

Part XI

XI

Law Enforcement Information

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“Hailed as a beacon at the time of its enactment in 1976, the Wanganui Computer legislation was simply not geared to cope with the broader spectrum of privacy issues that arose during the years that followed. Those issues went far beyond the scope of such a limited statute as the Wanganui Computer Centre Act 1976 and had already drawn a response from the New Zealand Government when it signed the ‘guidelines agreement’ in Rome as far back as 1980. The new Privacy Act is an endorsement of that response.”

- P L Molineaux, *Final Report of the Wanganui Computer Centre Privacy Commissioner*, 1993

“Part XI of the Act and the Fifth Schedule should be retained. They represent a balance between the spirit and intention of the Privacy Act and the needs of an efficient criminal justice system by allowing on-line access to information where it would not be practicable to process individual requests for information because of the volume of cases involved. The Fifth Schedule also has the potential to act as an aid to transparency and accountability in terms of the information handling practices of justice sector agencies.”

- Ministry of Justice, submission H14

“The Group favours a principled and flexible approach as opposed to a prescriptive approach. Part XI of the Act and the Fifth Schedule should be repealed.”

- NZ Law Society Privacy Working Group, submission H15

“The Ministry does not consider the repeal of Part XI and the Fifth Schedule to be practical. It is impossible to assess whether each on-line collection or disclosure of information fits within one of the exceptions to the information privacy principles. It is only practically possible to assess types or classes of information.”

- Ministry of Transport, submission S58

11.1 INTRODUCTION

11.1.1 Part XI makes special provision for certain law enforcement information. It incorporates, in a modified form, the Schedule to the Wanganui Computer Centre Act 1976 which was repealed by the Privacy Act.

11.1.2 The purpose of Part XI was described in the explanatory note to the Privacy of Information Bill as follows:

“The purpose of Part XI is to authorise access by certain

Government departments and local authorities to law enforcement information stored by other Government departments on the Wanganui computer. In the absence of this authority, access that is available now might not be permitted under the Bill because it would not otherwise be permitted by the information privacy principles. It was considered preferable to continue in a modified form the provisions of the schedule to the Wanganui Computer Centre Act 1976 rather than provide wide exceptions to the information privacy principles in order to preserve such access.”

11.1.3 Although Part XI, and its associated schedule, were carried forward into the Privacy Act 1993 as enacted, the Select Committee did make certain changes. As outlined below, one of those changes - concerning the method of amendment to the schedule - has been brought forward as a significant issue in the review.

11.1.4 In reviewing Part XI and the Fifth Schedule, it has been necessary to consider, amongst other things:

- whether the purpose of Part XI, as described above, was indeed an appropriate approach to the issue of law enforcement information sharing;
- whether the process for amending the Fifth Schedule, introduced by the Select Committee, should continue;
- what method of amendment to the Fifth Schedule should be adopted if change is to be made;
- how well Part XI and the Fifth Schedule have met the challenges of justice sector reorganisation, technological change and, in particular, the migration of law enforcement agencies off the Wanganui computer.

11.1.5 Thirty one submissions were received on the discussion paper from a wide range of respondents, including local and central government and business amongst others.

11.1.6 Before turning to the detail of Part XI it will be helpful to canvass two matters to gain a full appreciation of the issues. First, I will say something about the Wanganui Computer Centre Act 1976 which was New Zealand’s first information privacy law. Then I will comment upon the nature of on-line access to personal information which is authorised by this part.

Wanganui Computer Centre Act 1976

11.1.7 This is not the place to offer a definitive history of, or guide to, the Wanganui Computer Centre Act 1976. Instead, some background information is provided here to set the discussion of Part XI in context. Perhaps at some stage the definitive history of privacy and freedom of information law in New Zealand will evaluate the importance of the 1976 law - whether it was a significant precursor to the Privacy Act and Official Information Act or simply a minor sideshow in the early years of major computerisation which distracted attention from the lack of privacy or open government legislation.¹

11.1.8 In 1971 an amendment to the Transport Act 1962 established a central register of all driver licences as a precursor to a central computer system. In 1972 the Government announced that it was to investigate a specially designed electronic data processing system for law enforcement agencies. Privacy concerns were already in consideration and it was stated that the proposed system:

“Would not be designed as a reference file on every New

¹ I am unaware of any published review of the Wanganui Computer Centre Act’s 15 year operation. Some information is to be found in the annual reports of the Wanganui Privacy Commissioner from 1977 through to 1993 and, concerning the Act’s first 6 years, in T J McBride, *Privacy Review*, 1984.

