

Part VIII

VIII

Complaints

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“The lack of resources is a serious issue because over time it could undermine credibility of the Office and, ultimately, the aims of the legislation.”
- NZ Law Society Privacy Working Group, submission UV18

“Complaint outcomes can provide useful examples to educate the public and agencies on the law. Complaints serve to keep the Commissioner aware of the difficulties agencies and individuals are having in relation to personal information. In addition, complaints provide an overview which may highlight difficulties within particular industries which need to be addressed.”
- Health and Disability Commissioner, UV16

“It makes sense, particularly with employment-related complaints, to continue the present low-level disputes resolution process which a privacy investigation essentially represents. Taking a complaint to the District Court would involve a great deal more time and expense for all parties and would by-pass the mediation process which has achieved some success.”
- NZ Employers Federation, submission UV4

“A complaints procedure is clearly the most accessible and barrier free approach to seeking redress.”
- Ministry of Justice, submission UV15

“The Commissioner’s Office would become far less effective in its educational role if it was denied the experience that dealing with complaints on a day to day basis provides. By being involved at the coal face, the Commissioner’s Office is able to detect new trends early on and take action to educate the public about such issues.”
- Telecom New Zealand, submission UV13

8.1 INTRODUCTION

8.1.1 Provision for enforcement of rights and entitlements is an essential feature of any credible privacy or data protection law. It is not enough simply to have a set of privacy principles and to apply these to agencies. It is necessary to have a system to ensure that there is some reasonable compliance with those principles and to call an agency to account for its actions which may constitute a breach of those principles. Jurisdictions approach the question of enforcement in a variety of ways. Some countries allow individuals to sue through the regular courts.¹ Euro-

¹ Most jurisdictions do not favour this option. However, the USA allows individuals to take proceedings through the courts under the Privacy Act 1974 in relation to public sector agencies.

pean countries pursue enforcement through a registration or licensing system with a mixture of criminal and civil sanctions for failure to register or for a breach of the law or conditions on a licence or registration. Many also provide for complaints through independent data protection or privacy commissioners.

New Zealand complaints model

- 8.1.2 The approach set out in the Act, and particularly in this Part, is to provide for complaints to be made to an independent and specialist entity, the Privacy Commissioner. An emphasis is placed upon low-cost, non-adversarial and timely resolution of complaints. The process is modelled upon that of the Ombudsmen which was pioneered in New Zealand under the Ombudsman Act 1962.
- 8.1.3 However, an Ombudsman-type complaints process does not itself lead to a binding legal determination of a complaint.² If the Privacy Commissioner's recommendations are not accepted a complaint may progress to the Complaints Review Tribunal which has powers to issue binding determinations, compensation and enforceable orders. There is also limited provision for certain access complaints to be taken to the courts.³ Although there are some aspects of the complaints processes which are new or unique to the Act, by and large they follow an existing model which has been used in New Zealand by the Ombudsmen and the Human Rights Commission and since copied into the Health and Disability Commissioner Act 1994.
- 8.1.4 The complaints processes under the official information legislation are the most direct forerunner of Part VIII. The part of the Official Information Act concerning access by individuals to personal information was transferred into the Act and the processes for access complaints were, by and large, also seen as suitable for the complaints involving breaches of other information privacy principles. However, there is no Tribunal in the Official Information Act arrangements and this aspect of the scheme is derived from arrangements under the Human Rights Act.⁴
- 8.1.5 The influential report of the Committee on Official Information ("Danks Committee") made various recommendations as to the mechanisms for enforcement under the Official Information Act which have in effect also shaped aspects of the Privacy Act years later. For that reason I have referred back to the Danks Report in this review and will mention aspects of it in the section by section discussion. The Danks Committee took the view that there must be in the information law a channel for public grievance. It took the view that "decisions about disclosure of information taken by departments and agencies must be subject to test by an independent arbiter."⁵ In a variety of ways the Committee's ideas continue to be reflected. In this review, I have gone back to the Danks report, not only to remind myself of the Committee's insights, but also to reconsider whether the ideas crafted for a law dealing only with access, and only in the public sector, should be rethought in the broader based Privacy Act.

Role of the courts

- 8.1.6 Danks advised against creating legal rights to information and that approach has generally continued with the recourse to the Commissioner and the Tribunal rather than regular courts. The Committee did propose giving individuals a *right* of access to certain specific categories of information in the public sector and that too is continued in the Act at section 11.

² Although in the official information context the Ombudsmen are the final arbiters on such complaints subject to Ministerial veto.

³ Privacy Act, section 11.

⁴ At the time that the Privacy Act was enacted the Human Rights Commission Act 1977 was in force. Under that legislation there had been recourse to a Tribunal, earlier called the Equal Opportunities Tribunal, for many years.

⁵ Committee on Official Information, *Towards Open Government: General Report*, paragraph 98.

- 8.1.7 It is interesting to reflect on one indicator of the success of the framework for complaints established under the Act. That is, that a litigation alternative exists for a significant class of complaints and yet that alternative is almost invariably not chosen by complainants. For complaints concerning a denial of access to information held by a public sector agency, which remain a large part of my complaints load, the matters may be taken directly to the regular courts.⁶ This continues the position under the Official Information Act. However, under both statutes citizens have preferred the processes provided by the Ombudsmen, and now Privacy Commissioner and Complaints Review Tribunal. Litigation is generally an unattractive and inefficient means to review a decision to withhold information.
- 8.1.8 However, the courts do have one role which will not be referred to again in this part of the report. People charged with criminal offences have a particular interest in having access to information held by a law enforcement agency. At present, we have no criminal discovery or criminal disclosure legislation and the obligations on law enforcement agencies to give access to information, and the role of the courts in supervising that, is largely underpinned on a statutory basis by the right of access granted in the Privacy Act. Courts determine these matters with implicit reliance upon the provisions of the Privacy Act taken together with those in the Official Information Act (for official information which is not personal information about the requester) and in reliance upon certain common law duties upon prosecutors to ensure a fair trial.
- 8.1.9 Where a prosecution has commenced, and the police have withheld information from a requester, requests for review are normally handled by the criminal court seized of the matter rather than by complaint to me and on to the Tribunal. If an individual was not legally represented and, instead of taking the matter up with the court, directed a complaint against the prosecuting agency to me, I would probably decide to take no action on the complaint under section 71(1)(g) (there being an adequate remedy that it would be reasonable for the individual to exercise). The court has various powers to ensure that disclosure is made and to delay a substantive hearing until that happens. There is currently a proposal for a statutory criminal disclosure regime which I believe would better provide for the handling of access matters during and in relation to criminal proceedings.⁷
- Complaints or reviews?*
- 8.1.10 The subject of Part VIII is, as its heading suggests, “complaints”. In fact, at various places the Part makes a distinction between complaints and Commissioner-initiated investigations. There is little or no substantive or procedural difference. However, one legal correspondent has raised the matter and there may be a case for the heading to Part VIII to read “Complaints and investigations”.
- 8.1.11 The Part makes no procedural distinction between complaints alleging a breach of information privacy principle 6 and complaints alleging a breach of any of the other principles.⁸ However, there may be a small advantage in relabelling complaints involving a decision to refuse a request under information privacy principle 6, as access “reviews”.
- 8.1.12 The point is a semantic one and is not related to a problem or difficulty in applying the Act satisfactorily. The issue simply is that “complaint” has certain negative connotations which in many cases are not justified in respect of complaints concerning a denial of access. The fact is, when an individual is denied

⁶ Privacy Act, section 11(1).

⁷ See submission by the Privacy Commissioner to the Ministry of Justice and the Department for Courts in relation to a consultation paper regarding Preliminary Hearings and Criminal Disclosure, February 1998.

⁸ A distinction is made in section 66(2) between these classes of complaints as there is no equivalent to section 66(1)(b) in subsection (2).

“The Commissioner plays an important role in resolving complaints. While forcing complainants to go direct to the Tribunal would result in a body of case law about privacy law being built up fairly quickly, it would discourage many complainants from seeking redress and be more costly for all parties concerned.”

- TELECOM NEW ZEALAND,
SUBMISSION UV13

access to information, he or she is not in a position to know whether that information has been properly withheld or not. By taking the matter up with my office the complainant can have the issue reviewed by an independent person to see if my opinion accords with that of the agency.

- 8.1.13 That is in contrast to complaints involving the other information privacy principles, public register privacy principles and information matching controls, where the individual really is alleging that the agency has done something wrong. The contrast is further marked in cases where the agency has withheld information to protect the privacy of another person.
- 8.1.14 It is possible that by calling the principle 6 complaints “access reviews” a slightly less confrontational mood might be engendered in the investigation. I have no evidence that this would indeed be the case but it seems a reasonable supposition. The agency would not be informed that a complaint had been made against it but merely that the individual had requested a review of its decision to withhold information. Some overseas information laws refers to “complaints” and “reviews”.⁹ Reference to “complaint” continues the terminology adopted by Danks and used in the Official Information Act.
- 8.1.15 Notwithstanding the possible merits of any changes in terminology I make no recommendation for amendment at this stage.
- 8.1.16 Appendix J sets out a series of graphs which illustrate some aspects of the receipt and disposal of complaints since 1993.

