 90 minutes. Formats were developed for general and health sector audiences. Despite the positive feedback received from agencies for whom we conducted basic seminars, I was not convinced that this was the most efficient way to educate agencies about the legislation. Consequently, I launched a new training initiative which involved my office offering twice monthly half day workshops in Auckland and Wellington and, less frequently, in Christchurch. An introduction to the Privacy Act is repeated many times during the year as is a more advanced workshop. Supplementary modules target particular subjects, for example, employment or health issues. In-service workshops have also been conducted within agencies.

*Videotape*

In June 1995 I launched a professionally produced 27 minute videotape which was intended to increase awareness of privacy issues and to encourage agencies to consider the advantages of good personal information handling practices. *Mind Your Business* was prepared to such a high standard that it was accepted for broadcast by educational television twice on TV1. The videotape is accompanied by a trainers' booklet so that it may be used in in-house educational programmes and is occasionally used in conjunction with my office's own workshops. Copies are made available for purchase and on loan.

*Private Lives? An Initial Investigation of Privacy and Disability Issues*

In 1994 I republished an Australian publication on privacy and disability issues. I prepared an insert, specific to New Zealand and, with assistance and financial contributions from several public agencies, systematically distributed thousands of copies to all health and disability service providers in the country. Other activities were arranged in conjunction, including bringing the author of the report from Australia to the 1994 Privacy Issues Forum and enabling her also to speak to local health and disability sector groups. A special launch was organised by the Southern Regional Health Authority in Christchurch.

- 3.3.46 Submission G17 suggested splitting the educational function from the complaints function so as to have two separate entities performing the tasks. Change is not warranted. There already is a separate body which rules, in a binding sense, on complaints - the Complaints Review Tribunal. I find that the roles can be adequately combined and the educational function is enriched by experience of investigating real cases.

**Function (h): Public statements**

- 3.3.47 At first glance, the function of making public statements may seem rather unusual. In fact, similar provisions appear in comparable New Zealand legislation

**“For our clients we would like to have available plain English pamphlets on the Privacy Act. Bureaux want more training on the Act and some bureaux have indicated the cost of the Privacy Commissioner’s Office training seminars was off putting for them as community groups.”**

- NZ ASSOCIATION OF CITIZENS  
ADVICE BUREAUX, SUBMISSION S26

such as the Human Rights Act<sup>42</sup> and the Health and Disability Commissioner Act.<sup>43</sup> The function of independent Commissioners to make public statements in their various jurisdictions is an important one. The practice of speaking out publicly in order to promote, or protect, human rights is a common technique in all aspects of human rights work. In respect of information privacy issues it is especially useful to promote public awareness and discussion of privacy issues affecting individuals since frequently there is a limited level of understanding of the issues, particularly where they concern situations caused by new or converging technologies.

3.3.48 I have actively sought to promote public understanding, and awareness, of privacy issues through the release of public statements. I believe that privacy issues in the late 1990s require that approach to supplement any “behind the scenes” work for privacy or the necessarily confidential work involved in complaints investigation and settlement. Parliament in enacting the Act expects the Privacy Commissioner to publicly articulate important privacy concerns.

3.3.49 While I have used public statements in an effort to raise privacy concerns, or explain issues, most of the news media statements that I make are not initiated by me but in response to a journalist’s enquiry. Nonetheless, I resist many opportunities to make public statements through the news media due to the fact that I generally make no public statement on matters that are, or could be, the subject of a complaint to my office. Even when a complaint has been resolved it is not my usual practice to speak publicly on actual facts but instead, where warranted, issue a case note in which the complainant is anonymised.

***Function (i): Representations from the public***

3.3.50 One of my functions is to receive and invite representations from members of the public on any matter affecting the privacy of individuals. I frequently *receive* unsolicited comments from the public and this has been a valuable input into my work. I have been pleased that so many members of the public have shown an interest in privacy. Sometimes I can act upon representations from the public to provide practical and effective input into public policy processes in a way that an individual citizen cannot.

3.3.51 The second part of the function is to *invite* representations. Generally I have done this in an informal manner by indicating in public statements and in correspondence that I am always open to receive representations on matters affecting privacy or concerning the operation of the Act. On occasion I have more formally sought representations. For instance, in relation to this review exercise I placed public notices and otherwise solicited representations from members of the public. I have also done so on particular issues on which I wish to hear from affected individuals. For example, as a precursor to preparing a report in relation to the mandatory publication of remuneration details under the Companies Act I made a public statement inviting executives with views to make representations to me.<sup>44</sup> I have from time to time invited representations on the Health Information Privacy Code and, in particular, on rule 11.

***Function (j): Co-operation with others concerned with privacy***

3.3.52 It has been a matter of disappointment to me that since the demise of the Privacy Foundation with the introduction of the Privacy of Information Bill there has been no organised group of citizens involving itself in privacy issues on a regular basis. Privacy advocacy groups in other countries actively promote a privacy viewpoint.

<sup>42</sup> Human Rights Act 1993, section 5(1)(l).

<sup>43</sup> Health and Disability Commissioner Act 1994, section 14(1)(d).

<sup>44</sup> See Report of the Privacy Commissioner to the Minister of Justice, Disclosure of Executive Remuneration under section 211 of the Companies Act, November 1997.

**“Too often the Commissioner does not comment because the issue in question might be raised in a subsequent case. The Federation has long been concerned about the roles of education and enforcement lying with the same people.”**

- NZ EMPLOYERS

FEDERATION INC, SUBMISSION G10

3.3.53 I have been pleased to co-operate with other bodies where they have, for example, organised seminars, written leaflets or booklets on privacy, and such like. I have also co-operated with officials with privacy amongst their responsibilities. For example, my office has good working relations with the Ministry of Justice and the Ombudsmen's Office. I have also been pleased to co-operate with complaints bodies such as the Banking Ombudsman and the Insurance and Savings Ombudsman to the benefit of our mutual complainants and respondents. Elsewhere I have mentioned co-operation with such bodies as the Law Society and Mental Health Commission in various activities.

*Regional co-operation*

3.3.54 In other jurisdictions there are Commissioners and Commissions carrying out very much the same work as I do. The co-operation I have had from other Commissioners has significantly helped me in the carrying out of my functions. As my office has become more experienced, I have been pleased to say that the sharing of experience has been reciprocated.

3.3.55 In this regard, I particularly wish to acknowledge the co-operation of Kevin O'Connor, the former Australian Privacy Commissioner. The assistance extended, ever since the Privacy Commissioner Act 1991, has been invaluable and included, from the early months of my appointment, the making available of a senior staff member to advise on the Privacy of Information Bill and extended to an invitation to participate in the National Privacy Agencies meeting held with the various State bodies having a role in the protection of privacy. That 6-monthly meeting was later renamed the Privacy Agencies of New Zealand and Australia (PANZA) and has developed as a valuable forum for information exchange, consultation and co-operation. Its regional significance has grown in recent times with the participation of the Hong Kong Privacy Commissioner for Personal Data. I am pleased to say that co-operation with Kevin O'Connor's successor, Moira Scollay, has continued to be valuable for my office.

3.3.56 There are a limited number of specialist privacy organisations in our region. As well as the Australian and Hong Kong Commissioners, the PANZA meeting has facilitated co-operation with the New South Wales Privacy Committee and the South Australia Privacy Committee. It has also been valuable, through that forum, to establish networks on particular projects with the Australian Attorney General's Department, various officials in States Attornies' offices and others such as the Western Australian Information Commissioner.

3.3.57 The EU Directive on Data Protection has brought new attention to the adequacy of privacy laws. There are at present few comprehensive data protection or privacy laws in our region, with the Hong Kong Ordinance and the New Zealand Act the prime examples. Australia's Privacy Act applies primarily to the Commonwealth public sector and credit reporting agencies, leaving the State public sector and private sector without privacy law coverage. There are also laws in Japan, South Korea and Taiwan although their coverage tends only to be the public sector or automatically processed data. Interest has been shown in privacy laws by Malaysia and Singapore because of their trading relationships. There are currently no privacy laws in Pacific Island countries.

3.3.58 Something of a regional dialogue amongst agencies having responsibility for aspects of information privacy has commenced in recent years with a first tentative Pan-Pacific meeting in Victoria BC in 1996 and a more fully representative First Asia Pacific Forum on Privacy and Personal Data Protection in Hong Kong in April 1998. In 1997 I included on the agenda of the PANZA meeting I hosted in Auckland the question of privacy protection in the Asia-Pacific and was pleased, with assistance from the Ministry of Foreign Affairs and Trade, to be able to invite representatives from Western Samoa, Papua New Guinea, In-



**Bruce Slane and Kevin O'Connor: The New Zealand and Australian Commissioners confer at the 1996 Privacy Issues Forum.**

**PHOTO: OFFICE OF THE PRIVACY COMMISSIONER**

dia and the Philippines. I have, for some time, been concerned that the debate about the implications of the EU Directive on third countries ignores the position of developing countries. The issues are now getting a wider airing.