“When the Wanganui Computer Centre Act 1976 was introduced it provided for the first time an opportunity for the general public to examine information stored about them by a government agency and have it amended or corrected where necessary. In achieving this, the Act made a contribution in the field of human rights jurisprudence that has been justifiably claimed as being not only innovative but also unique. It broke new ground. It is of interest to note that when the OECD Guidelines were adopted several years later the principle of individual participation was included as being basic to any scheme for the legislative protection of privacy.”

- PL MOLINEAUX, REPORT

OF THE WANGANUI COMPUTER

CENTRE PRIVACY COMMISSIONER,

1985

Zealander. It would contain information already on record. It would not be an invasion of the privacy of the individual ... full safeguards to prevent unauthorised access or use of the information were being designed into the system.”²

11.1.9 During the 1972 general election the proposed law enforcement computer system was an issue and the Labour Party, then to become Government, distributed election literature entitled “Your Right to Privacy” warning of the risks. In 1974 the Labour Government announced that it intended to establish the law enforcement data system. In the closing session of that government’s term it introduced a Wanganui Computer Centre Bill and a Privacy Commissioner Bill as part of its plans to constrain the law enforcement computer centre and to provide privacy oversight. Although the Privacy Commissioner Bill did not survive a change of government, the new National Government did enact the Wanganui Computer Centre Act 1976. It conferred the privacy role proposed for the Privacy Commissioner upon a new Human Rights Commission.

11.1.10 The Wanganui Computer Centre Act established three new entities:

- *Wanganui Computer Privacy Commissioner* - an officer of Parliament;
- *Wanganui Computer Centre Policy Committee* - chaired by a Judge with a member of the NZ Law Society as Deputy Chairman, two members appointed by the Minister of State Services after consultation with the Attorney-General and interested groups, together with officials from the relevant departments;
- *Wanganui Computer Centre Management Committee* - made up of officials.

11.1.11 The Wanganui Computer Centre Act was described in its long title as:

“An Act to provide for the establishment and operation of a computer based information system to aid the Departments of Police and Justice and the Ministry of Transport to carry out effectively their roles in relation to the law and the administration of justice, and to ensure that the system makes no unwarranted intrusion upon the privacy of individuals.”

11.1.12 Much of the importance of the 1976 Act for privacy lay in the establishment of a Privacy Commissioner and the Policy Committee. The Wanganui Computer Centre Privacy Commissioner had a number of important functions such as to investigate complaints, carry out inquiries on the Commissioner’s own motion, and to give individuals access to information held about them on the system.³ The Policy Committee provided “civilian oversight” of the operation of the law enforcement database. It had amongst its functions the responsibility to:

“Determine the policy of the computer centre and the computer system relating to the privacy and the protection of the rights of the individual in so far as these are affected by the operation of the computer centre and the computer system ... ”⁴

11.1.13 Although the granting of access and correction rights, and the creation of the Privacy Commissioner and the Policy Committee, are the most important aspects of the Act from a privacy perspective I will say little more about them. In essence the Wanganui Computer Centre Privacy Commissioner’s complaints functions have been subsumed into the role of Privacy Commissioner while the

“The view is sometimes expressed that the Wanganui Computer Centre Act 1976 as it stands is cumbersome and too restrictive. Be that as it may any new appraisal will have to balance the needs of expediency against the requirement for privacy.”

- PL MOLINEAUX, REPORT OF THE
WANGANUI COMPUTER CENTRE
PRIVACY COMMISSIONER, 1985

² T J McBride, *Privacy Review*, page 29.

³ Wanganui Computer Centre Act 1976, sections 9 and 14.

⁴ Wanganui Computer Centre Act 1976, section 22.

rights of access and correction have been subsumed within the general rights provided in principles 6 and 7. The Wanganui Computer Centre Privacy Commissioner's function of operating a bureau to handle access requests has been discontinued. The role of a statutory Policy Committee has not been continued in any form. Some aspects of the Wanganui Management Committee, in a broader and non-statutory form, might be said to have been resurrected in recent years in the Justice Sector Information Committee.

