

Chapter 8

Complaints, enforcement and remedies

- 8.1 This chapter examines the complaints system under the Privacy Act and considers whether the existing approach is sufficient, or whether new enforcement tools and remedies are needed.
- 8.2 The essential aim of the existing Privacy Act is to secure voluntary compliance with the law through providing education, guidance, assistance and incentives to comply, backed up by the possibility of enforcement action in the event that voluntary compliance fails. This theory is often known as compliance-oriented regulation.⁵⁴⁸ In it, non-punitive enforcement methods are used as the first step.
- 8.3 It is important to understand that the privacy principles in the Act are not enforceable in the courts.⁵⁴⁹ Instead, breaches of the principles are dealt with through the complaints process established in Part 8 of the Act. There is an important exception. Access to personal information in principle 6, where the information is held by a public sector agency, is a legal right and that right is enforceable in the courts.⁵⁵⁰ So far as we can find, however, there appear to be no decided cases in which claimants have sought to enforce their access rights directly in the courts.

548 See further Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) 238.

549 Privacy Act 1993, s 11(2).

550 Privacy Act 1993, s 11(1).

OVERVIEW OF
THE CURRENT
SYSTEM

Complaints to Privacy Commissioner

- 8.4 Any person may make a complaint to the Privacy Commissioner alleging that any action is or appears to be an interference with the privacy of an individual. For the purposes of a complaint, an action is an interference with the privacy of an individual if it breaches a privacy principle, a code of practice, or Part 10 of the Act (relating to information matching). Furthermore, an action is not a breach of privacy unless it:⁵⁵¹
- has caused, or may cause, loss, detriment, damage or injury to the complainant; or
 - has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations or interests of the complainant; or
 - has resulted in, or may result in, significant humiliation, significant loss of dignity or significant injury to the feelings of the complainant.

Complaints about breaches of principles 6 and 7 do not require harm to be shown. There are some other special statutory jurisdictions, most notably section 22F of the Health Act 1956, which deem matters to be within the complaints jurisdiction.

- 8.5 The Act provides that in the performance of his or her functions, the Commissioner must have due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way.⁵⁵² This may also affect the interpretation of what amounts to a breach of privacy. The New Zealand Bill of Rights Act 1990 is a further influence.
- 8.6 The Commissioner usually receives around 600 to 700 complaints each year. In the 2008/2009 year there were 806, a significant increase.⁵⁵³ Currently around 80 per cent are dealt with within six months. Complaints most commonly relate to denial of access to personal information requested under principle 6, and disclosure of personal information in breach of principle 11. Complaints about breaches of the other principles are much less common.⁵⁵⁴ The Commissioner's functions in relation to complaints are to investigate, act as a conciliator and take such further action as is contemplated by Part 8 of the Act (that is, investigation and settlement of complaints, and action in the Human Rights Review Tribunal).⁵⁵⁵

551 Privacy Act 1993, s 66.

552 Privacy Act 1993, s 14(a).

553 Office of the Privacy Commissioner *Annual Report 2009* (Wellington, 2009) 25.

554 Paul Roth *Privacy Law and Practice* (loose leaf, LexisNexis, Wellington, last updated 2007) PVA 67.3.

555 Privacy Act 1993, s 69.

Process

- 8.7 Upon receiving a complaint, the Office of the Privacy Commissioner (OPC) will assess it against the privacy principles in order to identify the issues involved in the complaint and determine the immediate direction of the investigation. They would then generally contact the complainant, and the respondent agency may also be notified of the complaint and asked to respond. Once the respondent agency has been notified, the matter becomes jurisdictionally qualified as one that could be heard by the Human Rights Review Tribunal.⁵⁵⁶
- 8.8 The Office would then consider a range of options to deal with the complaint, ranging from equipping the parties to resolve the issue themselves, to mediation or a full investigation of the complaint. Often further information is required from one or both parties. Previously, in the early stages complaints were handled by an Assessment and Conciliation Team, whose focus was on trying to resolve the complaint early. Where this team was unable to resolve a complaint, or the complaint was complex or difficult, it was referred to an Investigating Officer Team. In 2009, however, the Office trialled a one-team approach, where the same team undertook both work-streams. This meant that all the team was able to advance early settlement, rather than only half as before. The trial was a success.
- 8.9 When a complaint is investigated, the officer dealing with it will gather and analyse the facts about the complaint. At this stage the Office will begin forming an opinion about whether there has been a breach of the privacy principles and whether any harm has resulted from the breach. Where the Commissioner believes that the complaint has substance, the Commissioner must use his or her best endeavours to secure a settlement between the parties.⁵⁵⁷
- 8.10 The Office will generally attempt to resolve the dispute at all stages of the process. In most cases, either complaints are settled or complainants decide not to pursue the matter further after the investigation is completed.⁵⁵⁸ Sometimes during the investigation investigating officers may indicate a legal view of the complaint in an attempt to persuade one or both parties of the merits of the case, with a view to encouraging settlement. If settlement does not occur, a more formal legal opinion may be given and a decision made as to whether to refer the complaint to the Director of Human Rights Proceedings (“the Director”). Parties are given an opportunity to respond before any adverse opinion is issued about them.
- 8.11 If a complaint cannot be settled, the Commissioner may refer the matter to the Director for the purpose of deciding whether proceedings should be instituted.⁵⁵⁹ Over the last four years, the Commissioner has referred an average of 15 complaints each year to the Director.⁵⁶⁰ A decision to refer the complaint to the

556 *L v T* (1999) 5 HRNZ 30 (HC); *Waugh v New Zealand Association of Counsellors Inc* (17 March 2003) HRRT 9/03.

