

Compliance Costs (DP9)
Submissions on Discussion Paper No 9

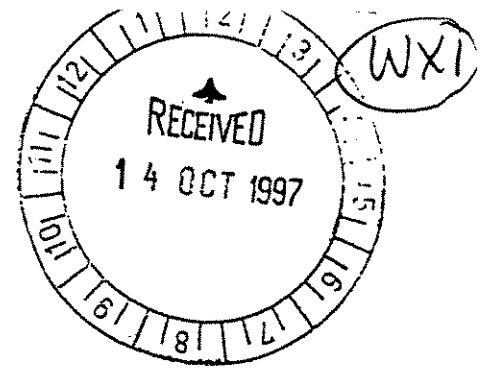
WX1	The Finance Sector Union
WX2	Franklin District Council
WX3	NZ Employers Federation Inc
WX4	NZ Association of Social Workers Aotearoa
WX5	Wellington City Council
WX6	NZ Video Dealers Association Inc
WX7	Commonwealth Press Union
WX8	Auckland District Council of Social Service
WX9	Telecom New Zealand Ltd
WX10	Ian MacDonald

Cross references to submissions held on 'S' series

S7	Healthcare Otago Ltd
S16	Peter Hattaway
S24	NZ Defence Force
S27	Ministry of Agriculture
S28	NZ General Practitioners' Association
S33	Department for Courts
S36	Nurse Maude Association
S40	NZ Bankers' Association
S42	Rosamund Averton
S43	Eastbay Health
S46	New Zealand Medical Association
S50	NZ Business Roundtable
S52	Tranz Rail
S53	Ministry of Education

REVIEW OF THE PRIVACY ACT 1993
DISCUSSION PAPER No. 9
COMPLIANCE AND ADMINISTRATION COSTS

- Q1. What are compliance costs? On what should the Privacy Commissioner concentrate in looking at the issue of such costs?
- Q2. Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs?
- Q3. What more could the Privacy Commissioner do within his budget to reduce compliance costs? What else could be done to minimise compliance costs, in particular for smaller businesses?
- Q4. What actual business costs are involved in complying with the Privacy Act?
- Q5. Could the layout or wording of the Privacy Act be improved to make it easier to use?
- Q6. Should more cost recovery for access and correction requests be allowed to reduce agencies' compliance costs?
- Q7. How do any delays in dealing with complaints affect compliance costs? What measures could reduce the time for complaints investigation and resolution to reduce compliance costs?
- Q8. Can the privacy officer's role be enhanced in some way relevant to effective use of resources in regard to compliance?
- Q9. What specific compliance costs incurred are of most concern? In what ways could these be reduced?
- Q10. Overall, what do you think about the extent of compliance costs incurred by the Privacy Act? Are they excessive, just about right, or is the Act in fact helpful in reducing compliance or other costs?
- Q11. Would advance rulings help reduce compliance costs? Can such rulings achieve the advantages expected of them? Are the disadvantages too severe to be worthwhile?
- Q12. Are there other mechanisms which could usefully cater for the specific needs and practices of agencies or sectors to reduce compliance costs?



14 October 1997

Privacy Act Review 1997
Office of the Privacy Commissioner
P.O.Box 466
AUCKLAND

Email privacy@iprolink.co.nz

Dear Sir / Madam



Please find attached FinSec's submissions.

Should you have any queries, feel free to contact the writer.

Yours faithfully

Andrew Casidy
Senior Industrial Officer

FinSec (The Finance Sector Union) Submissions on the Review of the Privacy Act 1993

FinSec, the Finance Sector Union represents approximately 15,000 members working primarily in the New Zealand Banking and Insurance industries.

Discussion Paper 9 - Compliance and Administration

Question 6 - It is FinSec's submission that the ability of the private sector to charge for access and correction of information should be withdrawn. Firstly, it is inequitable that private sector agencies should be able to charge whilst public sector ones cannot. Secondly, it is unreasonable that the individual should be liable for costs of access to and correction of information in the employment context when they have no choice but to provide such information in the first place. We have had examples where cost has been a significant disincentive to employees accessing information held about them. Thirdly, it is in the interests of the collecting agency to be sure that the information they hold is correct. We see no reason why costs involved in ensuring this should be borne by the person about whom the information is held.



16 OCT 1997
WX2

6 October 1997

Our Ref. L150/08

Privacy Act Review 1997
Office of the Privacy Commissioner
P O Box 466
AUCKLAND

Dear Sir

Privacy Act Discussion Papers

Thank you for the opportunity to comment on the Discussion Papers.

Our submissions to:

1. Structure and Scope
2. Information Privacy Principles
3. Access and Correction
4. Codes of Practice and Exemptions
5. Public Register Privacy Issues
9. Compliance/Administration Costs
10. Interaction with other Laws

are separately attached to this letter.

Responses have been made only to questions which have impacted directly upon our use of the Act.

The approach taken to this consultation and the simple layout of the Discussion Papers has been much appreciated.

I would be interested in attending the November meetings and can be contacted at the phone number printed below, or by direct dial (09) 2371368.

Yours faithfully

Beth Wahrlich
PRIVACY OFFICER



DISCUSSION PAPER No. 9

COMPLIANCE AND ADMINISTRATION COSTS

Q.1 What are compliance costs? On what should the Privacy Commissioner concentrate in looking at the issue of such costs?