- 11.1.14 There are other aspects of the Wanganui Computer Centre Act which have disappeared from our statute book. For example, specific legislation no longer exists to provide authorisation for this specific computer system. Indeed, in the latter years of the legislation it had become anomalous that while this major computer system had a specific legislated basis most other government computer systems did not.⁵ However, Part XI in a sense continues the Wanganui Computer Centre Act's function of *legitimising* the sharing of law enforcement information amongst several agencies through a common database - and in the future through the linking of separate databases. In this respect, Part XI essentially carried over aspects of sections 4 and 4A to 4E and the Schedule of the Wanganui Computer Centre Act 1976.
- 11.1.15 In considering Part XI of the Act in the light of this background and the legislative antecedents I have been mindful of:
- a background of concern amongst the New Zealand public in relation to large shared law enforcement databases;
 - the respect that has been accorded to those fears by legislators;
 - the work of the Wanganui Privacy Commissioner, as recounted in his annual reports;
 - the history of the Wanganui computer system, subject to strict controls, careful auditing, and rigorous oversight;
 - the fact that while the Privacy Act continues many of the key features of the Wanganui Act in a general framework there are nonetheless significant safeguards that have disappeared.⁶

On-line access

- 11.1.16 The Privacy Act, unlike some earlier forms of data protection laws such as the Wanganui Computer Centre Act, seeks to be “technology neutral” “media neutral” and “sector neutral”. Indeed, it is sometimes referred to as third or fourth generation privacy law with its application to “information” held in the public and private sectors, with earlier generation laws covering just automatically processed data, information contained in documents or information solely held in the public sector.
- 11.1.17 Notwithstanding its general technology neutral approach the Act does directly address certain information privacy issues in terms of certain computer applications. For example, public register privacy principle 3 constrains electronic transmission of personal information from a public register and information matching rule 3 prohibits the use of on-line computer connections in authorised information matching programmes.
- 11.1.18 Unlike those other two provisions, Part XI makes no mention of any computer database or computer technology. Nonetheless, it does seem relatively plain from the legislative history that it is directed to the type of arrangements main-

⁵ One that did was the Health computer system operated under the former section 22B of the Health Act 1956. Similar controls existed in section 62A of the Hospitals Act and section 51 of the Area Health Boards Act. The 3 sections were enacted in 1988 to allay privacy concerns over the privatisation of the health computer system and repealed in 1993 with the enactment of the Privacy Act.

⁶ For example, while the right of access has been successfully subsumed into principle 6, there is no longer a policy committee, an offence of coercing access requests, or independent oversight of the placing of remote terminals.

tained under the Wanganui Computer Centre Act 1976. In particular, the provisions of Part XI, and the Fifth Schedule, are directed towards providing authorisation for, and limits upon, the on-line accessing of law enforcement databases by other law enforcement agencies. That this is not entirely plain from the words of Part XI might be asserted as a criticism of the Part, but that is the basis upon which I have understood the provisions as have the law enforcement officials who have dealt with it.