*International co-operation*

- 3.3.59 It has also been valuable to meet with Privacy and Data Protection Commissioners from a variety of other jurisdictions in the annual International Conference of Privacy and Data Protection Commissioners. There are more than 40 such commissioners and the number grows with each conference, particularly as the former Eastern bloc has embraced human rights and nations respond to the implications of the European Union Directive on Data Protection. I have contributed to such conferences and established valuable contacts with commissioners struggling with the same vexed privacy issues that I do. The approach of Privacy Commissioners internationally is similar on most privacy issues even though the techniques applied, and the detail of the legislation under which they operate, may differ. This is because the OECD Guidelines and the European instruments provide a clear and consistent set of international principles governing data protection and fair information practice.



**International cooperation:  
Delegates to the 23rd Meeting  
of the International Working  
Group on Data Protection in  
Telecommunications,  
April 1998.  
PHOTO: HONG KONG  
PRIVACY COMMISSIONER FOR  
PERSONAL DATA**

- 3.3.60 Now that privacy laws are the norm in countries of our type, the size of the international conference has grown quite large. Accordingly, I took the initiative at the conference in 1996 to convene in conjunction with the conference a small workshop of commissioners in a committee room of the Canadian Parliament. The workshop sought to address the “how to” aspects of achieving effective education and publicity activities and providing input into legislative processes. It was well received with participation from Canada, Germany, Hong Kong, The Netherlands and the British Isles.

*Other co-operation*

- 3.3.61 It is not possible to list all the types of co-operation undertaken with others concerned with privacy. Co-operative initiatives range from the tiny to the moderately extensive. Two initiatives may suffice to illustrate:
- I have developed an extensive specialist collection of publications on privacy issues. On occasion I receive duplicate reports and have entered into an arrangement to deposit some of these with the Davis Law Library at the University of Auckland.
  - Recently an organisation associated with Alan Westin, well known American author and researcher on privacy issues, has developed an Internet site from which it is hoped to disseminate key data protection documentation. This includes links to laws and websites around the world and I have agreed to allow my own site to be hyperlinked.<sup>45</sup>

*Function (k): Suggestions for action*

- 3.3.62 I, and my office, are constantly making suggestions to various people concerning the need for, or the desirability of, action in the interests of privacy of the individual. Although I do not have all the answers I have endeavoured to have my office offer constructive suggestions, and occasionally solutions, to privacy problems rather than simply to criticise the actions of others. Where agencies

<sup>45</sup> [www.PrivacyExchange.org](http://www.PrivacyExchange.org)

have been open to constructive criticism, and suggestions for alternative actions, I have usually found that information privacy problems are well capable of practical and cost effective solutions.

***Function (l): Advice to Ministers or agencies***

3.3.63 I have the function “to provide advice (with or without a request) to a Minister or an agency on any matter relevant to the operation of the Act.” Most of the advice offered is in response to a request. Occasionally, I offer unsolicited advice and frequently that is welcomed as enabling an agency to avoid a compliance problem. Of course, sometimes advice which has not been asked for is not welcomed. As a watchdog on privacy issues I can be the bearer of unwelcome news on occasion. I accept any lack of appreciation for such advice as part of the job.

3.3.64 My advice is contestable since I have few powers to prohibit action or issue rulings. Ministers and others are free to disregard my advice or to seek another opinion elsewhere. However, the importance of the express function is that it makes quite clear that I have a proper role in offering advice even where that has not been requested. The absence of such a function in other jurisdictions has sometimes resulted in suggestions that a Privacy Commissioner has no place in becoming involved in an issue unless he or she has been formally consulted. This is not the position in New Zealand. The Privacy Commissioner is clearly given a roving brief to offer advice on privacy issues whether privately or publicly, asked or unasked. If an independent Commissioner is to fulfil his or her task nothing less is warranted. Ministers and others are free to criticise the advice that I offer or suggest that I am wrong, but there is no place for saying the Commissioner should not offer advice on matters relevant to the operation of the Act.

***Function (m): Inquiry into enactments, practices, procedures, technical developments etc***

3.3.65 This function can be looked at in two ways. If one considers “inquire into” in an informal and general sense then it is a function that is frequently undertaken and is a staple part of the work that my office does. Considerable amount of activity is undertaken to seek information relating to laws, practices and technical developments, which may infringe privacy so that they are better understood, problems can be avoided, and matters can generally be influenced in some way to better protect privacy.

3.3.66 However, if the function is seen as having a more formal application then it is not yet one that I have exercised. The function, would, it appears, empower me to convene a formal inquiry into any matter where it appears that the privacy of an individual is being, or may be, infringed. An example of that kind can be found in the New South Wales Privacy Committee’s recent inquiry into covert video surveillance in the workplace which was the first such formal inquiry since its establishment in 1975.<sup>46</sup> It may well be appropriate to undertake such inquiries from time to time although they will, of course, involve the commitment of a considerable resource and therefore have to carefully compete with other priorities.

3.3.67 I take the view that this function encompasses both the informal activity described above and also formal inquiries. Whichever interpretation is placed upon it the function is a usual one for a Privacy Commissioner and a necessary one to retain.

***Function (n): Research and monitor data processing and computer technology***

3.3.68 The function to research into, and monitor developments in, data processing and computer technology to ensure that any adverse effects of such developments on the privacy of individuals are minimised, and to report to the Minister the results

<sup>46</sup> The inquiry was undertaken pursuant to section 15(1) of the Privacy Committee Act 1975. Formal terms of reference were announced, submissions taken, and the resultant 132 page report published as: Privacy Committee of New South Wales, *Invisible Eyes: Report on Video Surveillance in the Workplace*, September 1995.

**“The Federation does not consider that advance rulings would help reduce compliance costs, particularly as they would introduce an element of inflexibility while at the same time inevitably failing to cover new fact situations. The relatively non-prescriptive nature of the statute is one of its better features. Guidelines are, however, another matter and should be provided wherever possible.”**

- NZ EMPLOYERS FEDERATION,  
SUBMISSION WX3

of such research and monitoring, is an important one. I would like to be able to undertake more work in that area. Activity by overseas Commissioners has led to a variety of valuable reports and resultant action. The Commissioners in Canada, Ontario, The Netherlands and Australia have an excellent reputation in this regard and reports of interest are starting to appear from the newer offices in British Columbia and Hong Kong. The Berlin Commissioner is active in coordinating research in relation to telecommunications and privacy issues.

3.3.69 Were I to undertake such research I would have careful regard to the work being carried on by colleagues in other jurisdictions so as to avoid duplication. The possibility of joint research with another Commissioner would offer potential to reduce the cost of such research or to enable more extensive projects than might be attempted alone.

3.3.70 In 1998 I commissioned some research into medical record databases and forwarded the resultant report to the Ministers of Justice and Health. I earlier commissioned research into aspects of drug testing and brought the researcher, Eugene Oscapella of Canada, to New Zealand to speak to the Privacy Issues Forum in Wellington and to employer and union groups. Although I have not formally reported to the Minister of Justice on that or other such projects I have nonetheless been active in researching, and informally monitoring, such issues for my own information in carrying out my functions. Participation in the annual Commissioners' conference, and PANZA meetings, have been valuable in monitoring developments.

***Function (o): Examination of proposed legislation***

3.3.71 I have the function of examining proposed legislation, including subordinate legislation, which may affect the privacy of individuals and to report the results of my examination to the Minister of Justice. Appendix F lists the reports I have submitted since 1992. Reports are available to the public shortly after the Minister has received and had a chance to consider them. Frequently the reports concern proposed legislation before a select committee and are followed up with an appearance before a select committee.

3.3.72 The *Cabinet Office Manual* requires departments to signify compliance with the information matching principles, public register privacy principles, and the information matching guidelines, when seeking introduction of a bill into Parliament or when proposing the issue of regulation. Accordingly, I have frequently been consulted by departments concerning new legislative proposals.

3.3.73 I have placed a considerable emphasis on exercising this function to provide a privacy input into the legislative process. There are a variety of reasons for this including:

- there has been since 1993 a series of legislative initiatives having considerable significance for privacy issues - such as the creation of a DNA databank, the enhancement of oversight controls on intelligence organisations, and the establishment of a photo ID drivers licence, to name three;
- by virtue of section 7 the requirements of enactments override the privacy principles and therefore it is important that the opportunity be taken to provide privacy input into the enactment of new laws and the review of existing ones;
- legislation often provide an opportunity for public education and the increase in knowledge about privacy issues amongst legislators and others - I do not simply oppose legislation but often seek to explain laws in privacy terms or support certain initiatives.