SECTION BY SECTION DISCUSSION

8.2 SECTION 66 - Interference with privacy

- 8.2.1 Section 66(1) defines the circumstances in which an action is an “interference with the privacy of an individual”. In essence (and with an important qualification in respect of access and correction matters) to qualify as an interference with privacy there must be:
- an action which breaches an information privacy principle; or
 - an action which breaches a public register code of practice;¹⁰ or
 - non-compliance with Part X (which relates to information matching);
 - taken together with some actual or possible adverse consequence of the action in question.
- 8.2.2 Subsection (2) provides that an action is an interference with the privacy of an individual if it involves certain decisions relating to an information privacy request and there is no proper basis for that decision. In other words, with respect to access and correction matters, subsection (2) does not contain the reference to the actual or possible adverse consequences that subsection (1) does.
- Clarification of interaction between subsections (1) and (2)*
- 8.2.3 Some confusion has arisen over the question of whether, on a complaint concerning refusal of access to personal information, there has to be shown to have been some kind of adverse effect upon the requester to constitute an “interference with privacy”. I am confident that section 66(2) was intended to ensure that substantiated access complaints could be considered an “interference with privacy” without any harm or detriment of the type referred to in section 66(1)(b)

⁹ See Freedom of Information and Protection of Privacy Act 1992 (British Columbia), section 42(2) and 52.

¹⁰ See recommendation 95 which proposes that breaches of the public register privacy principles should also found an interference with privacy.

so long as the various criteria in section 66(2)(a) and (b) are present. However, if there was some harm or detriment, a breach of principle 6 could alternatively be brought under section 66(1).

8.2.4 It is extremely important to ensure that there are enforceable remedies for the access entitlements in principle 6 without any proof of harm or detriment. Quite frequently, such harm or detriment will be absent. The absence of proof of harm must not exist as a barrier to enforceable rights of access. Were that to happen, it would significantly undermine the entitlement and be quite out of keeping with what was intended by the Privacy Act and what is expected by the OECD Guidelines and other international norms governing access laws. It would reduce rights formerly existing in the Official Information Act, and this was surely never intended.

8.2.5 Nonetheless, it is understandable that the confusion has arisen. The interpretational problem is derived from the fact that section 66(1) commences by stating:

“For the purpose of this part of the Act, an action is an interference with the privacy of an individual if, *and only if*, ...”.

On the other hand, section 66(2) commences:

“*Without limiting subsection (1) of this section*, an action is an interference with the privacy of an individual ...”.

8.2.6 In two early cases the Tribunal took the view that it needed to consider whether there had been some loss, detriment, etc under section 6(1)(b) for there to be an interference with the privacy in a case where information had been withheld. In my view, the Tribunal was wrong and it has, in fact, resiled from the position in all its recent cases.¹¹ The Tribunal has now explicitly held that pursuant to section 66(2) there is no need for evidence as to any damage to be established.¹²

8.2.7 I believe that it would be desirable to clarify the section notwithstanding that the confusion caused by the Tribunal’s earlier decisions has now been put right by the Tribunal itself. This may be achieved by deleting the phrase “and only if” from section 66(1). However, Parliamentary Counsel’s opinion should also be sought as to whether any other or further change is necessary to make the position more plain in any other way.



RECOMMENDATION 101

Section 66(1) should be amended by deleting the words “and only if”.

8.3 SECTION 67 - Complaints

8.3.1 Section 67 provides that any person may make a complaint to the Privacy Commissioner about an alleged interference with privacy.

8.3.2 A complaint may also be lodged with an Ombudsman who must forward the complaint to the Commissioner. The reason for this provision was that up until the enactment of the Privacy Act the Ombudsmen had been receiving and dealing with complaints concerning refusal of access to personal information held in the public sector and it was considered likely to cause less confusion for the Ombudsmen to continue to receive them for transfer to the Commissioner.

¹¹ For example, *M v Ministry of Health* (1997) 4 HRNZ 79, *M v Police* (1997) 4 HRNZ 91, and *Adams v NZ Police* CRT decision No. 16/97.

¹² For example in *M v Ministry of Health*.

- 8.3.3 It is timely to now repeal subsections (2) and (3) as there is no continuing need to expressly provide for the lodging of complaints with the Ombudsmen. The proportion of such complaints being received and passed on in this way has diminished as the public became more familiar with the Privacy Act and the respective roles of the Ombudsmen and Privacy Commissioner. Very few, if any, complainants complain to the Ombudsmen in reliance upon section 67. Rather, they complain to the Ombudsmen mistakenly thinking that they are the review authority for such complaints. There is no need for a provision such as subsections (2) and (3) since the complainants who enquire before lodging a complaint are easily directed to the correct complaints authority; and complaints wrongly received by the Ombudsmen may simply be transferred to my office pursuant to section 17A of the Ombudsmen Act.



RECOMMENDATION 102

Section 67(2) and (3) which provide for the lodging of complaints under the Privacy Act with the Ombudsmen, and for the transfer of such complaints, should be repealed.

8.4 SECTION 68 - Mode of complaint

- 8.4.1 Complaints may be made to the Commissioner orally or in writing. If an oral complaint is made, it must be put in writing as soon as practicable and if necessary my office is to render reasonable assistance.
- 8.4.2 My office is geared to render assistance but, in fact, oral complaints are rare. Usually in such cases the details are taken on the telephone, written down and subsequently checked with the complainant. Since the first year of operation of the Act I have maintained a freephone privacy hotline. This service helps ensure that complainants who are unable to make their complaint in writing nonetheless have equitable access to the complaints process wherever they live.

8.5 SECTION 69 - Investigation of interference with privacy of individual

- 8.5.1 My functions under this Part of the Act are:
- to investigate an action that appears to be an interference with the privacy of an individual;
 - to act as conciliator in respect of any such actions;
 - to take such further steps as are contemplated under Part VIII.
- 8.5.2 I may commence an investigation either on a complaint or on my own initiative. The overwhelming majority of investigations are commenced with a complaint. However, on occasion, I will initiate an investigation based on other information. For example, I may become concerned at an agency's actions through information received from the public or reported in the news media. It is also possible that I may initiate an investigation on my own initiative where a number of people complain about the same issue but not the individual concerned.
- 8.5.3 On one occasion there had been widespread news media reporting of an unauthorised disclosure of information. I expected a complaint to eventuate but, after a period, none arrived. Given the seriousness of the circumstances I initiated an investigation and, having established certain details from the agency, spoke with the individual concerned. It transpired that the individual was illiterate and had not been fully aware of aspects of the public disclosure or in a position to complain.

“A third party should be able to make a complaint. Some people lack the ability to make a complaint or would be too overwhelmed to make a complaint.”

- NZ LAW SOCIETY

PRIVACY WORKING GROUP,

SUBMISSION UV18

8.6 SECTION 70 - Action on receipt of complaint

8.6.1 Section 70 provides that on receiving a complaint, the Commissioner may decide either to investigate or to take no action on the complaint. I must advise the complainant and the agency complained about as soon as practicable of the procedure that is proposed to be adopted.

Notification

8.6.2 Section 70(2) provides for the Commissioner to advise the complainant and the “person to whom the complaint relates” of the procedure to be adopted. I take this latter phrase to mean the respondent, or the person who would be the respondent if proceedings are taken, as this is consistent with the way that the phrase is used in section 73(a).

8.6.3 An interesting point about the section is that it appears to require notification to the “person to whom the complaint relates” of a decision to take no action on the complaint. It might seem surprising to notify the agency that the Commissioner has received a complaint that he does not intend to investigate. Where a decision is taken not to investigate a complaint under the Human Rights Act notification is required to be given only to the complainant.¹³ Similarly, under the Ombudsmen Act only the complainant, and no-one else, is required to be notified.¹⁴

8.6.4 I suspect that it may have been unintentional to require notification to the agency where a decision is taken to take no action on a complaint. It is, for example, somewhat mysterious to advise an agency out of the blue of “the procedure that the Commissioner proposes to adopt” in relation to a complaint in respect of which the Commissioner intends to take no action. Furthermore, section 71, which precisely sets out the grounds upon which the Commissioner may decide to take no action, expressly states that the Commissioner is to notify the complainant of the decision to take no action, or no further action, and the reasons for that decision. It is silent in relation to the respondent agency.¹⁵

**RECOMMENDATION 103**

Section 70(2) should be amended so that the Commissioner is obliged to advise of the procedure to be followed only where he has decided to investigate a complaint so as to avoid overlap with the obligations in section 71(3).