- 11.1.19 However, the Part and the associated schedule, need not be read as simply continuing the “Wanganui” arrangements. The Wanganui Computer involved a shared database maintained in a single location to which law relevant enforcement agencies have access. The categories of information stored on the database were assigned as the responsibility of a particular agency, now known as the holder agency. The other agencies entitled to have access to that information are now identified as accessing agencies.
- 11.1.20 However, all law enforcement agencies will have migrated off the Wanganui Computer before the end of 1999.⁷ The Part XI and Fifth Schedule arrangements are intended to continue whereby the holder agencies will continue to separately hold the respective information, no longer in a shared database but in their own systems. The accessing agencies will continue to have on-line access to the information in much the same way (in legal, if not technical, terms).
- 11.1.21 There is something different in quality in these on-line access arrangements compared with the normal information handling and processing encountered by the vast majority of agencies. Most agencies hold some personal information and they will, on occasion, share that with other agencies. This might be initiated by the agency holding the information which may disclose that information elsewhere. Or perhaps another agency will request the information from the agency holding it and it will be released in response to that. In other cases the individual concerned will become involved and request the information directly or ask that it be transferred to a third party. The information privacy principles handle each of these arrangements perfectly well. To make the disclosure the agency that holds the information must “believe on reasonable grounds” that one of the exceptions to information privacy principle 11 applies.
- 11.1.22 However, in the on-line access arrangements contemplated by Part XI, and formerly by the Wanganui Computer Centre Act, the nature of the arrangement is somewhat different. The agency that actually holds the information makes no judgment in relation to the release of the information on a case by case basis. Instead, a blanket approval is given to another agency to have access to holdings of information. There are very few other agencies that have such arrangements. It is almost like a department or business giving another department or business the keys to its front door and filing cabinets together with an index to its files. Few agencies are willing to run that risk with sensitive data but in the law enforcement sector, subject to controls, it is essential.
- 11.1.23 The nature of on-line access brings with it a need to impose certain restraints and take certain safeguards. Part XI spells some of these out. For example, law enforcement agencies are not authorised to share information with just anybody, only the agencies specified. Other agencies may, on occasion, have need of the information and this will be shared on a need to know basis consistent with the information privacy principles and other legislation. Furthermore, the law enforcement agencies do not give each other complete access to their

“The current schedule makes for efficient administration for the agencies involved by not requiring each request to be authorised and provides for openness of the sharing arrangement by having a schedule and an approval process.”

- WELLINGTON CITY COUNCIL,
SUBMISSION H6

⁷ With at least one benefit being mitigation of Y2K problems. See Report of the Government Administration Committee, *The Y2K Inquiry: Inquiry into the Year 2000 Date Coding Problem*, April 1998, pages 88 and 99.

entire information holdings. The information is segmented and authorisation to have access to parts of the database is provided, again, on a need to know basis. For example, the detail of “victim identity” in the Police information holdings is available solely to the Department for Courts. Furthermore, this entry and others are subject to express limits. In that case, the Department for Courts’ access is limited to identity details for the purpose of providing assistance to victims in accordance with the Criminal Justice Act and the Victims of Offences Act.

- 11.1.24 The nature of on-line access is such that it would be difficult to operate the information sharing arrangements that exist in the law enforcement sector without an authorisation of the type provided in the Fifth Schedule. Without this statutory authorisation, sharing arrangements would be open to challenge for being in breach of, say, information privacy principles 2 or 11. Accordingly, the Part has a *legitimising* or *authorising* function. However, through the limits placed on access in the Fifth Schedule, the Part has a *constraining* or *controlling* function. The resultant Schedule provides a degree of transparency as to the on-line information sharing arrangements between the named law enforcement agencies.

SECTION BY SECTION DISCUSSION

11.2 SECTION 110 - Interpretation

- 11.2.1 Section 110 defines four terms used in Part XI.

Accessing and holder agencies

- 11.2.2 The definitions of “accessing agency” and “holder agency” are limited to any “public sector agency” (a term which is itself defined in section 2) for the time being specified in the Fifth Schedule as, respectively:

- an agency to which law enforcement information held by a holder agency is available;
- an agency the records of which are available to an accessing agency.

Neither definition was included in the Wanganui Computer Centre Act although the use of a schedule to identify the agencies which respectively hold and access any particular information is carried forward from that Act.⁸

Law enforcement information

- 11.2.3 The definition of law “enforcement” information is essentially the same as appeared in the Wanganui Computer Centre Act (the differences simply being the change in schedule numbering and the use of “individual” rather than “person”).

Local authority

- 11.2.4 The definition of “local authority” is taken from section 4E(2) of the Wanganui Computer Centre Act 1976.⁹ The origin of this definition in the 1976 Act provides the explanation for the fact that this definition of “local authority” differs from the definition set out in section 2. The section 2 definition is derived from the Local Government Official Information and Meetings Act 1987. It is not ideal for an Act to have two definitions of the same term since this theoretically may create confusion. In fact, no difficulties have been encountered because, as I explain at paragraph 11.4 in relation to section 112, local authorities have not utilised Part XI to obtain access to law enforcement information.

- 11.2.5 In recommendation 139 I propose that section 112 be repealed. If this is accepted the definition of “local authority” could also be repealed.