3.3.74 My office may be more active than some other Privacy Commissioners' offices in scrutinising legislative proposals and providing formal written reports which are made public. Part of this is simply a matter of priorities for my office compared with others. However, it is partly to do with the nature of lawmak-

**“The Commissioner must be properly resourced so that complaint investigations can normally be completed within a month or an early date fixed for complex cases, and to be able to comment on all proposed relevant government policies, legislation or regulation.”**

- AUCKLAND DISTRICT  
COUNCIL OF SOCIAL SERVICE,  
SUBMISSION G6

ing in New Zealand. There is often an openness and responsiveness amongst New Zealand officials and lawmakers to a well reasoned case whether it is on the grounds of privacy or any other. In those reports which have been copied to select committees, I have been pleased at the genuine interest shown in the issues by MPs and their willingness, when a problem has been established, to respond in the drafting of new laws. Such responsiveness does not always exist in large countries or in federal systems where lawmaking is more fragmented.

***Function (p): Report to Prime Minister on need for action***

3.3.75 During the period under review I made no reports to the Prime Minister on the need for any special action. However, I see the provision is valuable and would intend to use it on appropriate occasions especially where issues raised seem to have a wider or more general impact deserving attention by the Prime Minister rather than the Minister of Justice. The provision serves to underline my role independent of a Minister or ministry and it is appropriate to have this access.

***Function (q): Report to PM on acceptance of international instrument***

3.3.76 During the period under review I have not reported to the Prime Minister on the desirability of the acceptance by New Zealand of any instrument relating to the privacy of the individual. Much of the international work in the last couple of years has been in developing international instruments that require no national acceptance. For example, there has been work by the OECD in the areas of security of information systems and cryptography policy and the ILO has developed a code of practice on the protection of worker's personal data.<sup>47</sup> However, none of these are treaties to which countries can sign but instead have the status of guidelines. The European Union Directive on data protection, issued during the period, is not an international instrument that New Zealand can become a party to.

3.3.77 As far as I am aware, the only outstanding international instrument having general applicability to data protection and information privacy issues that New Zealand could accede to is the 1981 Council of Europe Convention No. 108. Although article 23 of that convention permits non-member states to accede none have done so. Most of the countries outside Europe which might have contemplated acceding have found the OECD Guidelines more appropriate as a basis for action. Interest may be rekindled amongst non-member states in acceding to the Convention as a means to encourage the EU to use this as a basis to judge the position in such a country as "adequate" in terms of the EU Directive.<sup>48</sup>

3.3.78 I have not formally, or systematically, scrutinised Convention No. 108 with a view to judging whether New Zealand would be in a position to accede to it or to identify the benefits of doing so. Tentatively, I would see some problems in acceding when our law is modelled on the OECD Guidelines and omits some features anticipated in the Convention such as special controls on the processing of "sensitive data". Also the Convention is now quite old and no longer considered "state of the art". It is unlikely that New Zealand's position with regards to "adequacy" in EU eyes would need to be enhanced by accession to the Convention which otherwise would be the main benefit in accession.

***Function (r): Report to PM on any other matter***

3.3.79 During the period under review I have not had cause to report to the Prime Minister pursuant to this function. There is no need for amendment of the provision.

<sup>47</sup> International Labour Office, Code of Practice on the Protection of Workers' Data, November 1996.

<sup>48</sup> Countries which accede to Convention No. 108 and which have appropriate institutional mechanisms, such as an independent supervisory authority with powers, are thought likely to meet the adequacy test where the country is the final destination - and not an intermediary - of the data. See EC (DGXV), Working Party on the Protection of Individuals with regard to the Processing of Personal Data, "First orientations on Transfers of Personal Data to Third Countries - Possible Ways Forward in Assessing Adequacy," June 1997.

**“The functions of the Commissioner could be usefully pivotal to the processes used by decision-makers in balancing competing interests under the Act. As it stands they are rather buried in section 13 and are not an obvious reference point for those using the Act.”**

NZ LAW SOCIETY PRIVACY WORKING  
GROUP, SUBMISSION G22

***Function (s): Gathering information***

- 3.3.80 It is apparent that many privacy issues revolve around the development of new technologies and the convergence of existing technologies. The pace of change has been rapid and it has been necessary to develop means of keeping my office informed of these “cutting edge” issues as well as the regular diet of important, and interesting, mainstream privacy issues. I have established within my office a specialist collection of privacy texts, journals and materials which has expanded rapidly and covers a wide variety of issues.
- 3.3.81 People working in the field of privacy are a valuable source of information. In addition to networks amongst overseas commissioners and experts I have established contacts within New Zealand amongst experts, officials and others working in the field. Perhaps one of the most useful networks has been the office’s contacts with privacy officers throughout government and business. These people are not necessarily “experts” in any formal sense but they possess a wealth of experience and I have frequently valued their insights.

***Function (t): Incidental or conducive functions***

- 3.3.82 It is quite usual to include in a list of functions a provision referring to anything incidental or conducive to the performance of any of the preceding functions. It is a necessary provision and need not be amended.

***Function (u): Other enactments***

- 3.3.83 Function (u) at first appears similar to the previous function in being a “catch-all” or “tidy-up” provision. However, it is more than this. By virtue of the existence of a Privacy Commissioner, with an office having facilities for complaints investigation and resolution, public education, research and other activities, it is open to Parliament to confer tasks upon the Commissioner in other laws without the need to establish any new institutions or enact elaborate legislative machinery.
- 3.3.84 It can be convenient for a Government, or Parliament, to confer functions upon the Privacy Commissioner in another law for several reasons. For example, a proposal contained in that law might raise public concerns. Without abandoning the basic proposal, the conferring of a special “watchdog” role upon the Commissioner may allay public concern and allow the proposal to proceed. Typically, this might involve requiring a public agency to consult with the Privacy Commissioner in the implementation of a new scheme. A complaints role might be conferred upon the Commissioner in anticipation of exceptional circumstances if there is a worry that new powers might be used in an unexpected way or that something might go wrong. Placing a complaints function with the Commissioner is cheaper than creating a special new procedure, or complaints body, especially where complaints are expected to arise only rarely.
- 3.3.85 Appendix G summarises most of the existing functions conferred upon the Commissioner by other statutes. Some, particularly those involving consultation on the implementation of a new programme, happen once and the Commissioner may have little or no continuing involvement with the issue. Others, such as new complaints processes, sometimes give the Commissioner an ongoing, albeit usually infrequent, role.
- 3.3.86 In Appendix G the functions conferred on the Commissioner to date are set out in six categories:
- complaints mechanisms;
  - Commissioner’s approval;
  - consultation;
  - appointment to another body;
  - codes of practice;
  - information matching.

*Complaints mechanisms*

3.3.87 Few complaints have been received under the complaints functions established under the Health Act, Domestic Violence Act and Social Security Act.

*Approval of, and consultation with, Commissioner*

3.3.88 The Passports Act 1992 contains two provisions which appear on their face to contain a strong privacy safeguard. They require the Commissioner's *approval* before certain disclosures can be made out of New Zealand. These are the only such provisions as it has usually been considered satisfactory in other cases to simply provide for consultation with the Commissioner. The requirement for approval is perhaps explained by the fact that the provision was enacted before the full Privacy Act 1993 framework was in force. The other consultation provisions vary in their implications for the Office. Consultations under the Official Information Act and Local Government Official Information and Meetings Act involve a significant call on resources. The other consultations tend to be infrequent and not particularly time consuming.

*Appointment to other bodies*

3.3.89 I am designated as a Human Rights Commissioner under the Human Rights Act 1993 by virtue of my appointment. This is the only such appointment. I would not favour any general practice of appointment to other bodies and committees. I am aware that in other jurisdictions Commissioners sometimes do accept such appointments but I presently take the view that it usually provides for better use of my resources for other statutory entities to consult with me where relevant rather than being appointed to another body.

3.3.90 Section 7 of the Human Rights Act 1993 provides that the Privacy Commissioner is a member of the Human Rights Commission. Prior to 1993 the Human Rights Commission itself had a “watching brief” on privacy issues. The Ombudsman was formerly a member of the Human Rights Commission but generally did not attend meetings. Neither the Commissioner for Children (established in 1989) nor the Health and Disability Commissioner (established in 1994) were added to the membership of the Commission when those positions were created.

3.3.91 Membership of the Human Rights Commission does involve spending time away from privacy work. The main commitment involves approximately 10 full day Commission meetings each year with additional preparation time. On one occasion I acted as alternate Proceedings Commissioner on a Human Rights Act case where the Proceedings Commissioner himself was unable to act, involving a further sustained commitment of time.