Compliance costs for business are, self-evidently, the costs involved in complying with the provisions of the Act - retrieving information, responding to complaints, form-filling, where this is necessary, and so on. The Ministry of Commerce compliance cost definition ("the costs to affected parties of interacting with government in meeting an obligation or obtaining a service") would, therefore, be applicable to the extent that anything which has to be done as a consequence of the statute's existence might be said to be encompassed by the phrase "a cost of interacting with government". However, rather than attempting to incorporate a definition of compliance costs in the Act (with the inevitable limitations which words impose), it is better to leave the determination of what, in a particular case, constitute compliance costs as a discretionary matter.

Q.2 Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs? (Cited in Minister of Finance, *Business Compliance Cost Reduction: A Government Policy and Discussion Paper*, Wellington, December 1994, page 6.)

The Federation has had no specific complaints.

Q.3 What more could the Privacy Commissioner do within his budget to reduce compliance costs? What else could be done to minimise compliance costs, in particular for smaller businesses?

As was pointed out earlier (Paper 1, question 15), the requirement to appoint a privacy officer is particularly onerous for small firms. It is proposed that the statute be amended to apply this requirement only to organisations with 100 or more employees.

Q.4 What actual business costs are involved?

The Discussion Paper itself enumerates many of the costs involved, and to these can be added the cost of taking part in any investigation, and the on-going costs associated with a possible Tribunal hearing. It should also be remembered that new small businesses are constantly coming into existence and being required to meet the initial set up costs of appointing a privacy officer and developing complaint mechanisms (if, that is, they are aware that these requirements exist). Such interventions can only add to the costs of business start-up and, therefore, have the potential to affect business viability. It is here that education from the Commissioner's office could be of considerable assistance.

- Q.5 Could the layout or wording of the Privacy Act be improved to make it easier to use?**

The Federation has not experienced any problems with the current layout of the Act.

- Q.6 Should more cost recovery for access and correction requests be allowed to reduce agencies' compliance costs?**

Cost recovery currently available is probably adequate, but the right to charge could be extended to government agencies.

- Q.7 How do any delays in dealing with complaints affect compliance costs? What measures could reduce the time for complaints investigation and resolution to reduce compliance costs?**

It is difficult to see how a delay in dealing with a complaint could affect the actual cost of compliance, although it could have an adverse effect on the relationship of the requester and the agency, employers in particular (and the banking industry may well be a special case).

Possibly (although doubt about this was earlier expressed) the Act could require a real initial attempt to resolve any dispute at workplace level.

- Q.8 Can the privacy officer's role be enhanced in some way relevant to the effective use of resources in regard to compliance?**

- Q.9 What specific compliance costs incurred are of most concern? In what ways could these be reduced?**

- Q.10 Overall, what do you think about the extent of compliance costs incurred by the Privacy Act? Are they excessive, just about right, or is the Act in fact helpful in reducing compliance costs?**

It is unlikely (as proposed) the privacy officer's role could, satisfactorily, be statutorily enhanced to ensure a more effective use of resources, although individual organisations may be able to make better use of the person appointed to this role.

Most cost is probably incurred where the information requested is not readily available or where the requester challenges the information provided. But as such costs are not static it is far from clear how any specific "reduction" could be contemplated.

Although any "non-business" cost is an imposition on business, to date it does not appear that compliance costs are excessive. It is difficult to generalise, however, as a time-consuming claim may well impose immense compliance costs on any one particular business. There is always the possibility that as familiarity with the Act grows, the greater use made of it will mean higher future costs.

- Q.11** Would advance rulings help reduce compliance costs? Can such rulings achieve the advantages expected of them? Are the disadvantages too severe to be worthwhile?

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

- Q.12** Are there other mechanisms which could usefully cater for the specific needs and practices of agencies or sectors to reduce compliance costs?

This is a question which specific agencies are best able to answer.



NEW ZEALAND WX4
ASSOCIATION OF SOCIAL WORKERS
AOTEAROA

- 7 NOV 1997

P O Box 9298
Te Aro
WELLINGTON

23 October 1997

Blair Stewart
Manager, Codes and Legislation
Privacy Commissioner
P.O. Box 466
AUCKLAND

Dear Mr. Stewart

**Submission : Review of Privacy Act 1993
Discussion Papers**

Thank you for the opportunity to comment on the above matter. Unfortunately we only have the last five papers distributed. Thus, given the short timeframe, I can only comment on discussion papers 5, 6, 7, 9 and 12.

On behalf of the New Zealand Association of Social Workers, I will make every endeavour to attend the consultation meeting in Christchurch on 19th November 1997. Please send me the details of this meeting when they are available.

Yours sincerely,

Lynne Briggs
NZASW Ethics Convenor

National Office
GAYLENE LAWRENCE
Administration Officer
P.O. Box 9298
Te Aro
Wellington
3rd Floor
39-41 Ghuznee Street
Wellington
Tel. (04) 384 7761
Fax. (04) 384 7761
NZ STD - 64

resident
DAVID McNABB
P.O. Box 4233
Hamilton East
Tel. (07) 856 7351 Pvt
(07) 856 7351 Bus
Fax. (07) 856 7351
Mob (025) 585 232
Email elganabb@wave.co.nz

ice President
TUROA HARONGA
Specialist Maori Mental Health
P.O. Box 2056
Palmerston North
Tel. (06) 323 6843 Pvt
(06) 350 8373 Bus
Fax. (06) 350 8374

cretary
JUSTINE KINGI
P.O. Box 4233
Hamilton East
Tel. (07) 843 8984 Pvt
(09) 418 1951 Pvt
(07) 834 8800 Bus
Ext. 8974
Fax. (07) 834 8858
mail cejlk@twp.ac.nz

*igata Whenua
representative*
ERLE DAVIS
P.O. Box 4233
Hamilton East
Tel. (07) 847 5708 Pvt
(07) 839 4536 Bus
Fax. (07) 839 4515

Discussion Paper 9.