⁸ The Wanganui Computer Centre Act 1976, section 2, contained a definition of “user departments” which brought together what now would be known as accessing and holder agencies.

⁹ As inserted by a 1989 amendment.

11.3 SECTION 111 - Access by accessing agencies to law enforcement information

11.3.1 Section 111 provides that:

“An accessing agency may have access to law enforcement information held by a holder agency if such access is authorised by the provisions of the Fifth Schedule to this Act.”

11.3.2 This section is the key operative provision in Part XI. It is the provision which legitimises information sharing amongst the relevant law enforcement agencies as provided for in the Fifth Schedule. It is, in the words of section 7 of the Act, a “provision that is contained in [an] enactment and that authorises or requires personal information to be made available”.

11.3.3 No definition is included of the term “access”. The Wanganui Computer Centre Act defined the term as follows:

“Access’, in relation to the computer system, means the placing of information on that system and the retrieval of information from that system.”¹⁰

11.3.4 Notwithstanding the lineage of Part XI directly from the Wanganui Computer Centre Act, I do not believe that such a meaning is intended in this context. Instead, I think what is meant is something like the second meaning ascribed to “access” in the *Concise Oxford Dictionary*, that is “the right or opportunity to reach or use or visit; admittance (has access to secret files; was granted access to the prisoner).” The Wanganui Computer Centre Act definition included within it the placing of information on the computer system. Part XI has not attempted to provide the authority for such matters.¹¹ Instead, the approach of the Part seems to be directed towards authorising access to information but not dealing with (whether by way of authorisation, prohibition or regulation) other matters concerning the use, modification or safeguarding, of information which were matters dealt with by the former Wanganui Computer Centre Act. The intention was, I believe, that those other matters be addressed by the normal application of the information privacy principles and any other relevant legislation.

11.3.5 Since Part XI, unlike the Wanganui Computer Centre Act, does not attempt to regulate all handling and processing of the information identified in the Fifth Schedule there are questions as to what the appropriate role of the Part is or should be. Questions to promote discussion of these issues were included in the discussion paper. One school of thought would favour diminishing the application and relevance of Part XI particularly as agencies move off the Wanganui computer system and the 1976 set up is no longer recognisable. That approach might see these matters dealt with by application of the information privacy principles coupled with any applicable specific legislation and, as necessary, protocols or contracts between the agencies sharing information. The other school would seek to enhance the role of Part XI by bringing within it other public sector agencies having law enforcement functions where those agencies share information. Further enhancement might involve, for example, prohibiting agencies to which the Schedule applies from sharing information *otherwise* than in accordance with the provisions of the Fifth Schedule.¹²

¹⁰ Wanganui Computer Centre Act 1976, section 2.

¹¹ However, access is made available in some entries in the Fifth Schedule in a manner which is limited to cases where an agency has business to add information to a particular record - see entry relating to Department for Courts access to particulars of the identity of persons who have been charged with an offence.

¹² An example would be to prohibit a local authority from obtaining details of the motor vehicle and driver licence registers otherwise than in accordance with a *Gazette* notice that had been issued under section 113 in respect of that agency.

“The issue can be seen as being, not the number of agencies collecting, using, or accessing the same personal information, but rather the extent to which the various privacy principles are reflected in the information management practices applied to the databases. The Group favours a principled and flexible approach as opposed to a prescriptive approach. Part XI of the Act and the Fifth Schedule should be repealed.”

- NZ LAW SOCIETY PRIVACY WORKING GROUP, SUBMISSION H15

11.3.6 I do not see the scope of Part XI as set in stone and a case could be made to bring further law enforcement agencies into the scheme as accessing or holder agencies. My review has not uncovered a need for that yet. I have concluded that Part XI fulfils a valuable function given the nature of the on-line access of information that is central to law enforcement and justice arrangements in the late 1990s. The Schedule provides a degree of transparency.

11.4 SECTION 112 - Local authorities may be authorised to have access to law enforcement information

11.4.1 The Minister of Justice may, by notice in the *Gazette*, authorise a local authority to have access to certain limited law enforcement information provided for in the Fifth Schedule to the Act. Such authority may be granted on condition and can be amended or revoked. Section 112 also continues the effect of notices given under the Wanganui Computer Centre Act.

