

Privacy Act 2020 - Section 77

What is section 77?

Section 77 of the Privacy Act¹ says that at any time after receiving a complaint, and before investigating, the Commissioner may decide to use best endeavours to try to resolve a complaint and seek a reassurance from the agency concerned that the issue that led to the complaint has now been rectified. Usually, we do this by way of a conciliation meeting between the parties, facilitated by an OPC staff member.

What's a conciliation?

Conciliation is a form of alternative dispute resolution. It is similar to mediation, except the third party neutral has expertise in the issue in dispute. We use conciliation to explore settlement of complaints where it appears an investigation may not be necessary, but there is a privacy issue to be resolved.

Usually this is where an agency has admitted it has breached a privacy principle but does not agree the breach has caused harm to the complainant, or where further discussions between the parties to understand the impact on the complainant would be beneficial.

We guide the conversation and help provide some structure, but the parties decide their own outcome. We are impartial, and we can't force an outcome, but we can give guidance on the Privacy Act if needed. We are also able to provide information on what might happen if the matter isn't settled via our process.

What's in it for me?

We focus on resolving disputes, and section 77 allows us to do this in a way that is flexible, creative and faster than having to wait for an investigation to be completed.

There are many benefits of resolving your complaint through conciliation – if we are able to achieve a settlement through this process it can be much faster, and help the parties to be able to move forward and get some closure. It's also an opportunity to ask the other party questions, human to human, to understand what went wrong, and what impact that has had. It is particularly useful where there is an ongoing relationship between the parties.

¹ <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23451.html>

There's no formula for determining what a good resolution looks like: ultimately that's up to the parties. An explanation and a heartfelt apology can go a long way to resolving a complaint. Often complainants are seeking compensation, and in some cases that may be appropriate. We see all kinds of creative solutions though – that's the beauty of getting people in the room and brainstorming to solve the problem together.

Conciliations aren't appropriate in every case. Where there has been a significant relationship breakdown between the parties, there is a large power imbalance or a very distressed party, we might not consider a conciliation is appropriate. In that case, we may explore shuttle negotiations instead.

How does this work in practice?

If we consider a matter suitable for a conciliation, we will write to the parties, notifying them of our intention to explore settlement under section 77. We have information about what the process looks like,² and a conciliation preparation toolkit³ on our website.

If both parties are willing to meet, we will work out who should attend, and determine the logistics.

These meetings can take place by zoom or in person, or even over the phone. They usually take 2-4 hours, depending on the issues to be discussed. We tailor the process to the parties and we will make reasonable adjustments if any of the parties have communication, cultural, disability or other needs.

To get the most out of your conciliation, you should be prepared to be open to hearing and trying to understand the other party's perspective, speak openly about your own experience and be willing to be flexible about the outcome. The content of the conversation will be confidential, but we may take what is discussed into account when we are considering the next appropriate steps for the file (i.e. whether to investigate the matter or discontinue).

You can also have a support person or lawyer attend to support you, but you do not need to do this.

What happens if we don't settle?

If the conciliation meeting has not led to a resolution or a reasonable settlement offer, we will consider our next steps. We may decide to formally investigate the complaint, and form a view on whether or not there has been an interference with the complainant's privacy. Alternatively, we may decide not to further consider the complaint if we consider this is unnecessary or inappropriate, or where we are satisfied that one of the matters set out in section 74⁴ applies.

Once a party has made a reasonable settlement offer, we will usually consider that the Commissioner's involvement is no longer necessary. This is so even if the complainant doesn't want to accept the offer.

² <https://www.privacy.org.nz/your-rights/complaints-process/>

³ <https://privacy.org.nz/assets/New-order/Your-rights/Your-privacy-rights/OPC-Conciliation-Case-Conference-Preparation-Toolkit-PDF.pdf>

⁴ <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23447.html>

Our Office has limited resources, so where we consider there is a fair offer of resolution open for acceptance by the complainant, we will usually consider our further involvement is not necessary - see [this case note](#).⁵

If we aren't able to resolve the matter at conciliation, and we think it is appropriate, we may proceed to investigate the complaint.

Whatever we decide, we will let the parties know as soon as practicable. If we decide to take no further action, we will close our file, and the complainant will have the right to take the matter to the Human Rights Review Tribunal.

⁵ <https://privacy.org.nz/publications/case-notes-and-court-decisions/case-note-25347-2003-nzprivcmr-18-acc-client-objects-to-acc-disclosing-comments-about-him-to-others/>