3.3.92 The discussion paper asked whether the Privacy Commissioner should continue to be a member of the Human Rights Commission. Only 9 responses were received with 6 supporting continuation of the present position,<sup>49</sup> 2 neutral<sup>50</sup> and one opposed to the Commissioner continuing on the Commission.<sup>51</sup>

*Codes of practice and information matching*

3.3.93 Other statutes have sometimes supplemented my powers and functions with respect to codes of practice, and information matching (see Appendix G). In respect of codes, the provisions have usually empowered the Commissioner to do some precise thing relevant to the other law by way of code of practice. In the information matching field, it is sometimes provided that a provision that is not an information matching provision is to be monitored as if it were.

<sup>49</sup> Submissions M3, M4, M7, M10, S4 and S42.

<sup>50</sup> Submissions M16 and M17.

<sup>51</sup> Submission S3.

**Subsection (2)**

- 3.3.94 Subsection (2) provides authority for me to publish reports whether or not the matters have been the subject of a report to the Minister of Justice or the Prime Minister. For example, I am empowered to publish notes of cases that I have investigated and have done so, usually anonymising the material sufficiently that the complainant, and often the respondent, cannot be identified. I believe the publication of reports is an important part of my job to disseminate appropriate information both for public education and to assist agencies in compliance with the law.

**3.4 SECTION 14 - Commissioner to have regard to certain matters**

- 3.4.1 Section 14 is an important provision although it is often overlooked by critics at the legislation. For this reason I set it out in full:

**“Commissioner to have regard to certain matters** - In the performance of his or her functions, and the exercise of his or her powers, under this Act, the Commissioner shall:

- (a) Have due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way; and
- (b) Take account of international obligations accepted by New Zealand, including those concerning the international technology of communications; and
- (c) Consider any developing general international guidelines relevant to the better protection of individual privacy; and
- (d) Have due regard to the information privacy principles and the public register privacy principles.”

- 3.4.2 Paragraphs (c) and (d) tend to guide me as to what meaning I should give to notions of privacy. I am guided by the information privacy principles and public register privacy principles in the main. However, where there are international guidelines relevant to the protection of privacy this also gives me a steer so that my approach and interpretations are informed by, and remain consistent with, the international approach to privacy. Paragraph (b) also gives some guidance on privacy but it is sometimes the case that international obligations *compete* with privacy.

- 3.4.3 However, it is paragraph (a) that is probably of most interest and important when considering section 14. I am required to have regard for certain interests that compete with privacy. Indeed, this is an everyday part of being a Privacy Commissioner. Section 14(a) makes explicit what would otherwise likely be an implicit part of the job in any case. It involves the balancing of privacy against competing interests since there is no notion of an absolute state of perfect privacy and instead there is something of a continuum depending on the degree to which an individual interacts with society and is able, or must surrender autonomy.

- 3.4.4 Often section 14 considerations are so much integrated into my approach to issues, or the work of my office, that they are not explicitly referred to. For example, seeking to reach a settlement on a complaint will often involve considering the needs of Government and business to achieve their objectives in an efficient way in order to give meaning to the various exceptions to the privacy principles or the “reasonableness” tests that appear in many of them. Aspects of section 14 are also a consideration for me in other functions such as in deciding

**“The NZBR welcomes the wide definition of ‘compliance cost’, including opportunity costs, adopted by the Commissioner. However, we note that the Commissioner defines costs as excessive only if it would be practicable to achieve the essential objects of the legislation without all or some of the actual costs being incurred. In other words the principles of the Act are taken as given and are not themselves to be subjected to any cost/benefit analysis. The NZBR considers that the concept of the Act should itself be subject to review.”**

- NZ BUSINESS ROUNDTABLE,  
SUBMISSION S50

whether or not to proceed with a code of practice and in reporting to the Minister on a legislative proposal.<sup>52</sup> Section 14 is derived from a similar provision in the Australian Privacy Act.<sup>53</sup>

3.4.5 The provision is drafted in such a way that it takes account of the changing international landscape without the need for any particular amendment. For example, the OECD has issued two recent sets of guidelines, and is considering another, which are automatically, through the operation of section 14, a consideration for the Commissioner.<sup>54</sup> The European Union Directive is having a great deal of influence internationally and is referred to at many parts of this report.

3.4.6 It may be worth observing that, while I am directed to have regard to the provisions in section 14, no such obligation exists upon agencies or the Complaints Review Tribunal.<sup>55</sup> This is appropriate, in my view, on both accounts. There is little point in directing agencies to have regard to certain matters of the type set out in section 14 and it would be unrealistic and meddlesome to do so. Less clear cut is the position of the Tribunal. However, to give directions to a court or tribunal to have regard to the sort of matters provided for in section 14 would insert an undesirable degree of uncertainty into proceedings for little benefit.

### 3.5 SECTION 15 - Deputy Commissioner

3.5.1 Section 15 provides for the appointment of a Deputy Privacy Commissioner. Under the control of the Commissioner, any deputy would have all the powers, duties and functions of the Commissioner, other than as a member the Human Rights Commission. A deputy would also act whenever the Commissioner's office falls vacant or when the Commissioner is absent from duty. No deputy has been appointed to date.

3.5.2 The section concerns a deputy appointed by the Governor-General on the recommendation of the Minister of Justice and not, as happens in some jurisdictions, an Assistant or Deputy Commissioner recruited by the Privacy Commissioner to take on certain functions delegated specifically by the Commissioner. The provision is similar to that provided in the Police Complaints Authority Act 1988<sup>56</sup> and the Health and Disability Commissioner Act 1994.<sup>57</sup> The approach taken in these three statutes differs from that in the Ombudsmen Act 1975 which provides for the appointment of more than one Ombudsmen, one of whom is the Chief Ombudsman.<sup>58</sup>

3.5.3 The provision for a Commissioner and a deputy is an attempt to capitalise upon the strengths of a single person "Commissioner" model while addressing its principal shortcomings. For example, the deputy can share the workload and act where the Commissioner is incapacitated. A deputy could offer continuity in any transition. However, some of the advantages of a deputy can, in any case, be achieved through the delegation of certain functions to senior staff. I already delegate some functions.

3.5.4 Subsection (3) provides that a deputy Commissioner may not exercise the function of being a member of the Human Rights Commission. There may be

<sup>52</sup> For example, in my report to the Minister of Justice on the Trans-Tasman Mutual Recognition Bill, April 1997. I explicitly noted that I had considered the international obligations undertaken by New Zealand.

<sup>53</sup> Privacy Act 1988 (Australia), section 29.

<sup>54</sup> The OECD issued its guidelines on information security in 1992 and five years later issued guidelines on cryptography policy. Guidelines are in preparation on consumer protection in electronic commerce.

<sup>55</sup> Or indeed the courts, which can adjudicate on certain access and correction proceedings - see section 11(1).

<sup>56</sup> See section 8.

<sup>57</sup> See section 9.

<sup>58</sup> See Ombudsmen Act 1975, section 3.

# III

## s 15

## 131

**“The Ministry has in the past undertaken some work concerning compliance costs and the Privacy Act. Our conclusion drawn from these experiences is that while at an anecdotal level there are assertions of burdensome compliance costs, few organisations are able to substantiate these claims with concrete evidence that the Privacy Act imposes long term compliance costs, beyond that expected from appropriately targeted regulation.”**

- MINISTRY OF JUSTICE,  
SUBMISSION WX11

instances where a deputy brings with him or her superb qualifications for contributing to the Human Rights Commission and where it would suit the Privacy Commissioner, on occasion or generally, for the deputy to do so. It seems to me that the constraint in subsection (3) limits the possibilities for best use of a deputy. It is not clear that the restriction would prevent a deputy being involved in the work of the Human Rights Commission by virtue of appointment as an alternate under section 8 of the Human Rights Act. This ought to be clarified.