Compliance and Administration Costs.

- Q1. A broad interpretation of cost would be appropriate for the Privacy Commissioner to focus on involving not only the monetary cost of compliance with and administering the act, but other human costs such as the obligations and subsequent anxieties created by the understanding of and responsibility for understanding complex requirements.
- Q2. Assistance with tailoring compliance to different types of business could increase efficiency and reduce cost.
- Q3. Compliance costs seem to be reasonably efficient and minimal and the act quite flexible in this respect.
- Q4. No comment.
- Q5. Probably is room for improvement in wording of the act to make it as easily understood as possible. This would enhance compliance. Also useful within an organisation to have people with specialist skills in this area to consult.
- Q6. No, the cost of providing information held by an agency about an individual should be minimal and not increased.
- Q7. We are unsure how to address this issue as complaints investigation and resolutions and compliance monitoring takes a considerable amount of time.
- Q8. Yes, Privacy Officers role could be enhanced in some way.
- Q9. No comment.
- Q10. Cost seems reasonable in terms of complying to the Privacy Act.
- Q11. No comment.
- Q12. No comment.

WELLINGTON CITY COUNCIL
SUBMISSION TO THE REVIEW OF THE PRIVACY ACT

DISCUSSION PAPER 9
COMPLIANCE AND ADMINISTRATION COSTS

Question 1. What are compliance costs? On what should the Privacy Commissioner concentrate in looking at the issue of such costs?

The bullet points in the paper are valid considerations in defining compliance costs. Consideration also needs to be given to costs of labour, processing times for systems, separating personal information from other information, changes to existing systems and material costs such as reprinting forms and advertising.

The Ministry of Commerce definition is not appropriate as local authority agencies do not interact directly with government agencies directly, but with the individual.

Question 2. Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs.

Yes. These include,

- the management of Domestic Protection Order directions involving a great deal of manual management of information and the resources needed to carry it out if systems can not easily be changed.
- the requirement for more written records of authorisation, however WCC would not find new written records of authorisation in critical situations to be excessive.
- disputes over public register information as a result of the conflict of current legislation and lack of progress in resolving it

Question 3 What could the Privacy Commissioner do within his budget to reduce compliance costs? What else could be done to minimise compliance costs, in particular for smaller businesses.

Recognise the management implications of changes, particularly the need to amend computer systems and potential increased consultation and communication requirements over and above what is already there.

Question 4 What actual business costs are involved in complying with the Privacy Act?

There are ongoing business costs in administering the system to suppress personal information as required, to easily produce information and to eliminate other information. There are ongoing training costs for staff in an area which is not core business for the agency, especially training in legislation requirements which need interpretation in many cases, and there are also time costs in dealing with access requests and set-up costs for any changes in forms or systems.

Question 5 Could the layout or wording of the Privacy Act be improved to make it easier to use?

There needs to be increased use of definitions as per Discussion Paper 1. As the Act has major impacts for, and is there to protect individuals and enhance privacy, the use of Plain English is imperative if they are to understand and use it. References to other acts are couched in language which is often difficult for non-legal people to understand.

Question 6 Should more cost recovery for access and correction requests be allowed to reduce agencies' compliance costs?

Yes, public sector agencies must be able to charge in the same way as the private sector

Question 7. How do any delays in dealing with complaints affect compliance costs? What measures could reduce the time for complaints investigation and resolution to reduce compliance?

Delays probably do not impact on compliance costs at WCC

Question 8. Can the privacy officer's role be enhanced in some way relevant to effective use of resources in regard to compliance?

No, but more Case Studies training at the Privacy Issues forum would be helpful.

Question 9. What specific compliance costs incurred are of most concern? In what ways could these be reduced?

No comment.

Question 10. Overall, what do you think about the extent of compliance costs incurred by the Privacy Act? Are they excessive, just about right, or is the Act in fact helpful in reducing compliance or other costs?

Costs for WCC are probably not excessive at this stage now that all forms are meeting requirements. The conflict between LGOIMA and the Privacy Act creates compliance costs for educating the public, i.e. it creates a business cost of complying. The issues over Official Information requests and misunderstanding of the PRPPs could be attributed to lack of explanation by the Privacy Commissioner. Currently, this is being left to the agencies to do.

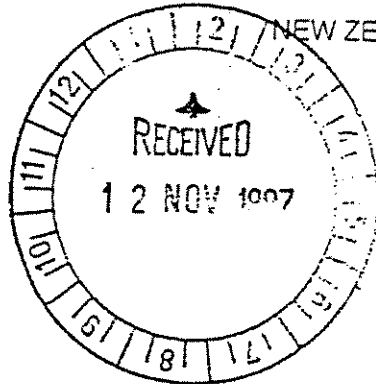
Question 11. Would advance rulings help reduce compliance costs? Can such rulings achieve the advantages expected of them? Are the disadvantages too severe to be worthwhile.

It would be useful to be able to get a 'reaction' from the Privacy Commissioner to what is being proposed, acknowledging that a thorough investigation has not occurred. Advance rulings would decrease compliance costs, as a definitive statement would be given, but the response would need to be timely to avoid any impact on complaints processing.