Deferral

8.6.5 In recommendation 106 I propose that provision be made for the deferral of complaints in certain limited circumstances. If this recommendation is adopted then it will be necessary to amend section 70(1) to provide that the Commissioner may defer a complaint.

Preliminary inquiries

8.6.6 Section 70 anticipates only two alternative courses of action when I receive a complaint - to investigate the complaint or to take no action. In fact, I receive a number of complaints for which neither course of action is immediately appropriate and instead I make preliminary inquiries of the complainant. It is undesirable that section 70 should ignore this third appropriate course of action since at present it does not accurately describe the appropriate range of

¹³ Human Rights Act 1993, section 76(3).

¹⁴ Ombudsmen Act 1975, section 17(3).

¹⁵ In passing, while there may be no good reason to require the Commissioner to tell the respondent in all cases of the *grounds* for which he is deciding to take no action, or no further action, obviously it is necessary that notification be given to the respondent where the Commissioner decides to take no *further* action. Such notification is given under section 75.

“Complaints should only be lodged by those directly affected (or their agents acting on their behalf). Given the Privacy Commissioner’s discretion to investigate on his or her own motion, there is no need to permit persons *other* than those affected (ie the officious bystander) to lodge complaints.”

- TELECOM NEW ZEALAND,

SUBMISSION UV13

action to be taken on receipt of a complaint. Where I make preliminary inquiries at present, I reconcile my actions with section 70 by taking the position that the inquiries are necessary to establish whether indeed I have a “complaint”, that is a complaint within jurisdiction. If I do not then, in a sense, section 70 does not apply. If I do, then I will indeed take one of the two courses of action mentioned in section 70 as soon as those preliminary inquiries are complete.

- 8.6.7 Typical preliminary inquiries of a complainant include:
- establishing whether a complaint really falls within my jurisdiction - which is not always plain from the initial communication;
 - asking for details of the respondent without which an investigation cannot commence anyway;
 - establishing for certain that the complainant does wish the matter to be investigated and is not simply raising a matter of concern for my information or to receive advice on the application of the law.
- 8.6.8 There are a number of complaints which, although within jurisdiction, are unlikely to succeed because of a relevant provision in the Act or a consistent line of interpretation on similar cases. For example, a complainant may not be aware that a respondent could rely upon the domestic affairs exemption in section 56 or that the case is similar to one in which the withholding of information was upheld by the Tribunal.
- 8.6.9 The approach that I have tended to take where a complaint appears to be beyond my jurisdiction is to explain that I will not take the matter further unless the complainant responds and answers the jurisdictional problem. No further action is taken unless the complainant comes back to me. In cases where the complaint is within jurisdiction, but there is an apparent answer in a section of the Act or in a precedent case, I explain to the complainant that unless I hear again I will presume that he or she does not desire that action be taken on the complaint. If I do not hear back, I write again to the complainant after a reasonable period communicating my decision to take no action on the complaint pursuant to section 71(1)(d).
- 8.6.10 I suggest that a provision should be inserted in the Act reflecting that such preliminary inquiries do appropriately occur. A precedent is to be found in section 42 of the Australian Privacy Act which states:
- “Preliminary inquiries**
Where a complaint has been made to the Commissioner, the Commissioner may, for the purpose of determining:
(a) whether the Commissioner has power to investigate the matter to which the complaint relates; or
(b) whether the Commissioner may, in his or her discretion, decide not to investigate the matter;
make inquiries of the respondent.”¹⁶
- 8.6.11 A provision dealing with preliminary inquiries could be incorporated into section 70 or established as its own section. Rather than specify the provision as a third option in addition to the two alternatives set out in section 70(1) I suggest that it be drafted as allowing the notification to the respondent to be postponed until preliminary inquiries are undertaken. In this fashion, once the preliminary inquiries are made the Commissioner may still simply choose one of the two alternatives in section 70(1) for a complaint which appears within jurisdiction.

¹⁶ Privacy Act 1988 (Australia), section 42. In the situation I am outlining the preliminary inquiries would be made of the *complainant*.

**RECOMMENDATION 104**

Section 70 should be amended to recognise that a decision to investigate a complaint, or to take no action on a complaint, may be postponed until preliminary inquiries are made of the complainant for the purpose of determining whether:

- (a) the Commissioner has power to investigate the matter; or**
- (b) the Commissioner may, in his or her discretion, decide not to investigate the matter; or**
- (c) the complainant wishes to proceed with the complaint.**

Complaints beyond jurisdiction

8.6.12 Complaints which are beyond jurisdiction pose a particular problem. From the way that Part VIII is presently drafted it seems that such communications are not to be treated as “actions that appear to be an interference with privacy” which is my function under the Part by virtue of section 69. For example, the grounds upon which the Commissioner may decide to take no action on a complaint under section 71 omit any reference to the fact that a complaint does not constitute an interference with the privacy of an individual. The Australian Privacy Act has that as the first reason for which the Commissioner may decide not to investigate or to investigate further a complaint.¹⁷

8.6.13 It appears to be intended that where a communication in the nature of a complaint is made to the Commissioner which is beyond jurisdiction that the formal complaints processes are not to be followed and, for example, cannot progress to the Tribunal. Although the Act is silent, good public administration would have me notify the person explaining that I have no jurisdiction to investigate the matter. That would not amount to a decision under section 71. However, it would amount to the exercise of a statutory power of decision that could be judicially reviewed. If this is the intended process it may be desirable for aspects of it to be explicitly set out in Part VIII.

8.6.14 However, consideration could be given instead to allowing the Commissioner to make a determination that the complaint appears to be beyond jurisdiction and to allow that matter solely (and not the substance of the complaint) to be the subject of Tribunal proceedings at the suit of the aggrieved individual. This may be an appropriate way of dealing with these issues since otherwise my view on the jurisdictional question would appear to be a bar to taking matters to the Tribunal whereas normally I simply render opinions which can, if proceedings are taken, be substituted by the opinion of the Tribunal. I might add that this course has actually been taken in proceedings before the Tribunal although the jurisdiction might be open to question.¹⁸ Consideration might also have to be given, for consistency, to the position of decisions concerning transfer under sections 72 to 72B of the Act.

**RECOMMENDATION 105**

Consideration should be given to establishing a process whereby a decision by the Commissioner that a complaint is beyond jurisdiction can, on this question alone, be referred by the complainant to the Complaints Review Tribunal for its decision on the matter.

8.7 SECTION 71 - Commissioner may decide to take no action on complaint

8.7.1 This section sets out the various grounds upon which I may, in my discretion, decide to take no action, or no further action, on a complaint.

8.7.2 Seven specific reasons are listed in respect of which I may decide to take no

¹⁷ Privacy Act 1988 (Australia), section 41(1)(a).

¹⁸ See *Laing v Complaints Assessment Committee*, Complaints Review Tribunal, CRT decision No 9/98, 22 June 1998.

“The Commissioner should not be empowered to take no action at all upon a complaint. The Commissioner should take some action - perhaps initiate an investigation - before reaching the conclusion that no further action should be taken.”

- TVNZ, SUBMISSION UV10

action on a complaint. Those are the only such reasons I may rely upon. However, in addition to those seven reasons, I may decide to take no *further* action on a complaint which I have started investigating for a further broader reason set out in section 71(2). That allows me to take no further action on a complaint if it appears to me that having regard to all of the circumstances of the case any further action is unnecessary or inappropriate.

8.7.3 I have carefully examined this section to see if there is any potential to appropriately screen out any further complaints given that my resources are fully stretched with the present complaints workload.¹⁹ My discretion to discontinue is satisfactory, from my point of view, where an investigation has already commenced. The specific provisions in subsection (1) and the general provision in subsection (2) provide me with all of the discretion that I believe I need. However, if the discretion to take no action is to contribute to diminishing the complaints queue, in some small fashion, it would need to be directed towards complaints for which no investigation has begun. The discretion to take no action on complaints without investigation is, quite rightly, tightly circumscribed since the meritorious complaints might be affected as well as the unmeritorious.

8.7.4 In fact, discontinuance on complaints where no investigation has been commenced is a double-edged sword for complainants and respondents. While it may be a blow to a complainant to hear that his or her complaint will not be investigated at all, the determination under section 71 also thereby permits him or her to take the matter directly to the Tribunal.²⁰ Similarly, from the perspective of the agency any initial euphoria at a potential complaint being “killed” may be tempered by the realisation that the complainant may take the matter to the Tribunal and the matter will not have benefited from the attempts by the Privacy Commissioner to look into the facts and sort the matter out in a conciliatory fashion.