### **RECOMMENDATION 38**

**Section 15(3) should be amended to make clear that a deputy may be designated as an alternate Human Rights Commissioner with the concurrence with the Chief Human Rights Commissioner.**

## **3.6 SECTION 16 - Term of office**

- 3.6.1 It is essential for a Privacy Commissioner's independence to be guaranteed through the statutory appointment and removal provisions and through the term of office. An unduly short term of office, with frequent renewals, could give rise to public suspicion that a Commissioner would defer to the government for fear of risking non-appointment or that a government could use the actual or implied threat of non-reappointment to seek to control the Commissioner. Some jurisdictions resolve the issue by providing for a single, relatively lengthy, term of office which is not open to renewal.<sup>59</sup> The current New Zealand practice with most such appointments is to provide for a five year term with provision for renewals.
- 3.6.2 The Act provides that the Commissioner's term of office is for a maximum of five years. Such appointments are renewable. I was appointed pursuant to section 4 of the Privacy Commissioner Act 1991 for a term of five years. My term of office was continued when the Privacy Act 1993 consolidated the 1991 Act.<sup>60</sup> In 1997 I was reappointed for a further term of three years.
- 3.6.3 I believe that the term provided for in section 16, and the provision for reappointment, are satisfactory. The provision relating to the term of office is the same as provided for in the Privacy Commissioner Act 1991<sup>61</sup> and for similarly situated Commissioners such as, the Health and Disability Commissioner.<sup>62</sup>

## **3.7 SECTION 17 - Continuation in office after term expires**

- 3.7.1 The Act provides that where a Commissioner's term of office expires, the occupier may continue in office until further provision is made for reappointment, succession, or vacation of office. This follows the same provision made in the Privacy Commissioner Act 1991.<sup>63</sup> Similar provision appears in other statutes establishing independent Commissioners.<sup>64</sup>
- 3.7.2 The provision addresses a real issue, the need for continuity where a term of appointment comes to an end and a new appointment, or a reappointment, has not been finalised. However, therein lies a matter of concern. Where a Commissioner's own term of office has expired and a continuation in office occurs solely by virtue of section 17, there exists a situation whereby the independence

<sup>59</sup> In British Columbia the Commissioner holds office for a term of 6 years but is not eligible for reappointment. See Freedom of Information and Protection of Privacy Act (British Columbia), section 37.

<sup>60</sup> See section 133 of the Act.

<sup>61</sup> See section 9.

<sup>62</sup> See Health and Disability Commissioner Act 1994, section 12.

<sup>63</sup> See section 9(3).

<sup>64</sup> See, for example, Health and Disability Commissioner Act 1994, section 12(3).

of the office could be impugned. In such circumstances, a Commissioner's independence is not protected by a fixed term in office. I am aware of examples in New Zealand and elsewhere where similarly placed Commissioners have approached, or even gone beyond the expiry of their term of office, not knowing whether and when a further appointment, or a reappointment, is to be made. Such a position undermines the credibility of the appointment processes and the independence of the relevant offices.

- 3.7.3 Ministers, and particularly the officials who advise them, must not rely on provisions such as section 17 to allow delay to creep into the taking of decisions on appointments or reappointments which must, at some stage, be taken. Section 17 is an appropriate provision to utilise where an appointment of a new Commissioner has been made and the existing Commissioner remains in office for the convenience of the change-over. It is also an appropriate provision to allow, for a matter of weeks not months, the reappointment processes to be completed where Ministers make their intentions known to a Commissioner. However, it would be improper, in my view, for a government to allow the position to drift for a matter of months following the completion of a term through reliance upon the section. Care should be taken to ensure that this does not happen.

### 3.8 SECTION 18 - Vacation of office

- 3.8.1 Section 18 provides for the removal and resignation of the Privacy Commissioner from office. Special provision is made for when a judge is appointed as a Commissioner. To preserve the independence of the office, the Commissioner cannot be removed during a term of office except by the Governor-General on the recommendation of the Minister for:
- inability to perform the duties of the office;
  - bankruptcy;
  - neglect of duty; or
  - misconduct.

- 3.8.2 This provision is appropriate and reflects similar provisions in the Privacy Commissioner Act 1991<sup>65</sup> and in statutes establishing other Commissioners.<sup>66</sup>

### 3.9 SECTION 19 - Holding of other offices

- 3.9.1 Section 19 restricts the Privacy Commissioner holding other offices. The Commissioner is not permitted to be a member of Parliament or of a local authority. The Commissioner is not permitted to hold any office of trust or profit or engage in any occupation for reward outside the duties of the Commissioner's office except with the approval of the responsible Minister in each particular case. It is an appropriate restraint.

### 3.10 SECTION 20 - Powers relating to declaratory judgments

- 3.10.1 Section 20 deals with the obtaining of declaratory judgments by the Privacy Commissioner. The process involves me referring a matter to the Proceedings Commissioner. I have not exercised the power during the period under review although I have on occasion considered whether it might usefully be applied to clarify an issue.
- 3.10.2 The only minor change that ought to be made to the provision is to replace the reference in subsection (2) to the Human Rights Commission Act 1977 with a reference to the Human Rights Act 1993.

<sup>65</sup> See section 11.

<sup>66</sup> See, for example, Health and Disability Commissioner Act 1994, section 13.

**RECOMMENDATION 39**

**Section 20(2) should be amended by substituting “Human Rights Act 1993” for the reference to the “Human Rights Commission Act 1977”.**

**3.11 SECTION 21 - Directories of personal information**

- 3.11.1 I am empowered under section 21 to publish, from time to time, a directory of information including some or all of the following:
- (a) the nature of any personal information held by an agency;
  - (b) the purpose for which any personal information is held by an agency;
  - (c) the classes of individuals about whom personal information is held by any agency;
  - (d) the period for which any type of personal information is held by any agency;
  - (e) the individuals who are entitled to have access to any person information held by an agency, and the conditions under which they are entitled to have that access;
  - (f) the steps that should be taken by any individual wishing to obtain access to any personal information held by any agency.
- 3.11.2 The objective of the directory is partly discerned from subsection 21(3) which provides that in determining whether or not a directory should be published, the Commissioner is to have regard to the need to assist members of the public to obtain personal information and to effectively exercise their rights under the Act.
- 3.11.3 The section is modelled upon section 20 of the Official Information Act which requires the production of a periodic publication setting out the functions of departments and organisations (that is, central government agencies). That publication was originally the responsibility of the State Services Commission but from 1989 was taken on by the Ministry of Justice.
- Worth of directory questioned*
- 3.11.4 This provision introduced in the Privacy of Information Bill would have imposed a mandatory function on the Commissioner. My advice to the Select Committee was that it ought to be recast as a discretionary function so that I could consider a directory amongst other priorities having a call upon my budget. My view was that the directory would have a very low call on my priorities. Realistically, I see no prospect of ever publishing a comprehensive directory of the type anticipated by section 21.
- 3.11.5 The impression I have gained from jurisdictions which require the production of a directory is that a lot of resource is consumed for very little public benefit. Frequently the production of directories is such a large task for small commissioners’ offices that it affects the orderly processing of other work. It can be a struggle to get the directory to publication in a timely fashion and published directories quickly fall out of date. “User pays” policies mean that the high price of the publication puts it beyond the reach of individuals.<sup>67</sup> The use of websites is a more promising option for the disclosure of information practices and policies.<sup>68</sup>

**RECOMMENDATION 40:**

**Consideration should be given to repealing section 21. Consequently section 13(1)(d) should be repealed and the content of section 21(1)(a) to (f) transferred to a rewritten section 22.**

<sup>67</sup> The *Directory of Official Information* currently costs \$99.

<sup>68</sup> The USA has stressed this approach by requiring at state and federal levels public bodies to post certain information pursuant to various “Electronic Freedom of Information” laws and policies.

*Directory of Official Information*

- 3.11.6 A directory may be of some value in relation to the core public sector - government departments and organisations. These agencies are often large and bureaucratic, or small and obscure, and a directory may diminish barriers to individuals effectively exercising their rights under the Act. It may also be desirable for government agencies to publish their holdings of personal information to promote transparency and public accountability. On my present resources it would not be feasible for me to contemplate a public sector directory. However, others may see a value in such a directory and it might be feasible for them. Another option would be to make it a goal to include this information on websites which can be accessed from home or public libraries.
- 3.11.7 The Ministry of Justice already has the task of preparing and publishing at 2 yearly intervals, the *Directory of Official Information* under section 20 of the Official Information Act. It might not significantly increase the size of that task to include some of the categories of information listed in section 21 of the Act. Efficiencies would be possible compared with the preparation of a stand alone directory of personal information. With respect to central government I believe it is more appropriate for a Ministry to publish the directory than an independent Commissioner.<sup>69</sup> It may first want to review the usefulness and actual usage of the existing directory.
- 3.11.8 Two items in section 21 which might most easily be included in the *Directory of Official Information* are those set in section 21(1)(a) and (f).<sup>70</sup> It is not clear that section 21, or section 20 of the Official Information Act, would have to be amended to achieve the change. Perhaps the Ministry could simply add details to the directory if it judges those to be worthwhile and able to be done in a cost-effective manner. Accordingly, I provide my recommendation as a suggestion for the Ministry to consider.<sup>71</sup>
- 3.11.9 My recommendation to consider combining the task with the role of producing the *Directory of Official Information* is consistent with views expressed in the 1987 options report to the Minister of Justice.<sup>72</sup>

**RECOMMENDATION 41**

**Consideration should be given to the costs and benefits of having the Ministry of Justice include some of the information listed in section 21(1) in any future Directory of Official Information.**

*Compliance costs*

- 3.11.10 If my recommendation to repeal section 21 is not adopted, I will be left with the discretionary function of publishing directories. It is not my present intention to publish any such directory. However, the power could be utilised in the future in a way that could cause compliance costs out of proportion to the benefits achieved.