Question 12. Are there other mechanisms which could usefully cater for the specific needs and practices of agencies or sectors to reduce compliance costs?

No.

WX6



NEW ZEALAND VIDEO DEALERS ASSOCIATION INC.
P.O. Box 36-067, Northcote, North Shore City 1330
Phone 9-419 0042 Fax 9-419 0059 Tollfree 0800 999 933

6 November 1997

Privacy Act Review 1997
Office of the Privacy Commissioner
P O Box 10-094
WELLINGTON

Dear Sir

The New Zealand Video Dealers Association, an Incorporated Society, established in 1983, represents some 310 video libraries - approximately 80 percent of the video rental market in New Zealand. Included in our membership is 100 percent representation of the franchises, chain and groups - United Video Franchise Ltd; Video Ezy; Video Village; Blockbuster Video and the 1st Group.

The Privacy Act is an important piece of legislation for every one of our members as in their day to day business each video library captures and holds data in respect of their members (customers). Membership can take the form of individual, joint or family. The data captured is held for the purpose of establishing the identity of the person renting product or equipment in order that it may be recovered in the event it is not returned or, establishing a credit rating where goods over a specified value are rented.

We attach our comments on aspects of the Discussion Papers as we see them affecting our business.

We would like to be included in the consultation meetings.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rosemarie Dawson".

Rosemarie Dawson
Executive Officer

PRIVACY ACT REVIEW

Paper 9, Page 5, Q 1

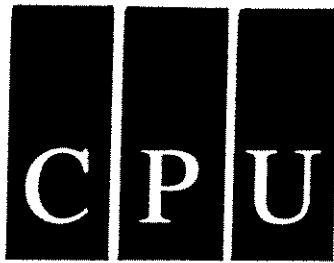
We would define compliance costs as those costs incurred in initially interpreting plus subsequently applying legislation which are over and above the costs which would not be incurred if the legislation was not in place.

As with all new legislation there is the initial cost of interpretation and regardless of any efforts made to ascertain that the correct interpretation is being applied there is no guarantee that any particular interpretation will be accepted as correct. Where an interpretation is disputed there is the subsequent cost of modifying forms and procedures. There are further the ongoing cost of tracking rulings given in specific situations and subsequent reviews such as this one, with the consequent cost of any changes to forms and procedures that may be required.

On top of this we have the cost of applying and administering the Act on a daily basis, and while this is not great it is still a cost.

A point which may sometimes get overlooked is the overall amount of legislation, each incurring its own compliance cost. Each piece of legislation in itself is no doubt very valid and worthwhile. However the cumulative effect of all of it becomes a significant cost which ultimately has to be borne by the customer.

The overall impact of compliance costs is particularly heavy in both financial costs and stress on smaller business which make up a significant proportion of the economy dealing directly with the public. Hence it is important that compliance costs be kept as low as possible. Given the requirements of the Privacy Act and the fact that it generally fits in with good business practice it is hard to suggest any ways of reducing compliance costs. However, we would be concerned to see any further requirements which would increase costs.

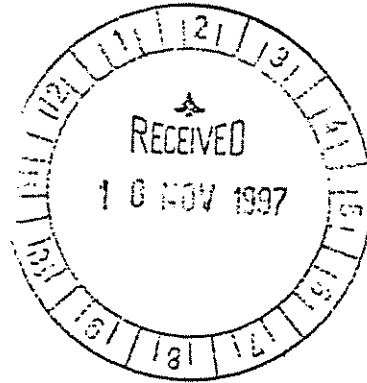


Commonwealth Press Union
New Zealand Section

WX7

10 November 1997

Mr Bruce Slane
Privacy Commissioner
5th Floor
Unisys House
44 - 52 The Terrace
WELLINGTON



Dear Bruce

Privacy Act Review

Please find enclosed the Commonwealth Press Union (New Zealand Section) submission to the Privacy Act Review.

If you have any queries or would like any further information please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. O'Reilly'.

pp Phil O'Reilly
HONORARY SECRETARY

DISCUSSION PAPER 9 - COMPLIANCE AND ADMINISTRATION COSTS

Background

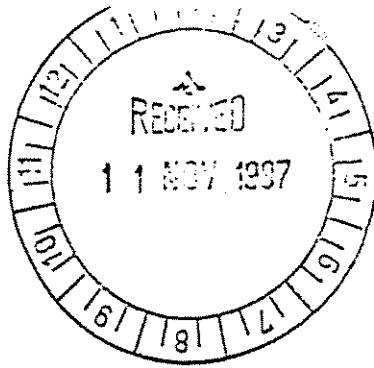
One of the comments made in the background statements to Discussion Paper 9 suggests that in looking at compliance costs we need to consider the fact that the New Zealand Privacy Act was enacted for, among other reasons, a need to comply with OECD guidelines and the requirements of the EU countries. Although we accept this is probably correct it should be stated that the wide spread of our privacy law is not necessarily required under the OECD guidelines nor by EU countries in terms of international trade. In order to comply with these guidelines and requirements New Zealand could have instituted a much more limited piece of privacy legislation than actually turned out to be the case. For instance, it is difficult to imagine that public hospitals in New Zealand refusing to make available information under the Health Information Privacy Code is a necessary response to an OECD guideline.

We believe that it would be incorrect to characterise the advantages of the Privacy Act overall as being significant because of the need to comply with OECD guidelines and requirements of EU countries. A far more limited piece of legislation with far less compliance costs for many New Zealand agencies would have been adequate to comply with these guidelines and requirements. This matter is covered further in section 4 of our submission.