Deferral of complaints

8.7.5 The grounds for taking no action on a complaint are appropriate. However, I have concluded that the Act would be enhanced through a provision allowing for the “deferral” of a complaint until a complainant has taken a particular action. “Deferral” would be a new category standing between investigation of a complaint and a decision to take no action.

8.7.6 The following features of the proposal should be noted:

- a decision by the Commissioner to defer a complaint would not entitle the aggrieved individual to take proceedings on the complaint to the Complaints Review Tribunal;
- the complaint would remain “on the books” of the Privacy Commissioner but no action would be taken on it except notification to the complainant explaining that investigation had been deferred until the individual had taken the requisite action (either taking the complaint up directly with the agency or with a recognised industry complaints body);
- a deferred complaint would not be queued in the Commissioner’s system until it ceases to be in a state of deferral - providing an incentive for individuals to make early efforts to seek to sort matters out for themselves if they can;
- deferral would *not* be automatic for all complaints that have not been taken up with an agency or recognised industry complaints body - the Commissioner would only use the deferral power where it appeared reasonable for the complainant to take the requisite action - in certain complaints the in-

¹⁹ At present the queue for complaints to be investigated is approximately 12 months from the date that the complaint is received - and this queue is growing. See Appendix J.

²⁰ Privacy Act, section 83.

“A complaints procedure is clearly the most accessible and barrier free approach to seeking redress. The trade-off for such an open mechanism is that screening out of insubstantial complaints is difficult and resource intensive. In comparison the cost and procedural barriers of litigation in the general courts usually provides a filter that prevents frivolous grievances progressing further, but at the same time may prevent deserving complainants from seeking redress.”

- MINISTRY OF JUSTICE,
SUBMISSION UV15

dustry body may be an inappropriate arbitrator of certain privacy disputes and on some occasions further direct contact between complainant and respondent may lead to more polarised positions which might hamper, rather than expedite, a resolution of the matter.

- 8.7.7 Neither the notion of “deferral” nor the placing of obligations on complainants to take matters up directly with respondents are entirely new for privacy laws. Section 41(3) of the Australian Privacy Act allows their Commissioner to defer the investigation of complaints in certain circumstances. The Australian Commissioner also has the power not to investigate a complaint where satisfied that:

“although a complaint has been made to the Commissioner about the Act or practice, the complainant has not complained to the respondent.”²¹

- 8.7.8 A further example of deferral is to be found in the Personal Health Information Act 1997 (Manitoba) which provides:

“The Ombudsmen may decide not to investigate a complaint about access or may defer investigating it if:

- (a) the complaint concerns a health care facility or health services agency and there is an internal appeal procedure that the complainant has not used; or
- (b) the complaint concerns a health professional and there is an expeditious and formal procedure for addressing such complaints available through a body that has statutory responsibility for regulating the practice of the health professional, which the complainant has not used.”²²

- 8.7.9 The proposal would introduce the notion of deferring a complaint. It would need to be made clear that a decision to defer did not entitle an individual to take the substantive complaint to the Tribunal. A deferral would not affect an individual’s right to take a complaint directly to a court in circumstances where that would be permitted under section 11(1). The new provision may have to spell out some matters such as the length of time that a complaint may be deferred and whether it lapses at that point.

Grounds for deferral

- 8.7.10 The first proposed ground for deferral is where the complainant has not complained to the respondent. This is relatively straightforward and I would desire that the resultant clause keep matters relatively simple. An elaborate procedure is not needed. I would simply expect the complainant to put him or herself in the position of most other complainants. The complainant would probably telephone the agency, or write a letter to it, and if still unable to resolve the complaint will revert to my office with a copy of the agency’s reply, an account of the conversation held or a copy of the letter written and the fact that no reply has been received.
- 8.7.11 The second proposed ground has some similarities to the existing sections 71(1)(f)(i) and (g). That is, that the complaint may be deferred where there is an industry complaints mechanism that the Commissioner considers ought to be utilised. Suitable criteria for recognition could be prepared or I might have re-

²¹ Privacy Act 1988 (Australia), section 41(1)(b). That ground is not appropriate to directly incorporate into section 71(1) of our Act because that decision itself may allow the complainant to take the matter to the Tribunal. No such implication flows from the Australian Commissioner’s decision not to investigate since there is no Tribunal under the Australian Act.

²² Personal Health Information Act 1997 (Manitoba), section 41(2).

“Providing the Privacy Commissioner with the discretion not to take up a complaint until such time as all reasonable attempts have been made by the individual to resolve the issue could ensure that only cases with substance can proceed to the Commissioner or courts.”

- INLAND REVENUE DEPARTMENT,
SUBMISSION UV7

gard to existing standards for the adequacy of complaints mechanisms.²³ There are no independent complaints mechanisms which would have *all* of the qualities that I would think necessary to substitute adequately for the Act's complaints mechanism. However, some exist which would be suitable for *some* complaints.

8.7.12 The two most promising mechanisms, the Banking Ombudsman and the Insurance and Savings Ombudsman, have a number of excellent features providing for professional investigation, impartial adjudication, and the awarding of consumer remedies.²⁴ However, their jurisdiction is based upon concepts and issues specific to the industries and not, for example, to address alleged interferences with privacy of individuals, or breaches of the information privacy principles. Another problem with industry complaints bodies is that they may have limited power to obtain evidence where that concerns someone else who will not consent to its release.

8.7.13 Furthermore, the compensation that can be awarded is not commensurate with that available under the Act. Nonetheless, since many cases involve compensation at the lower end of the scale they may each be adequate for many relevant privacy cases. Indeed, even under existing provisions my office often encourages some complainants to take their matters up with those industry ombudsmen.

8.7.14 While the two ombudsmen mentioned are the main industry bodies I would have in mind, others may exist or be created from time to time which may be suitable to address a deferred complaint in circumstances where I would not generally be willing to exercise a decision to take no action under section 71(1)(g). Where I defer on this ground I anticipate that I would notify the complainant and indicate the steps to be taken - namely to complain to the specified complaints body. The notification would also indicate at which point the complainant could ask the matter to be again taken up by me. This may involve, for example, an industry ombudsman rendering an opinion that a complaint cannot be settled or falls outside his or her jurisdiction.

8.7.15 Although I have made my recommendation in the context of section 71 it is likely that the amendment to give effect to the proposal would affect other sections as well. For example, section 70 would need to be amended. Parliamentary Counsel may have a view as to whether the provisions for deferral should appear in section 70, section 71 or constitute their own intermediate section.

8.7.16 While I see the introduction of deferral as a useful reform, no-one should be under any illusion that it will significantly reduce the complaints queue. It may contribute to a small reduction, to be welcomed, but the proposal is really directed to enhancing the processing and prioritising of complaints investigation whether or not there is a backlog of complaints.



RECOMMENDATION 106

Provision should be made in Part VIII of the Act for the Commissioner to defer action, or further action, on a complaint where:

- (a) the complainant has not complained to the agency concerned and the Commissioner considers that the complainant should do so in an attempt to directly resolve the matter; or**
- (b) the complaint concerns an agency in respect of which there is an independent, expeditious and appropriate procedure for addressing such complaints available through an industry body which the complainant has not used.**

²³ For example, see the Australian Federal Bureau of Consumer Affairs, "Benchmarks for Industry-based Customer Dispute Resolution Schemes", November 1996, set out in Office of the Retirement Commissioner, *Review of Banking and Savings Ombudsman Schemes and Consideration of the Need for a Statutory Savings Ombudsman*, July 1997, Appendix I.

²⁴ Indeed, to be entitled to use the title "Ombudsman" the credibility of the process must be established to the satisfaction of the Chief Ombudsman. See Ombudsmen Act 1975, section 28A.

"While it is possible for a large organisation, such as a bank, to provide internal complaints procedures of the kind described, it is clearly impractical to expect the same of smaller agencies. Because I have seen a number of cases where the initial problem has been exacerbated by the poor handling of the complaint, I do not think it desirable that complainants should routinely be required to approach agencies, or should have their complaints forwarded to agencies, for attempts at resolution unless the Privacy Commissioner is satisfied that the agency in question has appropriate procedures for complaints handling."

- BANKING OMBUDSMAN,
SUBMISSION UV14

Limitation period

8.7.17 The first ground upon which I may decide to take no action, or no further action, on a complaint is where, in my opinion:

“The length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable”.²⁵

8.7.18 It should come as no surprise that I have rarely taken a decision based upon this ground, given the fact that the complaints jurisdiction is relatively young. The Privacy Act only applies to actions which have occurred on or after 1 July 1993.²⁶ I have not yet found any significant problem of individuals bringing complaints to me a long time after the subject matter of the complaint. Were that to happen section 71(1)(a) provides an adequate filter for my purposes. As a backstop, pursuant to section 4(1)(d) of the Limitation Act 1950, any proceedings would generally be barred after the expiration of six years from the date on which the cause of action accrued.