11.4.2 I have examined two main issues in relation to this provision:

- whether there continues to be any need for local authorities to have such access;
- whether notices given under the Wanganui Computer Centre Act should continue in force.

Current local authority access

11.4.3 The only law enforcement information to which a local authority can currently access pursuant to a *Gazette* notice, is:

- the national register of motor vehicles maintained by the Ministry of Transport; and
- the national register of drivers' licences maintained by the LTSA.¹³

Since no local authority has sought, or been granted, a notice under section 112 the only local authorities authorised to have such access are those in respect of which a notice was given under the Wanganui Computer Centre Act 1976 which remained in force immediately before the commencement of the Act.

11.4.4 Four *Gazette* notices were issued pursuant to section 4E of the Wanganui Computer Centre Act. These related to six local authorities, none of which has actually utilised its access rights.¹⁴ The reasons for the lack of interest on the part of local authorities, to access the law enforcement information are readily apparent. Since section 4E was first enacted in 1980 there have been significant changes in respect of local authority functions in relation to driver licensing (which is now handled nationally rather than at local body level). None of the local authorities which maintained traffic enforcement departments in 1980 continue to do so. Enhancements have also been made in relation to the availability of the motor vehicle register to public register provisions.

11.4.5 The explanation from the Hutt City Council is typical of the replies received in response to enquiries about the continuing use of the entitlements under the *Gazette* notices. The Hutt City letter stated:

“The Council was originally given approval to access the drivers licence register and the motor vehicles register because it acted as a driver licensing agency for the Ministry of Transport. Such a function is not core Council business and Council no longer provides this service. Council has never exercised its rights to access information for the driver licence register or motor vehicles register of the Wanganui Computer and does not anticipate that it would need to exercise these rights to carry out its parking control functions.

¹³ See Privacy Act, Fifth Schedule.

¹⁴ Confirmed in correspondence with various councils and EDS (New Zealand) Ltd.

“Information from the motor vehicles register is crucial to Council’s core service of parking control. However, Council obtains the information it requires from the Land Transport Safety Authority’s motor vehicle register in Palmerston North.

“It is the understanding of Council officers that to access the ‘Wanganui Computer’ Council would require a separate secure PC link (remote terminal). Council does not have such a link and does not anticipate that it would ever require such a link to carry out Council’s current powers with respect to parking controls.”¹⁵

Need for local authority access

- 11.4.6 It seems plain that local authority access to law enforcement information pursuant to section 112 is currently unnecessary. In particular:
- since provision was made in 1980 only six local authorities have obtained such approval;
 - of those six, none ever installed a remote terminal or utilised the permitted access;
 - no local authorities have sought, or obtained, notices under section 112 in the years since the enactment of the Privacy Act.
- 11.4.7 My view is that if such access is not needed the provision should probably be deleted from the Act. Accordingly, my prime recommendation is that section 112 be repealed. Consequently the definition of “local authority” in section 110, and the references to local authorities in the Fifth Schedule, could also be repealed.



RECOMMENDATION 139

Section 112 providing for local authorities to be authorised to have access to law enforcement information should be repealed together with the definition of “local authority” in section 110 and the references to local authorities in the Fifth Schedule.

Amendments if local authority access retained

- 11.4.8 It may be that further examination by the Ministry of Justice will suggest that provision for local authorities to have access should be retained in case it is necessary in the future. In my view, any access that cannot presently be forecast should not be provided for in this way but instead should come before Parliament as an amendment to the Privacy Act in due course. However, if, unknown to me, there is a good case in the medium term for local authorities to have access to law enforcement information through these provisions then certain amendments should nonetheless be made.
- 11.4.9 First, while local authorities have continuing need to have access to the motor vehicles register (albeit that they currently find it more convenient to simply deal with the Motor Vehicle Registration Centre in Palmerston North), there appears to be no continuing need for access to the driver licence register.
- 11.4.10 Second, there are unacceptable privacy risks in continuing the notices given under the Wanganui Computer Centre Act. The notices given in 1990, 1992 and 1993, were based on a set of assumptions concerning the need for access which is not supported by current conditions. Section 112(4) should be repealed so that the *Gazette* notices given under the Wanganui Computer Centre Act cease to have any legal effect.