Q2. Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs?

Although the point is probably marginal with regard to the specific nature of question 2 we can report that journalists are now often engaged in lengthy debates and investigations of agencies because of refusals to release information, ostensibly because of the Privacy Act.

We can also report that these investigations and debates sometimes lead to the incurring of legal fees.



WX8

NORTHEY

PUBLIC & VOLUNTARY
SECTOR CONSULTANT

184 Arthur Street, Onehunga,
Auckland, 6. New Zealand

PHONE/FAX +64-9-634 1494
EMAIL northey@voyager.co.nz

November 9, 1997

Wendy Bertram
Codes and Legislation Officer
Office of Privacy Commissioner
PO Box 10094
Wellington

Dear Wendy:

Auckland District Council of Social Service Submission on the Review of the Privacy Act 1993

Further to our telephone conversation on Thursday, I attach the submission of the Auckland District Council of Social Service on the remaining discussion papers: 5, 6, 7, 9, and 12 on the Review of the Privacy Act 1993. This follows on from our submissions on discussion papers; 1, 2, 3, 4, 8, 10 and 11 which were posted to Blair Stewart on 17 October. I look forward to taking part in the consultation meeting in Auckland on 24 November where I shall be accompanied by Mike Darke, another Auckland DISCOSS Executive Member, who works for the Combined Beneficiaries Union, Private Bag 68905, Newton, Auckland.

Yours sincerely

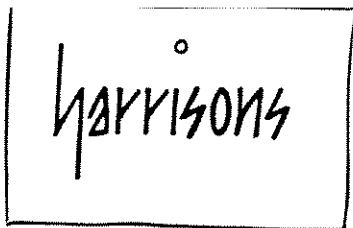
Richard Northey
Executive Member
Auckland District Council of Social Service

Attachments: Submissions on papers

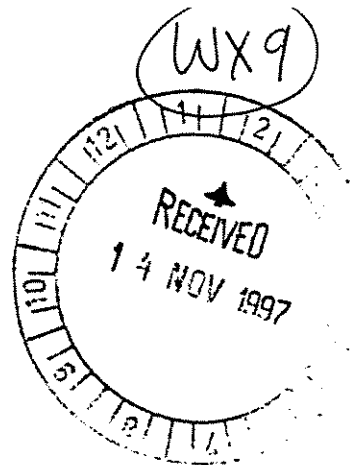
5, 6, 7, 9, and 12.

ADCOSS Submission on Paper 9: Compliance and Administration Costs

- Q1. Compliance costs are the actual costs incurred in directly meeting the obligation in terms of the paper and xeroxing materials together with the actual time taken in directly meeting the obligation of getting the information, together with a fair share of the overheads in terms of power and the cost of space occupied linked with the time actually taken in meeting the obligation. The other alleged costs are not relevant and should not be part of the charge.
- Q2. We are not aware of any instances of any such excessive costs.
- Q3. The Privacy Commission clearly needs more resources allocated to it to train and inform agencies so that they can comply more readily and more cheaply.
- Q4. Training staff, ensuring records are obtained, properly administered, accessible, the right ones are kept, and photocopying and postage costs. We believe that it is not unreasonable for these costs to be carried by business providing there is more adequate training assistance from the Commission.
- Q5. No. It is reasonably set out.
- Q6. No. Costs should still only be set on a real cost recovery basis as set out above.
- Q7. More resourcing of the Commissioner is required to enable all investigations to be commenced within a month and normally completed within a further month. There should be penalties on agencies not complying in order to ensure all complaints are finalised quickly.
- Q8. Yes. By providing more resources for information, education and training.
- Q9. No. There are no significant unreasonable costs.
- Q10. Compliance costs are about right.
- Q11. Yes. Advance rulings should help reduce compliance costs.
- Q12. Probably, if there is better resourcing and training.



Principal: Cathie Harrison, MA LLB Dip NZLS
Barrister & Solicitor



By Hand

November 14, 1997

Privacy Act Review 1997
Office of the Privacy Commissioner
P O Box 10-094
Wellington

**Telecom New Zealand Limited: Submissions on 1997 Privacy Act Review
Discussion Papers**

I enclose submissions on discussion papers 6, 9 and 12. These are lodged on behalf of Telecom New Zealand Limited.

Telecom has one further set of submissions to make. These are on paper 5 (public register privacy issues) which have a bearing on (among other things) shareholders' registers. The submissions will be brief but unfortunately we are unable to finalise them until early next week because of the unavailability of one or two key people. I will get the submissions to you as soon as possible.

Yours faithfully

Cathie Harrison.

Cathie Harrison
Principal

cc Jonathan Leach
Don McIlroy

REVIEW OF THE PRIVACY ACT 1993
DISCUSSION PAPER NO. 9
COMPLIANCE AND ADMINISTRATION COSTS

Party Making Submission: This submission is lodged on behalf of Telecom New Zealand Limited ("Telecom").

General Comments: Telecom has only one comment.

Q2: Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs?

An example that Telecom is aware of is the use of access rights to further objectives unrelated to privacy, eg coordinated mass requests for access to personal information by strikers while a strike is in progress. It might be thought that the provisions governing withholding where requests are frivolous might apply. However, Telecom is aware of a situation where the Commissioner's office has indicated that such requests must nevertheless be complied with.

The cost to Telecom of complying with such access requests is substantial.