8.7.19 I do not recommend any change to the limitation period at this stage. It is a matter which could be reviewed in later years when the complaints jurisdiction has matured if problems arise.

8.7.20 However, I should observe in this context that my own complaints queue now extends to more than 12 months.²⁷ This is not the fault of individual complainants but it may, in fact, mean that the investigation of some complaints may be no longer practicable or desirable given the length of time that has elapsed between the date when the subject matter of the complaint arose *and the date upon which it is practicable for the Commissioner to investigate*. This is a sorry state of affairs which has the potential to seriously impact on some complainants and cause inconvenience and irritation to some agencies when called upon to explain their actions many months after the relevant actions occurred. These problems cannot be solved by a shorter limitation period but instead point to the need to devote further resources to enabling complaint investigations to be completed with appropriate despatch.

8.8 SECTION 72 - Referral of complaint to Ombudsman

8.8.1 Section 72 requires me to consult the Chief Ombudsman where I receive a complaint which more properly relates to an area under the Ombudsmen’s jurisdiction. There are not many of these. Section 17A of the Ombudsmen Act imposes a corresponding duty on the Ombudsmen under which there is a frequent transfer of complaints. The provision has operated satisfactorily in practice.

8.9 SECTION 72A - Referral of complaint to Health and Disability Commissioner

8.9.1 I must consult with the Health and Disability Commissioner where I receive a complaint that more properly relates to an area under the Health and Disability Commissioner’s jurisdiction. Section 40 of the Health and Disability Commissioner Act imposes a corresponding duty on the other Commissioner. There are not as many complaints transferred pursuant to this provision as to the Ombudsmen.

²⁵ Privacy Act, section 71(1)(a).

²⁶ Furthermore, breaches of certain principles occurring before 1 July 1996 have not been able to be taken to the Tribunal - Privacy Act, section 79.

²⁷ See Appendix J.

8.10 SECTION 72B - Referral of complaint to Inspector-General of Security and Intelligence

- 8.10.1 Section 72B requires me to consult the Inspector-General of Intelligence and Security where I receive a complaint that more properly relates to an area under his jurisdiction. The section provides for the transfer of appropriate cases but, thus far, there have been no such consultations or transfers.
- 8.10.2 When the Privacy Act was enacted there was a single provision for the referral of complaints (section 72 allowing for transfer to the Ombudsman). With the creation of the Health and Disability Commissioner and Inspector-General of Intelligence and Security there are now three such provisions. Conceivably further provisions might be needed in the future if relevant complaints bodies are established. There may even be a case for existing complaints bodies to be referred to such as the Police Complaints Authority, Human Rights Commission and the Broadcasting Standards Authority. I note that the Health and Disability Commissioner Act and the Inspector-General of Intelligence and Security Act, both of which were passed later than the Privacy Act, have single combined complaints transfer provisions. In an effort to streamline the Privacy Act, and to create a simpler framework for the addition of any further complaints transfer provisions, sections 72, 72A and 72B should be combined into a single section and consideration be given to adding other statutory complaints bodies. If necessary, a new schedule could be created.



RECOMMENDATION 107

Sections 72, 72A and 72B should be combined into a single section providing for the referral of complaints to the Ombudsmen, Health and Disability Commissioner and Inspector-General of Intelligence and Security, and consideration should be given to listing other statutory complaints bodies.

8.11 SECTION 73 - Proceedings of Commissioner

- 8.11.1 Section 73 requires the Commissioner to inform all interested parties of his or her intention to undertake an investigation and to inform the person to whom the investigation relates of the right to submit a written response to the complainant. I have observed elsewhere that the marginal note to this section is not particularly helpful and recommend that it be changed to “parties to be informed of investigation”.²⁸

8.12 SECTION 74 - Settlement of complaints

- 8.12.1 Section 74 provides that the Privacy Commissioner may endeavour to secure a settlement of the complaint without investigating it or investigating it further. It is plain from this section, and others, that Parliament intends that considerable emphasis be placed in my complaints processes upon seeking to secure settlements of complaints. It is important to understand this to obtain a full appreciation of the complaints processes in the Act. A significant role of the Commissioner is to try to sort out the privacy problems that have led individuals to become aggrieved at the actions of agencies and to do so in a fashion which resolves those problems, if appropriate compensates the aggrieved individual and seeks to obtain assurance that the same breach of privacy is unlikely to occur again.
- 8.12.2 Quite often it becomes apparent fairly early in the piece that there really is “something” to the complaint and that while the investigation has not established all of the facts, or concluded the finer points of legal interpretation, the agency is partly at fault and ought to make some amends. Frequently I find

²⁸ See recommendation 2.



“Would enabling the complainant to go to the Complaints Review Tribunal result in any earlier investigation or merely shift the delay from one venue to another? Is it ultimately a matter of resources? If so, it is probably less costly to the community at large to increase the resources of the Privacy Commissioner.”

- NZ VIDEO DEALERS ASSOCIATION, SUBMISSION UV9

that all a complainant really wishes to secure is an apology, some out of pocket expenses, and an assurance from the agency that the same thing will not happen again. Often complainants say that they want to make sure that what happened to them could not happen again to someone else.

- 8.12.3 If a settlement can be secured in those circumstances, and I can be satisfied that the agency is taking steps to ensure that a breach is not repeated, it will frequently be unnecessary to go on with an investigation.

8.13 SECTION 75 - Parties to be informed of result of investigation

- 8.13.1 This provides that I must conduct my investigations “with due expedition” and at the end of the investigation am required to inform the parties concerned of the results and of what further action (if any) I propose to take in respect of the complaint.

- 8.13.2 I do not have the resources necessary to process all of the complaints that are received within time-frames that I believe New Zealanders would expect as reasonable. I do not believe that Parliament intended, when it enacted the Privacy Act, that individuals should have to await 12 months before having their complaint investigated.²⁹

- 8.13.3 Such a situation was never allowed to exist when access reviews were the subject of review by the Office of the Ombudsmen. I believe that the Ombudsmen’s office is more appropriately funded and does a good job of processing its access reviews. However, I consider it quite unfair to my office, and more particularly for complainants and respondents, that a third party who might request information from a public sector agency will have their complaint about access to official information promptly investigated by the Ombudsmen’s office but their complaint about access to their personal information may languish for months. This is despite the fact that access requests by the individual concerned have always been seen as one of the most fundamental and important of the access rights established originally by the Official Information Act. Accountability is at the heart of freedom of information laws and it would seem that accountability for handling people’s personal information is now seen as less important. The fundamental nature, and importance, is manifest by the fact that:
- personal access rights to information held by public sector agencies are *legal rights* and not simply entitlements;
 - information may be withheld for fewer reasons because of the importance of the rights and no charge may be made for individual access to such information.

- 8.13.4 I am in breach of the requirement of this section to conduct investigations “with due expedition” if the investigation is to be timed from the date upon which I receive a complaint. Through the queuing system I have endeavoured to ensure that my staff are not overwhelmed with too many current files. Complainants get an unrealistic impression that a complaint can then be investigated “with due expedition”. Therefore once a complaint file is allocated I do expect my staff to handle the work efficiently and expeditiously. However, it is of little comfort to complainant and respondent to know that in due course when the complaint reaches the front of the queue it may then be handled with due expedition.

- 8.13.5 It is anomalous that a third party such as a journalist may have a refusal to make available information about a person investigated promptly while the individual concerned who is refused access to their own information cannot get that review without a long delay.

“The use of Commissioners and Ombudsmen is considerably cheaper than the Courts. We consider that more resources should be made available to enable the Office of the Privacy Commissioner to promptly facilitate settlement of disputes.”

- NZ GENERAL PRACTITIONERS’ ASSOCIATION, SUBMISSION S28

29 Details of the complaints queue are set out as at Appendix J.

**RECOMMENDATION 108**

Adequate funding should be made available so that the volume of complaints received at the Office of the Privacy Commissioner can be processed, as required by section 75, “with due expedition”.

8.14 SECTION 76 - Compulsory conferences

8.14.1 This section provides for the calling of compulsory conferences enforceable by summons. The provision is derived from similar provisions in the Protection of Personal and Property Rights Act 1988 relating to compulsory pre-hearing conferences. Section 80 of the Human Rights Act 1993 makes similar provision but refers to the process as “compulsory conciliation” and the meeting as a “conciliation conference”. The Health and Disability Commissioner Act 1994, section 61, refers to it as a “mediation conference”.

8.14.2 I have used the power to call compulsory conferences very sparingly.

8.15 SECTION 77 - Procedure after investigation

8.15.1 Section 77 provides that after an investigation the Commissioner should attempt to secure a settlement of the matter and, where appropriate, obtain an assurance against repetition of the interference with privacy. Where a settlement and assurance cannot be secured, or where it appears that the action was done in contravention of a previous assurance, or that any term of a settlement has not been complied with, I may refer the matter to the Proceedings Commissioner for the purpose of deciding whether proceedings should be instituted before the Complaints Review Tribunal under section 82.