<sup>69</sup> The *Directory of Official Information* has never, for example, been the responsibility of the Ombudsmen. In Canada, although there is both an Information Commissioner and a Privacy Commissioner, the task of collating and publishing *Info Source*, a directory that combines details required under both the Access to Information Act and the Privacy Act, falls upon the Treasury Board Secretariat.

<sup>70</sup> Indeed, it appears that the Information Authority considered that an obligation to list such information already existed under section 20 of the Official Information Act. See Report of the Information Authority on the subject of collection and use of personal information, May 1998, AJHR E27B, paragraph 37 and draft clause 27I. The Information Authority canvassed an alternative to having a directory which would have involved departments having a document, setting out personal information held, at each of their public offices.

<sup>71</sup> The same exercise could be considered in respect of local authorities. They already have extensive obligations to publish information pursuant to section 19 of the Local Government Official Information and Meetings Act 1987 and it may not be problematic to add the two categories suggested. Again, I suggest this for consideration but do not have a firm view as to the merits or costs.

<sup>72</sup> Tim McBride, *Data Privacy: An Options Paper*, 1987, paragraph 7.83.

**“Information legislation is built on the premise that you have to know where to find information before requesting it. The Directory of Official Information is designed to fulfil this purpose under the Official Information Act; in the absence of a similar Privacy Act [directory] the privacy officer fulfils a similar role.”**

- NZ LAW SOCIETY PRIVACY WORKING GROUP, SUBMISSION G22

- 3.11.11 Accordingly, I suggest that section 21(3) should direct the Commissioner to have regard not only to the need to assist members of the public but also to the compliance costs that would be imposed upon agencies in relation to the preparation of such a directory. I make this suggestion to give some reassurance that the power would be used sparingly having regard to the cost that would be imposed in complying with demands for such information. The direction would supplement the more general considerations set out in section 14.



#### **RECOMMENDATION 42**

**Section 21(3) should be amended so that the Commissioner is obliged to have regard, in determining whether or not a directory of personal information should be prepared, to the compliance costs to agencies consequent upon such a determination.**

### **3.12 SECTION 22 - Commissioner may require agency to supply information**

- 3.12.1 I am empowered to require agencies to supply information that I may reasonably need for the publication of a directory of personal information or to enable me to respond to public enquiries concerning general matters connect with the holding of, and access to, the personal information by the agency concerned. I have not published a section 21 directory and therefore have not exercised the power for the purpose set out in section 22(a). However, I have used the power for the purposes provided for in section 22(b) so as to enable me to respond to public enquiries. Indeed, it is section 22(b) which holds the greatest possibilities from my perspective.
- 3.12.2 I have indicated at paragraph 3.11.4 that I am unlikely ever to publish directories under section 21. However, I do see it as an appropriate use of my office to seek out necessary information, relying upon the legal powers in section 22 where necessary, so that interested individuals can find out the sort of details which might otherwise be included in such a directory.
- 3.12.3 My enquiries team frequently question agencies to find out certain details so as to respond to enquirers. For example, an individual who wishes to obtain personal information from an agency may become exasperated through being unable to find the right person to speak to in order to obtain access to necessary records. They may call my privacy hotline. In turn, my enquiries officers through their existing contacts, or by making a specific enquiry of the agency, may find the name of the relevant privacy officer and put that person in touch with the individual. In other cases, the information sought from the agency may be more detailed but still be of the type contemplated by section 21. Such dealings are usually informal and carried out with of co-operation from the agencies concerned.
- 3.12.4 On only one occasion have I formally exercised my powers under section 22(b). On that occasion I sought from the Northern Regional Health Authority details concerning their personal information holdings about patients. On that occasion it took eight months to obtain full details. The resultant information was made available to enquirers who had been unable to get the information for themselves.
- 3.12.5 I have taken section 21(f), which refers to the steps that should be taken by an individual wishing to obtain access to personal information held by any agency, to include the identity and contact details of an agency's privacy officer. Often when a "road block" is encountered in obtaining access to information it is only by reference to a person within the agency knowledgeable in the requirements of the Act that proper explanations can be obtained as to why information is withheld or, if a mistake has been made, for the error to be rectified. If there is

doubt that the identity of the Privacy Officer is implicit in section 21(f) it may be desirable, because of the use made under section 22(b), for the matter to be made explicit.



#### RECOMMENDATION 43

**An appropriate amendment should be made to section 21(1) or 22 so that it is plain the Privacy Commissioner has the power to obtain from an agency the identity of the agency’s privacy officer to enable the Commissioner to respond to enquiries from the public.**

### 3.13 SECTION 23 - Privacy officers

3.13.1 Section 23 provides that each agency must ensure that there is a privacy officer to undertake certain responsibilities. It has been successful as a statutory mechanism to introduce the law to a variety of agencies in the public and private sectors and to ease compliance. A heavy handed approach is not taken and there is no specific offence of failing to appoint a privacy officer. Many businesses have seen the benefit of giving the responsibilities of a privacy officer to an appropriate employee and providing that person with the necessary authority, support and training.

3.13.2 I have observed a variety of approaches taken to appointment of the privacy officer to suit the style of particular agencies. Some have assigned a senior executive to the post who has, after developing suitable policies, delegated some of the functions. Others have devolved functions to three or four district or assistant privacy officers. Some agencies routinely involve their privacy officers in the handling of access requests whereas others retain the privacy officer as a more dispassionate internal reviewer of cases where difficulties are struck.

3.13.3 In the first months of the Privacy Act privacy officers were, in many cases, very much “on their own” (although they could, and many did, ring my privacy hotline). I am pleased to say things have since improved and now there are:

- books, and other publications, on complying with the Privacy Act;
- training opportunities through my office and other organisations;
- annual Privacy Issues Forums with, in recent years, an associated privacy officers meeting;
- some informal groupings of privacy officers in particular sectors - perhaps the most active has been those from public hospitals.

3.13.4 I continue to believe that there is significant value in the position of privacy officer and that the provision is still needed. My views in this regard were reinforced by consultation in the course of this review. In the context of complaints, I have observed that agencies with capable and experienced privacy officers have far less difficulty in resolving matters satisfactorily. A steep learning curve is required for an agency without a privacy officer if they start studying the Act when the first complaint is received.

#### *Appointment of outside privacy officers*

3.13.5 Although I take the view that section 23 is adequate, and has worked well, I propose one small change. Presently the section states that it is the responsibility of each agency to ensure that there are “within that agency” one or more individuals who have the responsibilities set out in the section. I propose that the words “within that agency” be omitted. In most cases the appropriate person to have the responsibilities of privacy officer will be an individual within the particular agency. However, there may be instances where an individual outside the agency would satisfactorily fulfil the role. Amendment to the section may provide the flexibility to enable such people to take on the role.

3.13.6 I offer as an example a franchised video library. It might be a small business

**“Tranz Rail submits that the privacy officer provision has generally worked well. However, privacy officers probably need more education.”**

- TRANZ RAIL, SUBMISSION G18

with, say, a manager and six or seven staff and yet be the repository of large holdings of personal information. However, across a city there might be seven or eight franchised businesses run on identical lines. It might be possible to have an individual who is not within the agency - since the franchised businesses are separate agencies - do an excellent job as privacy officer through familiarity with the information aspects of the business. Such as officer may, at less cost than doing so in separate agencies, obtain experience with compliance issues and complaints handling. He or she may also have a degree of independence from the day to day decisions that gave rise to a complaint, thereby offering a degree of detachment which can facilitate resolution of a customer or employee complaint.

- 3.13.7 It would be possible for some businesses to offer their services as a privacy officer. While lawyers or accountants might feel able to offer such a service to corporate clients the model I had in mind is something akin to the companies that provide “body corporate” services to blocks of apartments. It may also be that an experienced privacy officer might on retirement wish to spend a few hours a week, or days a month, offering contract services as a privacy officer to former employer or to agencies in the sector that he or she formerly worked in. I know of examples where departments and corporate bodies, have brought onto their staff, on a part-time basis, a trusted former employee to act as the privacy officer. I have seen this work well with experience and detachment combined to achieve excellent resolution of complaints and encouragement of compliance.
- 3.13.8 I should add that I see the opportunity for outside privacy officers as being quite limited. In most cases the ideal candidate for privacy officer will already be on staff and that is where the responsibilities should lie. However, in certain limited circumstances I can see a case for a niche “privacy officer firm” or an individual taking on the task for a number of separate agencies. I believe that the Act should allow the flexibility for these developments to occur.