REVIEW OF THE PRIVACY ACT 1993

Discussion Paper No. 9

COMPLIANCE AND ADMINISTRATION COSTS

Submission of Ian MacDonald Enquiries Officer Office of the Privacy
Commissioner

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Q1: What are compliance costs? What should the commissioner concentrate on in looking at such costs?

The definition offered in the Discussion Paper, described as “cost incidental to the obligation” seems to capture the idea of compliance costs. The cost is incurred when an action is required in order to substantively or procedurally comply with the Privacy Act. Such compliance includes, but is not limited to: acquiring some knowledge of the workings of the Act, policy development, staff training, processing access requests, or assessing information integrity and systems security. It has been said by one commentator that the Privacy Act has done nothing more than legislate for what is considered good information management practice. The Privacy Act 1993:

“...introduced a number of legal principles and obligations for those who hold and manage information. However, in many respects the new rules simply embody in the law principles which should be observed in sound business and information technology practice.”¹

In my opinion: if best practices are employed, to what extent does the Privacy Act have a real and not an illusory impact on information management costs. A distinction between real and illusory costs of compliance may be a beneficial starting point of any compliance cost analysis.

In looking at compliance costs, I read the second limb of the question as inferring that: the Commissioner should have regard to reducing costs borne by agencies. Such “cost shifting” may require an increase in the Privacy Commissioner’s budget. Such costs would ultimately be drawn from the tax base. A proposal for such change raises political issues concerning fiscal and monetary policy of the governing political parties. In a user pays era a cost recovery regime may be considered appropriate for actions which may be construed as a section 13 activity. Actions that fall outside section 13, would place the Privacy Commissioner faced with the reality that, four years on from 1 July 1993, the Privacy Commissioner would then be in direct competition with private sector consultants possessed of Privacy Act expertise in cost effective compliance programmes. Such competition would, in my opinion, raise issues concerning both the role and the scope of the role of the Privacy Commissioner as a Crown Entity.

Assessing whether or not there is a distinction to be drawn between real and illusory costs of compliance, in the context of modern information management practice may be something to which the Privacy Commissioner may wish to consider. Whether or not the Privacy Commissioner should expand the scope of his function to compete with private consultants that provide advice, is another matter for his consideration.

¹ Adlam, G “*Compliance with the Privacy Act 1993 for Information Technology Professionals*”, *Ensure Compliance with the New Privacy Act* (Institute for International Research Seminar, Auckland 13 October 1993).

Q2: Are there any aspects of the Privacy Act which fall into any of these categories of causes of excessive compliance costs?

As result of my experience as an Enquiries Officer, in my opinion the most problematic category listed in the Discussion Paper is: "for individual businesses themselves, a lack of the management systems and skills necessary to comply, due to factors such as lack of experience, capabilities or equipment" I see these factors as contributory of the reason that compliance costs are of concern at all, as I have commented at Q1 (refer to footnote 1).

The nature of the Act requires that certain ends be achieved and that certain standards be maintained. Due to the existence of section 23, agencies subject to the Privacy Act bear the responsibility for their compliance with the Act, for which some cost may be associated. Other than section 23 of the Privacy Act, the Act is non-prescriptive in regard to methods of compliance; this confers a discretion upon agencies to comply in a manner appropriate to their functions, their clientele and within their means. The exercise of such a discretion is a management skill and capability issue.

If for some reason the discretion conferred becomes discretion deferred, a likely consequence is that an agency's first real brush with the Privacy Act may occur not at policy planning, implementation of operational procedure or risk management but at damage control. As such, their information management policy functions as a mechanism of "putting out fires" frustrating ordinary business functioning. The result is then blamed on the Privacy Act as the cost of compliance has shifted to the greater costs of non-compliance; the Privacy Act, rather than management practices is then regarded as the source of the frustration and expense.

One suggestion to reduce "excessive compliance costs" may be that as a remedial measure for existing agencies: agencies performing an audit function, more fully comment on the existence and viability of their client's compliance programmes. For agencies that tend to audit "in house", such as small businesses, a different approach, such as a greater assistance for self audit of Privacy Act compliance, may be preferable.

Perhaps a tax incentive for the implementation of compliance programmes which have been independently audited and certified of achieving a certain standard of compliance, is workable. The standard of compliance could be scaled on a continuum; for example: meets the basics satisfactorily as evidenced by the existence of policy, appointment of Privacy Officer(s) -to- deployed "X" level of information technology systems and procedures which meet e.g. NZSA or ISO standard; "n" number of staff have attended Privacy Act attended seminars.

I am not advocating that the Privacy Commissioner develop some accreditation scheme for Privacy Act compliance; I merely point out that an obvious and reasonably instant monetary incentive for agencies that can provide some independent evidence of a measure of compliance is more likely to attract the attention of those agencies most at risk of non-compliance.

Q3: What more could the Privacy Commissioner do within his budget to reduce compliance costs? what else could be done to minimise compliance costs, in particular for smaller businesses?

I have mentioned a tax incentive for compliance at Q2, of course such an incentive would not come out of the Privacy Commissioner's budget; but, the Privacy Commissioner could provide significant contribution to such a proposal. Contribution into such a proposal, as a function under section 13, may or may not, be produced within the Privacy Commissioner's budget.

Small businesses that seek grant assistance from city council's for setting up are required to submit a Business Plan. The Plan and the funding application are reasonably comprehensive. Some evidence of consideration of a Privacy Act compliance programme incorporated into the application and Plan would provide some assurance that new businesses are at least meeting a minimum threshold of awareness with a compliance programme for development scheduled into their plan. Such a recommendation to the Minister of Local Government may be an appropriate section 13 activity.