8.15.2 It may be desirable to make a small change to section 77(1)(a) to align it more closely to the approach for seeking settlement of complaints set out in section 74. Section 74 indicates that the Commissioner may use his best endeavours to secure a settlement “where it appears possible to secure a settlement”. Section 77(1)(a) simply provides that the Commissioner “shall” use his best endeavours to secure a settlement where he is of the opinion that the complaint has substance. At some point the Commissioner has to conclude that attempts at settlement are fruitless through, say, the intransigence of the respondent or an unreasonable attitude of the complainant.

**RECOMMENDATION 109**

Section 77(1)(a) should be amended so that the Commissioner is required to continue endeavouring to secure a settlement only where it appears to the Commissioner that settlement is possible.

8.16 SECTION 78 - Procedure in relation to charging

8.16.1 Where a complaint is that a charge made for an information privacy request is unreasonable, the Privacy Commissioner, failing settlement, is to make a final and binding determination of the charge that ought reasonably to have been imposed.

8.16.2 When the Privacy of Information Bill was introduced it was proposed that no charge be made for giving access to information whether held in the public or private sectors. This would have continued the approach from the Official Information Act and extended it to the private sector as well. However, the Select Committee agreed with a variety of submissions that the making of a reasonable charge should be permitted for obtaining access to information held in the private sector. Consequently, there needed to be a procedure for complaints alleging that a charge levied was unreasonable. Mainstream complaints, if not amenable to settlement through the Commissioner’s processes, can be

“We are concerned at the large increase of complaints which your office is dealing with. Our experience of complaints about breaches of the Privacy Act or banker/customer confidentiality is that easy access to the free complaints investigation service provided by the Privacy Commissioner sometimes impedes the resolution of complaints. We believe that the Commissioner’s resources are better spent on the policy area ensuring that there is informed debate on what are increasingly complex issues.”

- WESTPACTRUST, SUBMISSION S34

taken to the Complaints Review Tribunal for determination. This was seen as undesirable for charging complaints and it was preferred that they be able to be determined without recourse to the Tribunal, which would have added time and cost to an issue which should be determined quickly and cheaply. Charging complaints under section 78 are the only ones for which the Commissioner may issue a final and binding determination.

- 8.16.3 The provision has worked satisfactorily and it would be inappropriate to have charging complaints able to be taken to the Tribunal. However, it may be appropriate to broaden section 78 so that it applies to all charging complaints not simply those alleging that a charge fixed in respect of an information privacy request is unreasonable. The section should perhaps also apply to complaints that the charge was made in circumstances where none at all was permissible, reasonable or not. The main circumstance in which this would arise is if a public sector agency made a charge notwithstanding the prohibition in section 35(1). The other circumstance is where a private sector agency makes a charge prohibited by a code of practice. Such complaints ought to be able to be determined in the same relatively straightforward manner as other section 78 complaints.



RECOMMENDATION 110

Section 78 should be broadened to encompass all charging complaints.

8.17 SECTION 79 - Breaches of certain principles occurring before 1 July 1996

- 8.17.1 Section 79 was part of the staged implementation of the Act. While all twelve of the information privacy principles were applied to agencies from “day one”, Tribunal remedies were not immediately available for all interferences with privacy. During the first three years I could investigate complaints concerning breaches of any of the principles but if I was unable to secure a settlement then proceedings could be taken to the Tribunal only if the complaint concerned principles 5, 6, 7 or 12.
- 8.17.2 The staged implementation did satisfactorily assist in the introduction of the Act. Had Tribunal remedies been fully available from the commencement of the Act I suspect that many agencies would have worried about their liability. With the three year “breathing space” agencies had the opportunity to modify their information handling practices before enforceable sanctions became available. The period also gave the opportunity for professional associations and trade bodies to give advice to their membership as to compliance and for my office to undertake training and education activities. The complaints that were investigated during the early years were done so on an Ombudsman-type basis (that is, without prospect of an enforceable remedy) and some of the resultant opinions were disseminated through the issue of case notes. A number of settlements were achieved involving the payment of damages.
- 8.17.3 The staged introduction was not a complete success in all respects since it allowed a degree of complacency to be established in some quarters particularly with respect to the collection principles. Some advisers misunderstood the implementation arrangements and thought that eight of the twelve principles did not apply until 1996 - whereas they had applied since 1993. This was an unfortunate message since a pro-active attention to information collection practices almost inevitably leads to fewer compliance problems down the track with use and disclosure of information. Another consequence related to the fact that Tribunal precedents were largely unavailable for the first three years. Indeed, there was only a single decision of the Tribunal in 1994 and one interim decision in 1995. From 1996 onwards, with the completion of the transitional arrangements, a modest but steady stream of Tribunal decisions have been rendered providing the guidance on the interpretation of the Act.

8.18 SECTION 80 - Commissioner to report breach of duty or misconduct

- 8.18.1 This section requires me to refer evidence of any significant breach of duty or misconduct on the part of an agency or an officer or employee or member of an agency to the appropriate authority.
- 8.18.2 Generally speaking, my complaints and investigation role is to find out if an interference with privacy has occurred and, if so, to see if the complaint can be settled with steps taken to avoid future breach. My primary focus is on the effect on privacy, both in the present case and the potential for harm to privacy in similar circumstances in the future. However, in the course of investigations it sometimes transpires that the action that constituted the interference with privacy also amounts to a significant breach of duty or misconduct. Occasionally, the breach of duty or misconduct is not actually the interference with privacy itself but has simply been turned up during the investigation.
- 8.18.3 I do not commonly refer matters to other authorities. However, during the period under review I utilised the provision in the following ways:
- referring the failure of a professional person to respond to my requirements to the appropriate professional association;
 - referring a case of breach of the Private Investigators and Security Guards Act to the registrar under that legislation;
 - referring the actions of an official to the relevant Minister;
 - referring the actions of an individual to the Police.
- 8.18.4 It should be noted that section 80 imposes on me a *mandatory* duty to report significant breach of duty or misconduct. I am not, for example, to be swayed from doing so by the fact that an agency, or an employee, is able to reach a satisfactory settlement with a particular complainant. I am not open to negotiation with respondents (or indeed complainants since surprisingly the misconduct that is exposed is not always on a respondent's part) as to the question of whether misconduct is to be reported.

8.19 SECTION 81 - Special procedure relating to intelligence organisations

- 8.19.1 A special procedure is established where a complaint is lodged against an intelligence organisation, that is the NZ Security Intelligence Service (NZSIS) or the Government Communication Security Bureau (GCSB). This special procedure was not in the Privacy of Information Bill when introduced but was inserted by the Select Committee after taking submissions. Unfortunately, a drafting error crept into the process with the provision, and the heading, referring to “intelligence agencies” rather than the term defined in section 2, “intelligence organisations”. Section 81 was repealed and substituted by section 4 of the Privacy Amendment Act 1996 and was deemed to have taken effect on 1 July 1993. This resolved the problem.
- 8.19.2 At present section 57 provides that only principles 6, 7 and 12 apply to intelligence organisations. Elsewhere in this report I have recommended that several additional principles should be applied.³⁰ The special procedure for complaints against intelligence organisations prevents matters being taken to the Complaints Review Tribunal and therefore public hearings and enforceable orders do not feature as part of the process. Instead, consistent with the needs of national security, a process is provided whereby if complaints cannot be settled with the intelligence organisation a report is made to the Prime Minister which may be laid before Parliament.

³⁰ See recommendation 83.

- 8.19.3 To date there have been no complaints against GCSB. There have been a number relating to the NZSIS involving requests for access to personal information which have been refused. To date no reports have been made to the Prime Minister and therefore a full opportunity to review the special procedure and practice is not yet possible.
- 8.19.4 Since the special procedure was created there have been two related developments. These are the enactment of the Intelligence and Security Committee Act 1996 and the Inspector-General of Intelligence and Security Act 1996. The role of the Inspector-General of Intelligence and Security is mentioned elsewhere in this report.³¹ The Intelligence and Security Committee is a statutory committee of senior members of Parliament which has amongst its functions:
- to examine the policy and administration of an intelligence organisation; and
 - to consider any matter referred to the Committee by the Prime Minister by reason of that matter’s security or intelligence implications.³²
- 8.19.5 The functions of the Committee do not include originating or conducting enquiries into complaints by individuals concerning the activities of an intelligence organisation that are capable of being resolved under any other enactment.³³ It seems to me that there might be a purpose in providing for reports to the Prime Minister under section 81 to be referred to the Committee on occasion. Such referral would not be intended as part of the resolution of the complaint which, if it has reached the stage of a report to the Prime Minister, is a matter for the Prime Minister, but rather because of the possible relevance to questions of the policy and administration of an intelligence organisation. This might be valuable where, for example, an intelligence organisation might seek to adopt a standard policy in respect of a broad class of complaints. Referral of the report to the Committee should not be seen as a substitute for tabling the report in Parliament (in whole or part) in appropriate cases. It seems to me that laying the report before Parliament, or referring it to the Committee, have separate purposes and either or both might be followed in particular cases.
- 8.19.6 I do not consider that amendment is essential since there would appear to be sufficient discretion under the Intelligence and Security Committee Act for the Prime Minister to take the initiative to forward the report without any further statutory authority. It is also the case that section 81 is primarily directed towards complaints investigation and resolution and the step that I am proposing is only indirectly related to that and, in fact, more relevant to the general policy and administration for complaints of such a type. However, since this is the first opportunity for the matter to be considered since the enactment of the two 1996 Acts I make a recommendation that the change may be examined.

