REFLECTIONS ON 10 YEARS OF THE PRIVACY ACT

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I had intended my contribution to this session to have been a power point slide show of incriminating photographs from the previous Privacy Issues Forums since 1994 – featuring a number of the people present today. Regrettably, the size of images caused my computer to crash. Notwithstanding my strictness in insisting that other speakers file their papers well in advance of the Forum, I have failed to do so myself – don't go looking for a paper from me in your binder or out in the foyer.[1] Accordingly, you have only my oral remarks on this occasion.

In the five-minutes I have allowed myself and other presenters, I hope to cover just two topics: the Health Information Privacy Code and certain international developments. If there is further time during Q&A and discussion I have some further observations to make.[2]

Health Information Privacy Code

I was taken on by the Privacy Commissioner as a legal adviser in February 1993 with the principal task to draft what has now become the Health Information Privacy Code. In fact, at that time there were proposals to have three health codes cover:

- medical practitioners;
- health researchers; and
- everyone else in the health sector.

The three competing proposals were rationalised into a single code which was issued in August 1993: roughly a month after the Act came into force.

Accordingly, the code proposal was researched, consulted upon, drafted and issued within 6 months. Of course, I did not know very much about privacy at that time. I have learned a lot more since then and could not now have drafted such a code in less than 3 or 4 years!

As far as I could find, there were no comparable models in other similar countries' laws at that time to draw upon. There are now quite a number, including some that have copied some features upon the Health Information Privacy Code.

Although I was not able to attend the public health session earlier today, I know from the papers prepared for that session that there are some questions about how effective a "light handed" set of regulatory controls like the Privacy Act and Health Information Privacy Code can be given the challenges to privacy in the delivery of health services.

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1 This paper is a somewhat edited version of what I think I said in my oral remarks.

2 I never got the opportunity to share those thoughts given that the session started late and others exceeded their allocated time. Had I done so, I would have offered some observations on whether successive governments have done a good job of respecting privacy and whether privacy officers have fulfilled the role that the Privacy Act expects of them.

Of course, the fact that, 10 years on, there are issues with, and indeed assaults upon, privacy which are even greater than the case in 1993 is not a sign of failure. Rather, the fact is that we are better able to identify and debate those issues and assaults with greater understanding and confidence because of our experience over the last 10 years. (Indeed, the 9 or 10 Privacy Issues Forums convened by the Commissioner have helped contribute to that understanding.)

For my own part, I continue to see the Health Information Privacy Code as offering a reasonable regulatory approach. I am not about to suggest that we should look at something as prescriptive and bureaucratic as the new US health privacy law. At the very least, I think that the code remains no worse a piece of privacy regulation than those adopted elsewhere. However, new electronic health systems are a difficult challenge whatever the privacy regulatory system. In New Zealand we have recommended that privacy impact assessment be central to an appropriate privacy response to such challenges and released the *Privacy Impact Assessment Handbook* last year. By coincidence, today is the closing date for submissions on a Ministry of Health discussion paper on a new public health bill. One of the issues canvassed is the possibility of requiring privacy impact assessment in the development of certain information systems. I think this could be an important development for the future.

International developments

As is well known, the Privacy Act 1993 implements the OECD Guidelines of 1980. The bill also drew upon policy development in New Zealand itself including, for example, an options paper prepared by Tim McBride for the Minister of Justice.

The Privacy Act also anticipated work in progress in Europe. This was completed with the EU Directive of 1995. In reflecting on 10 years of the Privacy Act, one thing that has certainly surprised me is the failure of the EU to yet recognise that the Privacy Act provides an "adequate standard of data protection".

In the years following the enactment of the Privacy Act, we saw new privacy laws in a variety of jurisdictions such as Hong Kong and Korea and the extension of privacy law to the private sector in Canada and Australia. The developments in Australia and New Zealand have built upon each other. The New Zealand Act has much in common with the Australian Privacy Act 1988 and, in turn, when Australia extended its legislation to the private sector in 2000 it drew upon aspects of the New Zealand Act which had already regulated such matters.

Everything I have observed in the last 10 years has strengthened my view that the New Zealand Parliament made the correct decision in 1993 to enact an omnibus privacy law with a seamless application to the public and private sectors.

As we have heard at the Forum today, APEC is now starting work on developing privacy principles. I hope that they recognise that there is an "Asia Pacific model" of data privacy law (a term coined by Nigel Waters). This involves a comprehensive or omnibus data protection law, which accords rights to individuals and provides accessible remedies for breach while remaining light-handed in its regulatory effect. The Asia Pacific model typically uses codes of practice to encourage co-regulation or to provide flexibility by the tailoring of standards to particular sectors or activities. While

this is diplomatically called the “Asia Pacific model” it might just as well be called the New Zealand model.

Finally, at the international level, Graham Greenleaf has today announced new work on an Asia Pacific Privacy Charter. This is an exciting non-government privacy initiative. I wish it well and hope it continues the innovative and clear conceptual thinking that marked that Australian Privacy Charter of several years ago.