Q4: What actual business costs are involved in complying with the privacy act?

I refer to my comments at Q1 and Q2 concerning "actual business costs". In my opinion, any "actual business costs" of compliance will be far outweighed by the benefits of compliance, allowing for the continuation of commercial trade with Europe, once the European Union Directive of 24 October 1995 comes into effect.²

At Chapter IV of the Directive which deals with the transfer of personal data to third (non-member) countries, Article 25 provides a set of principles which are applicable. In summary those principles provide:

1. Transfers of information to third countries will occur only if the third country ensures an adequate level of protection of privacy of the personal information.
2. Adequacy of protection offered by third countries may be assessed by member states.

² Directive 95/46/EC of the European Parliament and of the Council.

3. Member states shall inform each other as to which non-member states do not ensure adequate protection for member state information transferred.
4. Member states may prevent transfer of information to non-member states that are privacy law inadequate.
5. Negotiations between the EU Commission and non-member states to remedy a harsh result of 4 may occur.
6. Following negotiation, a non-member state may be found to be adequate, due to its domestic or international commitment to laws which protect basic rights and freedoms.

A government which fails to provide a regime to meet the adequacy test of principle 1, will be subjected to the leaping of hoop and hurdle required of overcoming the effects of principles 4 to 6 in order for the private enterprise of that country to continue to trade in Europe.³ Without a Privacy Act in NZ, not only would the performance of such “leaping” require funding from the tax base, an indirect cost to business of non-compliance, private enterprise may lose the opportunity of receiving increased European trade opportunities which the operation of the Directive may provide. This could seriously undermine an agency’s ability to participate in an export driven economy.

The alternative to a Privacy Act providing a legislative infrastructure for European trade is an approach suggested in America.⁴ The suggested approach is: agencies trading with Europe contract for compliance with the Directive. The cost of such collateral contracting is likely to equal Privacy Act compliance costs, on the first transaction.

Reasonable “actual business costs” of compliance need to be measured against and in comparison to the likely costs of non-compliance: taxation, loss of opportunity of access to a large market where NZ may currently be placed in a preferred trading nation category.

³ *The Australian Financial Review* 17 April 1997, ‘The Problem for Business NO PRIVACY’., C Merritt comments that New Zealand is seen to have a competitive advantage over Australia due to Australia’s lack of a law that provides ‘adequate’ privacy protection. New Zealand’s Privacy Commissioner has independently commented that the NZ Privacy Act is ‘adequate’.

⁴ The USA does not yet have a Federal Act which is “adequate”.

Q5: How beneficial are the information privacy principles in assessing and devising more effective information handling practices?

I am unable to improve on my initial comment that the Privacy Act simply legislated what is considered to be good management practices; except to add that the Act also set a statutory minimum requirement for information handling practices. Viewed as a minimum requirement, any proposed information technology or handling practices have, in the Act, a benchmark against which any proposed information system may be compared. The ultimate measure of the effectiveness of a business practice has to be the test: does achieving the successful ends of the practice have a positive or negative impact on revenues.

With the above mentioned test in mind: viewed positively, a common benchmark that is applicable to both the public and private sector provides to agencies a “level playing field” to develop, and implement their compliance policies unique to the needs of the operation and its clientele. The common benchmark of ISO accreditation has resulted in a deluge of advertising by agencies that are proud to boast of their ISO accreditation. Such accreditation is marketed to the client as an aspect of the agency that provides to the client an advantage in dealing with that agency instead of an agency not so accredited. Where the products of two companies in competition are not too dissimilar, the companies may only successfully compete on aspects of service. I am not suggesting that the Privacy Commissioner advocate a Privacy Act accreditation scheme. I merely wish to point out that the astute business person may see a benefit in being open regarding their confidence in the ability of their agency to comply with the Privacy Act, particularly where an auditor has been able to comment on or certify some level of compliance.

As consumers become increasingly aware of the Privacy Act and its various rights and duties respectively conferred upon them and imposed upon agencies, consumers may form an expectation of something more than a “privacy disclaimer” (as one person put it) on a personal information collection form. If in their literature an agency can be openly confident regarding their ability to comply with the Act, any such declaration may function as tool for marketing their business; placing them in a situation where they may be better able to compete on the basis of being better able to provide better services.

The Privacy Act is a Public Law Statute with a Commercial Law flavour. A commercially astute approach to taking the best advantage of the Act may have short term compliance costs; which in time may prove to bear important long term revenue generating benefits. A best practices approach to information management would place the Privacy Act at the starting point for policy development; as per Q1 footnote 1.

Q6: Could the layout or wording of the privacy act be improved to make it easier to use?

In the context of compliance and administration costs, I do not see the layout or the wording of the Privacy Act as a hindrance to compliance. A grasp of: the legislative intent, the concepts expressed within the Act, the criteria of the principles and their exceptions is the key to understanding how to make use of and comply with the Act. The time taken to come to this understanding is a compliance cost that, in my opinion, is not barred by the Act's format.

Q7: Should more recovery for access and correction requests be allowed to reduce agencies' compliance costs?

A cost recovery rather than a punitive measure is to be preferred. The question in the middle ground: whether an agency should be able to profit from processing the request, is another matter. Time spent on access and correction requests is time lost from other aspects of the agency's business; this presents as an arguable case for a margin of profit to be allowed. My concern is : can that margin be exploited for profit. A review of the charge imposed for an access request will of course require a further investment of time by the agency, which may weigh against any attempts at profiteering.