**RECOMMENDATION 111**

Consideration should be given to including in, or following, section 81(5) a provision that the Prime Minister may refer a report given under section 81(4) to the Intelligence and Security Committee.

8.20 SECTION 82 - Proceedings before Complaints Review Tribunal*“Specialist” tribunal*

- 8.20.1 Section 82 introduces the Complaints Review Tribunal. This, and the following 7 sections, govern proceedings before the Tribunal which is utilised for proceedings under the Privacy Act, Human Rights Act, and Health and Dis-

³¹ See paragraphs 6.13.25 - 6.13.30.

³² Intelligence and Security Committee Act 1996, section 6(1)(a) and (d).

³³ Intelligence and Security Committee Act 1996, section 6(2)(c).



**Susan Bathgate: Current
Chairperson of the Complaints
Review Tribunal.**

PHOTO: S BATHGATE

ability Commissioner Act. The Tribunal occupies an important place in the enforcement scheme of the Act. A credible complaints system needs a way of issuing final and binding rulings where a matter cannot be resolved through investigation, conciliation and an independent recommendation. By vesting powers of determination in a judicial tribunal it has been possible to avoid creating a scheme where such powers might be vested in the Commissioner. While the Commissioner is seized of a complaint, the most that he can do is investigate, seek to settle a complaint, and if necessary issue a formal opinion which has persuasive value but is not binding.

- 8.20.2 The Complaints Review Tribunal deals with complaints by individuals of a breach of their human rights. It had existed for many years previously under the title of Equal Opportunities Tribunal where its jurisdiction extended solely to complaints made under the Human Rights Commission Act 1977, which involved allegations of discrimination or sexual harassment. Its jurisdiction now also includes, in addition to privacy, complaints of a breach of the Code of Health and Disability Services Consumers' Rights. Accordingly, it is not a specialist *privacy* tribunal but rather a specialist human rights or complaints tribunal.
- 8.20.3 While the need for a judicial body to have the role that the Tribunal presently serves is accepted, it might be questioned whether the District Court might fulfil the role adequately. The discussion paper asked the question of whether the existing role of the Tribunal should be transferred to the District Court. Fourteen submissions were made opposing any transfer³⁴ and none supported the proposal. Two submissions, while not offering support or opposition, offered further comments such as a suggestion that complainants be given the right to elect whether they take proceedings to the Tribunal or District Court.³⁵
- 8.20.4 Many of the submissions favoured perceived greater flexibility, speed and lower cost of tribunal proceedings as against the District Court. A tribunal is also seen as less daunting for unrepresented plaintiffs and respondents compared with a court. I take the view that there is no case for change at present but believe that the matter should be looked at again at the time of the next review. While the specialist tribunal model is a good one, it may be that at some point in the future when the Act has been "bedded in" over a number of years that efficiencies could be gained through placing the functions with the District Court. While as yet premature, there may in the longer term be positive benefits in bringing the jurisdiction into the mainstream of legal proceedings. Provision could be made for a District Court Judge to sit with assessors if that would assist. Initially there would be advantages in a limited number of judges exercising the jurisdiction to build up experience, knowledge and consistency.
- 8.20.5 I believe that the panel from which the Tribunal is made primarily consists of people who have experience in, or who would be able to contribute in respect of, proceedings brought under the Human Rights Act which has been the Tribunal's staple diet for many years. I am not aware of panel members being selected because of their knowledge of privacy issues. There may be some scope for further developing the Tribunal's expertise in privacy cases in the future through the selection of the panel. An alternative might be that if the Tribunal is chaired by a District Court Judge that Privacy Act cases could be heard solely before that person. Those proceedings should, I suggest, be able to be heard by the chairperson alone.

Section 82

- 8.20.6 Section 82 provides that the Proceedings Commissioner may take civil proceedings before the Complaints Review Tribunal against any person and in

³⁴ See submissions UV1-UV6, UV8-UV11, UV13, UV15, UV16 and S36.

³⁵ See submissions UV18 and S42.

“To allow a complaint to go straight to the Tribunal would cut out the conciliation/mediation stage and introduce from the outset, the litigious note which the Act’s authors attempted to discourage. It is doubtful if delays would be avoided; they would merely occur in a different context.”

- NZ EMPLOYERS FEDERATION,
SUBMISSION UV4

relation to an action of that person that is an interference with the privacy of an individual. The Proceedings Commissioner may also bring proceedings on behalf of an affected class of persons.

- 8.20.7 The Proceedings Commissioner is, like the Privacy Commissioner, a Human Rights Commissioner. The appointment is made pursuant to section 7(1)(d) of the Human Rights Act 1993. The involvement of the Proceedings Commissioner introduces a further independent element to review the strength of the evidence before commencing proceedings, and then to take the proceedings themselves. This is not a role that need be performed by the Privacy Commissioner and it has been seen as desirable in this, and similar contexts, to bring an independent person into the process.
- 8.20.8 The transitional provisions in section 79 have meant that cases which could go to the Tribunal have only started to build up since mid-1996. As it happens, the Proceedings Commissioner has not had a great deal of involvement in the taking of Privacy Act proceedings during the period under review as the cases that have gone to the Tribunal so far have all been taken by aggrieved individuals themselves where I have formed an opinion in favour of the respondent or have declined to refer the matter to the Proceedings Commissioner. For most meritorious cases, my office has usually been able to secure a satisfactory settlement of the complaint and an assurance that the interference with privacy will not be repeated. On only a small number of occasions have I referred matters to the Proceedings Commissioner to be taken to the Tribunal. Thus far, all such cases have been settled prior to the matter being heard before the Tribunal.
- 8.20.9 In cases brought by aggrieved individuals it is not necessary for the Proceedings Commissioner to become involved. Where he declines to appear the Privacy Commissioner may appear. I have adopted the practice to date of ensuring that I am represented before the Tribunal in pre-hearing conferences and in hearings before the Tribunal. In a developing jurisdiction such as this I have wished to use the opportunity to offer assistance to the Tribunal which might not otherwise be presented by the parties to a complaint. I believe that this practice has been of assistance to the Tribunal. Such an appearance does not constitute either Commissioner as a party enabled to appeal against the decision.
- Enforcement of assurances*
- 8.20.10 The inter-relationship of sections 74, 77, 82 and 85 does not seem ideal when it comes to making sure that assurances which are part of a settlement of a complaint are adhered to and if necessary enforced. Under sections 74 and 77 it is anticipated that satisfactory assurances will be obtained from respondents that repetition of any action that is the subject matter of the complaint will not be repeated. However, it is not made plain what will happen if such assurances are breached.
- 8.20.11 Assurances or settlements formally executed between the complainant and respondent might be enforced, irrespective of the mechanisms in the Privacy Act, as a contract. However, assurances obtained against repetition of the action, or similar action, are frequently not directed simply at actions affecting the individual complainant but, as a matter of public policy, to prevent further breaches of the Act affecting other individuals. Therefore, in some cases I have an interest on behalf of the public in ensuring that assurances are adhered to where the individual may not be so concerned. Indeed, assurances are a critical part of a complaints-based mechanism for securing broader compliance with the objectives of the Act. Without them, it is difficult to have confidence that individual complaints will indeed lead to a change in the prohibited behaviour.
- 8.20.12 It ought to be possible for the Proceedings Commissioner to take a case for a breach of an assurance given under sections 74 or 77. This could perhaps be

“The Ministry acknowledges the considerable resource pressures placed on the complaint investigation process. It also notes that to date few privacy complaints have been referred to the Tribunal. The involvement of the Commissioner prior to Tribunal proceedings serves the invaluable function of clarifying the nature of the complaint, particularly the issues in dispute. It is also likely that complaints of a less substantive nature and ones which are capable of resolution by a more conciliatory means, could end up in the CRT.”