“Care is needed to ensure that agencies are only included in the Fifth Schedule where both the importance of their function and the frequency of their requests makes this necessary. We note that there is increasing demand from agencies with some law enforcement functions to share information with law enforcement agencies. This is becoming technically feasible as agencies exit from the Law Enforcement System on the Wanganui Computer, although the Fifth Schedule may not prove to be the appropriate mechanism to address this issue.”

- MINISTRY OF JUSTICE, SUBMISSION H14

¹⁵ Submission H11.

**RECOMMENDATION 140**

If section 112 is not repealed in its entirety then the reference to local authorities in the Fifth Schedule relating to the national register of drivers' licences should be repealed.

- 11.4.11 The existing *Gazette* notices issued under section 4E of the Wanganui Computer Centre Act, none of which are being utilised, should be revoked if there is no present prospect of them being utilised. If any of the six affected local authorities wish to continue to retain such authority a process should be instituted to prepare a new *Gazette* notice to be issued under section 112 which would replace and enable the revocation of the earlier notice. When that process has been completed then subsection (4) of section 112 should itself be repealed.
- 11.4.12 Conditions on the notices given under the Wanganui Computer Centre Act are no longer satisfactory. The *Gazette* notice of 17 July 1990 has six conditions. The three subsequent notices each refer to that notice and incorporate the relevant conditions.¹⁶ Conditions(c), (d), and (f) each rely upon directions, approvals, inspections, and audit, by a body which no longer exists - the Wanganui Computer Centre Policy Committee. The issue of a new *Gazette* notice would give an opportunity to reconsider the appropriate conditions.

**RECOMMENDATION 141**

All existing approvals given under section 4E of the Wanganui Computer Centre Act 1976 should be reviewed and:

- (a) any that are unnecessary should be revoked;
 (b) any which need to be continued should be replaced, within a reasonable time, with a new notice carrying appropriate conditions issued under section 112.

11.5 SECTION 113 - Amendment to Fifth Schedule

- 11.5.1 By operation of the “sunset” clause in section 114, section 113 has now expired. Presently the Fifth Schedule may be amended by further Act of Parliament. However, during the Act's first four years of operation the Schedule was, through reliance upon section 113, able to be amended by Order in Council.¹⁷
- 11.5.2 As already noted the Fifth Schedule of the Privacy Act was, in essence, previously contained in the Schedule to the Wanganui Computer Centre Act 1976. There was a procedure for supplementing the provisions of the Schedule to the 1976 Act by Order in Council.¹⁸ The Privacy of Information Bill (which became the Privacy Act) provided for amendment to the Schedule to be made by Order in Council. However, when the bill was considered by the Select Committee after its introduction, that committee decided that amendments to the Fifth Schedule were more appropriately the province of Parliament than the Executive. Parliament accepted the Select Committee's advice and allowed a period of three years for further work to be undertaken on identifying existing uses of law enforcement information and for any implementing amendments to be made during that period by Order in Council.
- 11.5.3 Thus, at the time that the Privacy Act was passed, section 113 provided that the Fifth Schedule could be amended by Order in Council made on the advice of the Minister of Justice given after consultation with the Privacy Commissioner. However, this ability to amend the Fifth Schedule by way of Order in Council was to expire on 1 July 1996. The progress anticipated on researching the

¹⁶ See *Gazette* notices of 28 September 1990, 11 November 1992 and 20 April 1993.

¹⁷ Originally amendment by Order in Council was allowed for three years during an implementation phase. This was extended for 12 months by the Privacy Amendment Act 1996.

¹⁸ Wanganui Computer Centre Act 1976, section 30.



“It is important that the law is seen to be upheld and that there are no hidden or secret agreements between law enforcement agencies. By publishing the schedule this retains the transparency and would provide an assurance to the public that there is some control over the use of the information.”

- CLIVE COMRIE, SUBMISSION H1

“Amendment to the Fifth Schedule should, for purposes of transparency, continue, as at present, to be by Act of Parliament.”