#### **RECOMMENDATION 44**

**Section 23 should be amended to delete the words “within that agency”.**

##### *Privacy officer support*

- 3.13.9 I have two further observations in respect of privacy officers notwithstanding that the Act need not be amended to address either.
- 3.13.10 First, I encourage management of agencies to offer support and training for their privacy officers. A well informed, and proactive, privacy officer is the best friend that an agency can have to avoid problems under the Privacy Act. There are publications now available and agencies should obtain these so that the officers have the resources they need. Training should be allowed for.
- 3.13.11 Second, there is greater scope for privacy officers themselves to pool their experience, establish networks, and generally benefit each other. I know that the CHEs privacy officer group has met regularly over the years and that this has benefited the participants greatly. Smaller and less frequent meetings of privacy officers in the insurance and banking areas have also yielded benefits. I have encouraged privacy officers to organise groupings of their own but have declined to attempt any formal organisation myself - other than to offer an annual get-together at the Privacy Issues Forum.
- 3.13.12 There may be value in privacy officers examining the merits of formalised networking and organisation if the full benefits of co-operation are to be realised. In the United States there has for many years been an American Society of Access Professionals (ASAP) which offers training and education to US Federal Government employees on both the Privacy Act and the Freedom of Informa-

**“Section 23 has worked well - appointment of a Privacy Officer allows focus for the setting up of procedures and education.”**

- FRANKLIN DISTRICT  
COUNCIL, SUBMISSION G3

tion Act. Since at least 1987 there has been a Canadian counterpart organisation for access and privacy coordinators. Something similar exists in the UK. I am not in a position to know whether that degree of organisation will suit New Zealand privacy officers but I do know that there is much to be gained through networking and that if such an organisation were to exist it would be possible to further develop the support and training of those people given the important responsibilities outlined in section 23.

### 3.14 SECTION 24 - Annual report

- 3.14.1 Section 24 requires me to make an annual report on the operation of the Act to the Minister of Justice, who in turn is to lay a copy of the report before Parliament. I submitted two annual reports under the Privacy Commissioner Act 1991 (the first for a part year) and four further reports under the 1993 Act.
- 3.14.2 I have endeavoured to provide a very full annual report on my activities since this is a reference point for a wide variety of people interested in the Act. Also, for certain aspects of my work, this is the only, or most convenient, place to describe some aspects of the work of the office.
- 3.14.3 However, my practice has been to regularly release and actively disseminate material from my office as an important facet of my education and publicity functions. For instance, I publish case notes of the opinions that I have reached on a range of complaints. These case notes are released individually or in batches during the year - I do not republish them in the annual report. I believe that an active dissemination policy is of most value to the public and is consistent with my commitment to freedom of information.
- 3.14.4 It would be desirable to enable my annual report on information matching programmes to be submitted separately from my general annual report. The practical difficulty I have found is that I have been delayed in submitting my annual report because of the need to await departmental reports on the last matching runs held during any financial year. Consequently, the report on my own activities tends to get held up. Conversely the report on information matching often has to be finalised in haste when the last departmental reports are to hand. The two types of reports differ in nature. The section 24 report is an account of the activities of my own office. The section 105 report is primarily a commentary upon the activities of other agencies. I propose a change to address this problem in recommendation 131.

### 3.15 SECTION 25 - Further provisions relating to Commissioner

- 3.15.1 The provisions in the First Schedule are primarily of a machinery nature and deal with such matters as the appointment of expert staff, salaries and allowances, superannuation, the provision of goods and services, and financial arrangements.
- 3.15.2 The use of a schedule for such matters is valuable in uncluttering the Act itself. By removing such matters to a schedule ordinary users of the Act, who have no need to know these machinery provisions, are able to move straight to provisions of greater relevance and importance. On reflection, I take the view that there are further provisions in Part III of the Act which could have suitably appeared in the Schedule.<sup>73</sup> However, there is little point now in transferring such provisions.
- 3.15.3 I have considered the provisions in the First Schedule and have identified two changes which would be desirable. One turns upon a point of principle and the other simply reflects changed circumstances.

**“The provision relating to privacy officers is a useful one particularly so far as the public sector is concerned. When newspapers are requesting information and that request is refused because of the Privacy Act it is occasionally beneficial to be able to talk to the relevant privacy officer to discuss the matter further. We find it ironic that there is no corresponding duty on public sector agencies to appoint officers with similar responsibilities under the Official Information Act.”**

- COMMONWEALTH PRESS UNION,  
SUBMISSION G17

<sup>73</sup> For example, provisions concerning a Deputy Commissioner and continuation in office after expiry of term.

*First Schedule: Clause 2 - Staff*

3.15.4 Clause 2(3) of the First Schedule provides that:

“The number of persons that may be appointed under this clause, whether generally or in respect of any specified duties, or class of duties shall from time to time be determined by the responsible Minister.”

3.15.5 It seems that this provision does not sit well with the independence of my position nor the modern approach to accountability epitomised by the Public Finance Act 1989. Accordingly, I consider that it should be deleted.

3.15.6 Given the existence of the Public Finance Act, and the Memorandum of Understanding that exists between the Minister of Justice and the Privacy Commissioner, I suggest it is unnecessary to replace the provision with anything else. However, it would be possible to devise a replacement provision which did not encroach upon the Commissioner’s independence. For example, I would have no concern with a clause which provided:

The number of persons appointed under this clause shall from time to time be advised to the responsible Minister.

**RECOMMENDATION 45**

**Clause 2(3) of the First Schedule should be repealed so that the Minister does not have the function of determining how many staff the Commissioner engages whether generally or in respect of any specified duties.**

*First Schedule: Clause 6 - Services for Commissioner*

3.15.7 Clause 6(2) of the First Schedule provides that the Commissioner and the Human Rights Commission may enter into arrangements for the provision by the Commission of office accommodation and other services. At the time that the Privacy of Information Bill was being drafted this was a possibility although it has not proved to suit the needs of my office under the Privacy Commissioner Act 1991 or the 1993 Act. At one stage, I examined the possibility of shared accommodation in the event that I were to establish a Christchurch office. I considered this in the context of an invitation extended to me by the Ombudsmen to consider the possibility of sharing new premises. There were some attractive features of sharing accommodation with the Ombudsmen in Christchurch but the timing was not propitious for me to establish a South Island presence and subsequently funding difficulties would make this an impossible proposition.

3.15.8 However, exploring the Ombudsmen’s invitation emphasised to me that clause 6(2) was limiting in terms of the arrangements that might be reached with regards to the provision of services. Matters have now moved on such that I suggest that subclause (2) be repealed or amended. If it were repealed I would not see this, in any sense, as restricting my ability, or that of the Human Rights Commission, to enter into an arrangement for the sharing of services if that were appropriate. However, if the provision were to remain it could be changed to reflect the reality which is that arrangements might also be reached with other similarly placed entities such as the Ombudsmen.

**RECOMMENDATION 46**

**Clause 6(2) of the First Schedule should be repealed as being unnecessary.**

**3.16 SECTION 26 - Review of operation of Act**

3.16.1 Section 26 requires the Commissioner to review the operation of the Act as soon as practicable after it has been in force for three years and thereafter every

five years. The Commissioner's findings are to be reported to the Minister of Justice who is to lay a copy of the report before Parliament. This is, of course, the provision pursuant to which this review is being undertaken.