- MINISTRY OF JUSTICE
SUBMISSION UV15

secured by an amendment to section 82(2) simply adding the words “or which is a breach of an assurance given to the Privacy Commissioner under section 74 or 77”. In addition to this, there may need to be an amendment to section 85 to make clear the powers of the Tribunal to grant the listed remedies not only where there has been an “interference” but also where there has been a breach of an assurance. There may well be other or better ways to achieve a similar effect.

- 8.20.13 A comparable problem has arisen in relation to settlements obtained under the Human Rights Act complaints processes. In *Proceedings Commissioner v Ah Voo*³⁶ the Complaints Review Tribunal held that there was no jurisdiction under section 83 of the Human Rights Act for the Proceedings Commissioner to enforce a settlement made pursuant to section 81. The Tribunal said:

“We think that the absence of the power to enforce settlements is probably an unfortunately omission of the Act. It is difficult to accept that the legislature intended this Tribunal to hear and determine proceedings concerned with breaches of the Act but not those concerned with enforcing settlements made pursuant to the Act.”

A similar sentiment might apply in respect of assurances given under the Privacy Act.



RECOMMENDATION 112

Provision should be made by amending section 82(2), or otherwise, to allow Tribunal proceedings to be brought by the Proceedings Commissioner where there is a breach of an assurance given to the Privacy Commissioner under section 74 or 77.

8.21 SECTION 83 - Aggrieved individual may bring proceedings before Complaints Review Tribunal

- 8.21.1 Section 83 provides for individuals to bring proceedings before the Tribunal where the Privacy Commissioner or Proceedings Commissioner is of the opinion that the complaint does not have substance, or should not be proceeded with, or, where the Proceedings Commissioner would be entitled to bring proceedings, he or she agrees to that individual bringing the proceedings or declines to bring proceedings. By allowing aggrieved individuals to undertake proceedings before the Tribunal themselves, the Act provides individuals with an alternative to having to make an application for judicial review against the Privacy Commissioner or Proceedings Commissioner, as well as obviating the need for wider litigation.
- 8.21.2 A number of complainants have pursued proceedings to the Tribunal with varying degrees of success. The statutory scheme makes clear that the Privacy Commissioner’s opinion is not necessarily the last word - this is the prerogative of the Complaints Review Tribunal.³⁷
- 8.21.3 Interestingly, all of the decisions issued to date have related to proceedings brought by individuals and not by the Proceedings Commissioner. This is not a trend that concerns me since I believe it largely reflects a high degree of success with settling most complaints without the need for Tribunal proceedings. It also reflects my view that where reasonable efforts to settle are made but declined by the aggrieved individual, it is appropriate for the litigation to be undertaken by that person. If no reasonable offer is made and the circumstances justify, I will refer the complaint. It is important that recalcitrant respondents know that that can

³⁶ 15 December 1997, CRT 17/97.

³⁷ Or perhaps, depending upon one’s perspective, the courts if an appeal is taken on a point of law.



“Complaints procedures and enforcement are an integral part of the Privacy Act. A complainant should be able to select from as wide a range of complaint avenues as possible.”

- FINANCE SECTOR UNION,
SUBMISSION UV1

“The complainant should be given the right to go to the Complaints Review Tribunal if the Commissioner has not made a determination within 6 months of the complaint being lodged.”

- AUCKLAND DISTRICT COUNCIL OF
SOCIAL SERVICE, SUBMISSION UV12

occur. It also reflects the implementation provisions whereby until mid-1996 most complaints could not be taken to the Tribunal. I believe that a more realistic position in respect of the ratio of individually-brought cases to Proceedings Commissioner cases will only become apparent in a few years from now. I do expect a number of cases referred to the Proceedings Commissioner will, from time to time, go to the Tribunal for adjudication.

8.22 SECTION 84 - Remedies that may be sought

8.22.1 Section 84 provides that there are no restrictions on the remedies that may be sought by the Proceedings Commissioner or the aggrieved individual from among those described in section 85.

8.23 SECTION 85 - Powers of Complaints Review Tribunal

8.23.1 This section sets out the remedies that the Tribunal may grant if it finds, on the balance of probabilities, that an action is an interference of the privacy of an individual. The Tribunal is able to grant:

- declarations;
- restraining orders;
- compensatory damages;
- orders specifying acts the defendant must perform to remedy the interference;
- any other relief that the Tribunal thinks fit

8.23.2 The Tribunal may also award costs against either party. Costs ought not to be automatically regarded as following the event in respect of proceedings concerning the withholding of personal information in response to an access request. While costs may well be appropriate to be visited upon recalcitrant agencies which have delayed matters, and caused costs to be borne by the complainant, there will be many cases where the agency has withheld information believing it to be justified in the circumstances by reason of an apparently applicable withholding ground. For example, an agency might withhold information to protect the privacy of another person. Any kind of signal that costs may automatically follow the event would undesirably encourage agencies to avoid the risk by releasing the information regardless of qualms regarding the privacy of the other person. Costs need to be considered on a case by case basis if the competing needs of privacy are to be fairly addressed.

8.24 SECTION 86 - Right of Proceedings Commissioner to appear in proceedings

8.24.1 Section 86 provides for the appearance of the Proceedings Commissioner before the Tribunal and in any judicial proceedings in the courts that relate to proceedings before the Tribunal.

8.25 SECTION 87 - Proof of exceptions

8.25.1 Section 87 provides that the onus of proving an action is excepted from conduct that is an interference with the privacy of an individual rests on the defendant. Section 85 provides that the standard of proof is on the balance of probabilities.

8.25.2 I have suggested in recommendation 67 that section 37 should be amended to make it clear that in cases where a request for urgency has been substantiated, an agency is obliged to make reasonable endeavours to process the request with priority. It may be appropriate to place an onus on agencies on review to show that information which was supplied after delay was indeed provided “as soon as reasonably practicable”.

“Allowing complainants to go direct to the Tribunal at the outset may lead to complaints being brought before the Tribunal which could have readily been resolved by the Commissioner. It is unlikely that the Tribunal could deal with complaints more speedily than the Commissioner’s Office and the benefits of the Commissioner’s relatively informal inquisitorial approach (as opposed to the adversarial approach necessarily adopted before the Tribunal) are lost.”

- TELECOM NEW ZEALAND,
SUBMISSION UV13

8.26 SECTION 88 - Damages

- 8.26.1 The Complaints Review Tribunal is empowered to award damages for an interference of the privacy of an individual in respect of:
- pecuniary loss;
 - loss of any benefit;
 - humiliation, loss of dignity and injury to feelings
- 8.26.2 The largest award of damages to date was \$20,000 awarded in *L v N*³⁸ for humiliation, loss of dignity and injury to feelings. The decision is being appealed.
- 8.26.3 Section 88(2) and (3) provides for the disposal of damages in cases where the proposed recipient is an unmarried minor or is not of full mental capacity. Essentially, damages may be paid to the Public Trustee who deals with it in accordance with section 12 of the Minors' Contracts Act 1969 or section 66 of the Public Trust Office Act 1957. The provisions were modelled upon a provision in the (now repealed) Human Rights Commission Act 1977.
- 8.26.4 There appears to be a good case to align the provision to section 88 of the Human Rights Act 1993 which is arguably more consistent with fully respecting the autonomy of the individual. For example, where the individual is an unmarried minor the damages may be paid, as an alternative to the Public Trustee, to any person or trustee corporation acting as the manager of any property of that person.³⁹ Where the relevant person's property has been managed under the Protection of Personal and Property Rights Act 1988 payment can be made to the property manager.⁴⁰
- 8.26.5 Section 88 should be aligned with section 88 of the Human Rights Act. As an alternative, sections 88(2) and (3) could be repealed and it be provided in section 88 or 89, that section 88(2) to (6) of the Human Rights Act 1993 is to apply, with such modifications as are necessary, in respect of proceedings under section 82 or 83 as if they were proceedings under section 38 of the Human Rights Act.

**RECOMMENDATION 113**

Section 88(2) and (3) should be more closely aligned with section 88(2) - (6) of the Human Rights Act 1993.

8.27 SECTION 89 - Certain provisions of Human Rights Act 1993 to apply

- 8.27.1 Section 89 applies the relevant provisions of the Human Rights Act to proceedings of the Complaints Review Tribunal taken under the Privacy Act. In particular, the Human Rights Act gives the Tribunal jurisdiction to award damages up to the same maximum that the District Court can award which is, at present, \$200,000.⁴¹ Under section 90 of the Human Rights Act, the Tribunal can refer a matter to the High Court for a monetary remedy that exceeds the \$200,000 limit.

38 (1997) 3 HRNZ 721.

39 Human Rights Act 1993, section 88(3).

40 Human Rights Act 1993, section 88(5).

41 District Courts Act 1947, sections 29 to 34.