- NZ EMPLOYERS FEDERATION,
SUBMISSION H5

existing uses of information, and the consequent making of any necessary amendments, was not rapid and the work was not completed within 3 years. This was partly due to the various restructurings which were being planned, or implemented, during the early to mid 1990s.¹⁹ These restructurings themselves required work to be done to reflect information sharing in the Fifth Schedule. Accordingly, a case was made for an amendment to sections 113 and 114 allowing the Order in Council amendment procedure to continue for a further 12 months. I supported the amendment on the basis that reorganisation had made completion of the task within 3 years more difficult than anticipated but that it was nonetheless important that the task be undertaken.

- 11.5.4 Justice sector agencies would like to have a procedure to amend the Fifth Schedule without the need to obtain an amending Act of Parliament.²⁰ They would tend to make their case based upon the desire for flexibility, and the desirability of a reasonably rapid response, to changing technology and issues arising from the exit from the Wanganui Computer system. While all businesses and departments are familiar with the traumas and uncertainties surrounding the move to new computer systems, few will have faced that prospect having worked with a shared mainframe computer system, such as Wanganui, for over two decades.
- 11.5.5 The importance of information management in this sector, the significant changes, and the present degree of uncertainty, persuades me that there is a case for resurrecting a less restrictive amendment process than Act of Parliament for changing the Fifth Schedule. However, I am suspicious of the surveillance potential of overly “flexible” arrangements for sharing information amongst the law enforcement arms of the state. I am also mindful of the Select Committee’s firm views, affirmed in 1993 and 1996, that the Order in Council process should be available for only a limited time, after which such decisions should revert to Parliamentary control.
- 11.5.6 Accordingly, while I support the revival of a process for amendment by Order in Council my recommendation takes account of the Select Committee’s misgivings. My proposal is that the Order in Council amendment processes be revived only for a limited period to take account of the uncertainties faced by the sector during the period of migration off the Wanganui Computer system and in establishing and implementing separate databases. I consider that five years should be adequate.²¹
- 11.5.7 The requirement is quite straightforward and picks up upon the Select Committee’s earlier insistence on a limited three year period later extended to four years. It is to be preferred over the alternative that I considered, which was to transfer the entire Fifth Schedule into regulations.²²



RECOMMENDATION 142

Provision should be made to allow the Fifth Schedule to be amended by Order in Council subject to a five year sunset clause.

¹⁹ In a sector which had been almost untouched by structural change since at least the time of Wanganui Computer Centre Act 1976, there was during these years, an amalgamation of the Police and Ministry of Transport, the creation of the Land Transport Safety Authority, the division of the Department of Justice into a Ministry and two departments, and various reallocation of responsibilities amongst new and existing entities.

²⁰ See, for example, submissions H1, H14, S33 and S58.

²¹ A five year period will also allow the matter to be re-examined at the next periodic review under section 26.

²² The advantages of moving the Schedule into regulations include the end of section 113 as a “Henry VIII clause”. Such clauses, which allow primary legislation to be amended by secondary legislation, are not favoured for constitutional reasons. The transfer to regulations would also lead to a slightly “streamlined” Act for regular users not concerned with technical law enforcement information issues. However, the alternative recommended is considered to offer greater transparency and reassurance, be easier from a drafting perspective and continue familiar arrangements.

“It is inefficient to have to go to Parliament each time a technology change or law enforcement requires an amendment to the Act. Regulation making powers, or changes by ministerial notice make changes simpler and they remain subject to the scrutiny of the Regulations Review Committee of Parliament. That said, the Act provides certainty and a level of control over sensitive information and a higher level of transparency because it goes through Parliamentary debate and Select Committee process.”

- DEPARTMENT FOR COURTS,
SUBMISSION S33

11.6 SECTION 114 - Expiry of power to amend Fifth Schedule by Order in Council

- 11.6.1 Section 114 expired on 1 July 1997. The issues surrounding this expiry have been discussed in relation to the previous section. If the process for amending the Fifth Schedule by Order in Council is revived section 114, or something similar to it, will need to be enacted.

“If it was not deemed appropriate to require the full legislative process to be embarked upon for a change to the schedule then, as a matter of policy and administration, a wider consultative exercise than that adopted when amendment by Order in Council is prescribed would be favoured.”

- NZ LAW SOCIETY PRIVACY

WORKING GROUP, SUBMISSION

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