3.16.2 It is quite usual for modern privacy or data protection laws to include a review clause of some sort. For example, the privacy laws in British Columbia and Nova Scotia, and the private sector privacy law in Quebec were all passed at about the same time as the Act and each contained a provision for review. The Nova Scotia and Quebec reviews were completed in 1996 and 1997/98 respectively.<sup>74</sup> The review in British Columbia is ongoing.<sup>75</sup>

3.16.3 Although the section does not require me to undertake public consultation, or otherwise direct how the review to be carried out, I have undertaken very full public consultation. After I launched the public phase of the review, debate was sparked in the print media as to the appropriateness of placing the section 26 review role with the Privacy Commissioner. The debate was kicked off by an article by an MP which stated, amongst other things:

“The Act has an unusual and unfortunate provision. It requires the Privacy Commissioner to review his own Act and to report to the Minister of Justice whether any amendments are necessary or desirable. This is not the way to protect the interests of the public. The Minister should amend the legislation to provide for an autonomous body, independent to the Privacy Commissioner, to review the Act.”<sup>76</sup>

3.16.4 This drew a ready response from some newspaper editorial writers who have campaigned against privacy rights for individuals. The *Evening Post* stated:

“The public might have more confidence in the review process if it is carried out by someone seen as totally impartial. As it is, Mr Slane is widely perceived - we believe correctly - to have a strong ideological commitment to the privacy principles outlined in the Act.”<sup>77</sup>

3.16.5 The newspapers' position may be judged from the introduction to a booklet published by the Newspaper Publishers Association and Commonwealth Press Union in 1997:

“The newspaper industry's view of the Privacy Act has been consistent since before its enactment. We saw no reason for the Act to exist and we still do not.”<sup>78</sup>

3.16.6 It is understandable that those who are openly hostile to the Privacy Act may fear that the Privacy Commissioner will not share their views. However, I doubt

**“There will be a review by Commissioner in 3 years' time and that process will continue at 5-yearly intervals. That is to be expected because of the changes that are being made day by day. Everyone who looks at the *Dominion* on Monday mornings and sees the changes in computer technology could see that the House cannot predict what is likely to happen over the next few years, and the appropriate procedure is to ensure that there are reviews at regular intervals”.**

- ROB MUNRO MP ON THE SECOND READING OF THE PRIVACY OF INFORMATION BILL, APRIL 1993

<sup>74</sup> See Department of Justice, *Advisory Committee Freedom of Information and Protection of Privacy Act Report*, Nova Scotia, March 1996, Commission d'accès à l'information, *Privacy and Openness in the Administration at the End of the 20th Century* (abridged version of the Report on the Implementation of the Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information and the Act Respecting the Protection of Personal Information in the Private Sector), Quebec, June 1997 and Quebec National Assembly Committee on Culture, *Study on the Five Year Report of the Commission d'accès à l'information: Final Report*, April 1998.

<sup>75</sup> Several hearings of the Special Committee to review the Freedom of Information and Protection of Privacy Act have been held and transcripts of proceedings are available on the website of the British Columbia legislature. That can be accessed through the homepage of the Information and Privacy Commissioner of British Columbia: <http://www.oipcbc.org>

<sup>76</sup> Patricia Schnauer, “Too Much Autonomy for Commissioner”, *National Business Review*, 19 September 1997.

<sup>77</sup> “Right Man for Privacy Review?”, Editorial, *The Evening Post*, 21 October 1997.

<sup>78</sup> NPA/CPU, *Privacy: A Need for Balance*, 1997, page 4.

that a commitment to the privacy principles should disqualify me from carrying out a satisfactory review. It should also be borne in mind that in carrying out this function I am guided by section 14, which requires me to have due regard to, amongst other things, the interests that compete with privacy and the right of business and government to achieve their objectives in an efficient way. There seemed to be an assumption that it was within my statutory review to advise Parliament to repeal the Act. It was not my function to do so and any other reviewer of the Act would find, as I have, that there is no groundswell of opinion for such a move.

- 3.16.7 I think it should be plain to anyone who took the trouble to read the discussion papers that they encouraged, and did not limit, debate about the Act. Furthermore, I have undertaken to supply copies of *all* the submissions received to the Minister of Justice so that he will have the views of others as well as any recommendations.<sup>79</sup>
- 3.16.8 This report as to whether any amendments are “necessary or desirable” is not the end of the process. The Minister will consider my recommendations and I would be surprised if every single one is adopted. Rather, he will first take advice from the Secretary for Justice. If amending legislation is contemplated consultation would be undertaken by the Ministry with other government departments. Once Cabinet has settled its policy, an amending bill would be introduced and referred to a select committee. Public consultation will again be had and the committee will form its views on which of the Government’s proposals for amendment, and others suggested by submissions, are desirable. Parliament itself makes the final decision. My review is hardly likely to be the last word on the subject.
- 3.16.9 The MP’s article criticised section 26 as an unusual provision. It is true that only a minority of statutes have a review provision. However quite a number do<sup>80</sup> and section 26 is by no means unique. Most reviews required by statute are carried out by entities established by the particular statute. The approach appears to be that the public body most intimately involved with the carrying out of functions under the statute ought to examine the issues and provide recommendations. If there is no organisation created by the statute suitable to carry out the review, the function is placed with the department or ministry. I have identified one statute which provides for a joint review by an entity established by the Act and the administering department.<sup>81</sup>
- 3.16.10 If it were to be desired to have someone other than the Commissioner carry out future reviews, there would need to be someone to do the task. One possibility would be to keep section 26 much as it is now but to place the function with the Ministry of Justice. That would have several disadvantages. In particular, it would leave no separate or knowledgeable source of advice to the Minister on the recommendations for reform - unless, of course, one imagines the Privacy Commissioner and Ministry of Justice switching present roles.
- 3.16.11 The other models that are sometimes used for reviews of this type overseas are

**“The Privacy Commissioner is required to be an advocate for privacy of the individual. That’s fine except that the Office of the Privacy Commissioner also has quasi-judicial functions so it’s a bit like a rugby game where the other team’s coach acts as referee. Those who deal with the Privacy Commissioner do not doubt his sincerity or the fact that he attempts to be even-handed, but lets face it - the role of the Office of the Privacy Commissioner is to be on the side of individual privacy. A better solution would be to remove this role to a separate body which does not have any advocacy role.”**

- PETER HATTAWAY,  
SUBMISSION S16

<sup>79</sup> All non-confidential submissions were given to the Ministry of Justice in February 1998. The submissions have also been available at my office for anyone to inspect and to purchase copies.

<sup>80</sup> Examples of statutes having similar review provisions: Contraception, Sterilisation and Abortion Act 1977, section 14; Electricity Act 1992, section 158; Foundation for Research, Science and Technology Act 1990, section 12; Health and Disability Commissioner Act 1994, section 18; Legal Services Act 1991, section 112; Wheat Industry Research Levies Act 1989, section 30. Examples of provisions which concern the review of only one Part of an Act include: Evidence (Witness Anonymity) Amendment Act 1997, section 4; and Medical Practitioners Act 1995, section 75. These latter tend to be “one-off” rather than continuing reviews and are carried out by the administering departments.

<sup>81</sup> See Foundation for Research, Science and Technology Act, section 12.

the creation of an *ad hoc* review body or the conferring of the function on a Parliamentary committee. It is easy to understand why the establishment of machinery and funding for a series of 3 and 5 yearly *ad hoc* review committees is not favoured.<sup>82</sup> However, it is always possible for the Minister to ask the Law Commission to review an aspect of the Act as he recently did in relation to the Official Information Act. This need not await, or replace, the section 26 review.

- 3.16.12 Canadian jurisdictions typically confer the review role upon a Parliamentary committee. However, conferring such functions by statute on Parliamentary committees is not a general practice in New Zealand. Furthermore, since the mid-1980s virtually all bills are sent to a select committee which takes public submissions. Our process therefore already involves a Parliamentary committee. Adoption of the Canadian process could conceivably limit the diversity of input into the review rather than expand it and still involve my office conducting a detailed review to place before the committee.
- 3.16.13 In my view, regular review of the Act's operation is desirable and it is an appropriate function to confer on the Commissioner as demonstrated by overseas and local practice. The five yearly frequency of reviews is appropriate and I would not wish to see it lengthened or shortened. I considered that the first review should be completely open and wide-ranging and set out the reasoning for changes or for rejecting any change. Subsequent reviews may be more specifically focused.

<sup>82</sup> Sometimes legislative machinery is provided for the convening of an *ad hoc* review committee for one-off reviews. See, for example, Insurance Companies (Ratings and Inspections) Act 1994, section 24.

# Bouquets and Brickbats

## THE REVIEW PROCESS

**“The approach taken to this consultation and the simple layout of the discussion papers has been much appreciated.”**

- FRANKLIN DISTRICT COUNCIL, SUBMISSION G3

**“The review is very comprehensive and a number of useful points have been raised. However it may have been more useful if the review was phased in over some months with organisations being given more time to evaluate the papers.”**

- NZ DEFENCE FORCE, SUBMISSION S24

**“We are aware that there has been some criticism of the credibility of the section 26 review, probably because the responsibility for the review lies with an office established by the Act. The content of some of the discussion papers suggests that considerable effort has been expended to ensure the opportunity for all view points to be expressed.”**

- NZ BANKERS' ASSOCIATION, SUBMISSION S25

**“We do appreciate that the papers were sent out well in advance of the October and November closure dates, and congratulate the Commissioner's Office on recognising that substantial notice is required, if community organisations are to have time to consult their constituents about the issues raised.”**

- NZ FEDERATION OF FAMILY BUDGETING SERVICES, SUBMISSION S29

**“We found that the order in which the discussion papers were released has complicated consideration of the issues and limited the ability of staff to have helpful input.”**

- FAMILY PLANNING ASSOCIATION, SUBMISSION S45