Q8: How do any delays in dealing with complaints affect compliance costs? what measures could reduce the time for complaints investigation and resolution to reduce compliance costs?

The real impact on compliance costs due to delays in dealing with complaints, will most likely arise where an agency may intend compliance as a remedial measure after a breach has occurred and in response to a "ruling" by the Privacy Commissioner.

One explanation of such an approach may be: the mistaken belief that by acting in accordance with any recommendation by the Privacy Commissioner an agency may galvanise itself against further complaint. An agency acting in such a manner may also mistakenly characterise any delay as causative of a period of time where the agency is at risk of further non compliance, due to the actions of the Privacy Commissioner.

The decision that an agency makes in committing themselves to developing and implementing compliance programmes and policies as a reactive rather than proactive measure is, in my opinion, self explanatory of the manner in which delay may have an

impact on compliance costs: costs of non-compliance have been chosen in preference to the costs of compliance. In my opinion the Privacy Commissioner should bear no responsibility for costs in such an instance.

I will assume that the second limb of **Q8** means “reduce both: the time of delay, time of investigation, time of resolution -and- compliance costs for each”.

I have no present comment on delay time and have commented on delay costs at earlier in these submissions.

Investigation time is an issue of applying a Just procedure equally in all cases, regardless of complexity of facts and issue. No doubt time frames vary dependant upon the variables. Investigation costs are really a cost of non-compliance for which my prior comments are reiterated.

The time spent on negotiating a resolution will be relative to the particular facts of each individual case; no doubt this will vary, as per, investigation time. The greatest resolution cost will most likely be the time spent on attempting resolution, that is a procedural cost of non-compliance issue.

Q9: Can the privacy officer’s role be enhanced in some way relevant to effective use of resources in regard to compliance?

Section 23 prescribes a minimum requirement of the duties of a Privacy Officer. These are set out at paragraphs: (a) to encourage compliance with the Act by the agency; (b) deal with requests related to the Privacy Act; (c) participate in the investigation of complaints. Beyond those minimum requirement provisions, paragraph (d) provides a legislative catch-all: “otherwise ensuring compliance by the agency with the provisions of the Act”.

At paragraph (d) an agency may further define the scope of the Privacy Officer’s duties as is appropriate to the agency. An agency may spend as much or as little time and money as they please on: “otherwise ensuring compliance”. The section does not prevent an agency from engaging outside agents to support or instruct the Privacy Officer; or redefining the Privacy Officer’s role in regard to paragraph (d) as simply being the person nominated to permanently retain or periodically call in a consultant. At risk of unnecessarily stating the obvious, paragraph (d) provides an equally free hand to agencies to develop the “in house” role as appropriate to their business, their clientele and their means.

Although my comments may be seen by some as a restatement of the obvious, others may not have fully appreciated the freedom which 23(d) confers. Freedom to act under 23(d), making decisions concerning the effective use of resources by an agency, is perhaps best left to the agencies themselves.

Q10: What specific compliance costs incurred are of most concern? in what ways could these be reduced?

Private enterprise, particularly Public Accounting firms, provide education services concerning awareness and compliance requirements of the Privacy Act. Solicitors and Management Consultants alike are increasingly better able to offer advice on privacy matters as well as provide Privacy Impact and Privacy Audit Assessments. The Privacy Commissioner has invested significant resources into the education and awareness aspects of his functions as set out at section 13 of the Privacy Act.

Notwithstanding the endeavours of both private enterprise and the Privacy Commissioner, there are still some basic awareness issues that are contributory to costs of compliance with the Privacy Act, which are of concern. These arise in regard to the ways that, through lack of awareness, agencies: misconstrue its intent and misinterpret its contents; misunderstand or misuse its application, in both the public and private sectors.

An agency's inability to comply with the Privacy Act due to the issues cited, is a concern because an agency's limited resources for compliance are then squandered for lack of paying the price of a free telephone call. I have commented more fully earlier in this paper in regard to reasons, results, remedies.

Q11: Overall, what do you think about the extent of compliance costs incurred by the privacy act? are they excessive, just about right, or is in fact the act helpful in reducing compliance or other costs?

No further comment.

Q12: Would advance rulings help reduce compliance costs? can such rulings achieve the advantages expected of them? are the disadvantages too severe to be worthwhile?

"Advance rulings" may be of most use to agencies that plan to develop their compliance policies in response to some potential adverse outcome, rather than focusing on first attempting to "get it right" the first time. The words "advance ruling" are really nothing more than another name for a prior "opinion". (Opinions are what lawyers form in order to provide advice to their clients). Such opinions may provide an agency with some reassurance that : if they follow what essentially amounts to advice given, they may either gain some indemnity against complaint or may present their practices as "Privacy Commissioner approved". In ether circumstance

consideration of such a mechanism would require a very scrupulous assessment of how such a mechanism will sit juxtaposed to the Privacy Commissioner's jurisdiction to investigate complaints.

Currently a number of private agencies are able to provide opinions which can serve to function similarly to "advance rulings". As such, is it appropriate that the Privacy Commissioner compete for that business, is it appropriate that such a function be funded out of the public purse, as I have commented at Q1.

Q13: Are there other mechanisms which could usefully cater for the specific needs and practices of agencies or sectors to reduce compliance costs?

No further comment, at this point in time.