557 Privacy Act 1993, s 77(1)(a).

558 Katrine Evans “Show Me the Money: Remedies under the Privacy Act” (2005) 36 VUWLR 475. In 2008–2009 the number of complaints settled or mediated rose by 43 per cent: Office of the Privacy Commissioner *Annual Report 2009* (Wellington, 2009).

559 Privacy Act 1993, s 77.

560 Office of the Privacy Commissioner *Annual Report 2008* (Wellington, 2008). In the 2008–2009 year the number referred was 12, down from 20 the previous year: *Annual Report 2009* (Wellington, 2009).

Director would only be made if the investigation has established an interference with the privacy of an individual. Credible and admissible evidence is required. Other factors such as the attitude of the parties, the seriousness of the breach, the possibility of relief from the Tribunal and other mitigating or aggravating features are also weighed.

Director of Human Rights Proceedings process⁵⁶¹

- 8.12 When referring a complaint to the Director, the Commissioner sends a letter of notification together with a certificate of investigation. The certificate summarises the nature of the complaint, the key points and the statutory provisions that are in issue. The Director also receives the Commissioner's opinion that has been given to the complainant. Aside from this, however, the Director does not generally receive any further information about the complaint.
- 8.13 The Director then considers the complaint afresh in order to decide whether to begin proceedings in the Human Rights Review Tribunal ("the Tribunal"). The Act does not specify how this process should work, nor does it give criteria to be taken into account in deciding whether to begin proceedings. It provides that it is for the Director to determine, in his or her discretion, whether a matter justifies the institution of proceedings and whether proceedings should be instituted.⁵⁶² The only requirement is that the Director must give respondents an opportunity to be heard before instituting proceedings against them.⁵⁶³
- 8.14 The current Director draws on the Human Rights Act 1993, which has quite specific provisions. As a first step, he meets with respondents to give them the opportunity to explain why proceedings should not be issued. Often the response will be referred to the complainant for comment. Settlement offers are often made during this process and a considerable number of cases are settled at this point.
- 8.15 After hearing from the parties and considering the facts the Director then decides whether to bring proceedings. In making this decision, the Director often considers the following factors:
- whether there is a significant question of law involved;
 - whether it would be an effective use of his resources to issue proceedings;
 - the likelihood of success;
 - the degree of harm to the complainant as a result of the interference with his or her privacy; and
 - whether a reasonable settlement offer has been made.
- 8.16 If the Director decides to take the case, he would then notify the parties and begin proceedings in the Tribunal. Remedies sought would usually include a declaration of breach, an order preventing further breaches, an order that specific steps be taken to prevent further breaches, compensation and costs. The Director acts as the plaintiff, rather than appearing for the complainant.⁵⁶⁴

561 See generally Robert Hesketh "The Role and Function of the Director of Human Rights Proceedings in Cases Under the Privacy Act 1993" (Privacy Issues Forum, Wellington, 30 March 2006).

562 Privacy Act 1993, s 77(3).

563 Privacy Act 1993, s 82(3).

564 Privacy Act 1993, s 82.

- 8.17 Currently, the Director receives around 30 to 40 cases each year under the Privacy, Human Rights, and Health and Disability Commissioner Acts. Privacy cases are the most common, and have increased significantly since 2002.

Human Rights Review Tribunal process

- 8.18 Proceedings in the Tribunal may be brought by the Director, as outlined above, or by an individual. An individual may himself or herself bring proceedings if the Commissioner or the Director is of the opinion that the complaint does not have substance or ought not to be proceeded with, or where the Director agrees to the individual bringing proceedings or declines to take proceedings.⁵⁶⁵ In such cases the Director may appear as an intervener, to independently assist the Tribunal.⁵⁶⁶ An agency does not itself initiate proceedings.⁵⁶⁷
- 8.19 Cases in the Tribunal are by way of rehearing: the Tribunal considers the matter afresh. Again, the Act and Regulations⁵⁶⁸ do not provide much guidance as how Tribunal proceedings should be conducted. There are uncertainties around the Tribunal's powers: for example, it is not clear whether it has the power to order discovery. In practice, the Tribunal operates in a similar way to a court, with a statement of claim, discovery and pleadings. Parties may call evidence and cross-examine witnesses.⁵⁶⁹
- 8.20 If the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant one or more of the following remedies:⁵⁷⁰
- a declaration that the action is an interference with the privacy of an individual;
 - an order restraining the defendant from continuing or repeating the interference or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference;
 - damages in accordance with section 88 of the Act (see below);
 - an order that the defendant perform any act specified with a view to remedying the interference, or redressing any loss or damage suffered by the individual;
 - or
 - such other relief as the Tribunal thinks fit.

The Act provides that it shall not be a defence that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.⁵⁷¹

565 Privacy Act 1993, s 83.

566 Privacy Act 1993, s 86.

567 Katrine Evans "Show Me the Money: Remedies Under the Privacy Act" (2005) 36 VUWLR 475.

568 Human Rights Review Tribunal Regulations 2002.

569 Human Rights Review Tribunal Regulations 2002, reg 19.

570 Privacy Act 1993, s 85(1).

571 Privacy Act 1993, s 85(4).

- 8.21 The Tribunal has had around 17 new proceedings under the Privacy Act each year over the past five years. It issued 17 privacy decisions (including 10 interlocutory decisions on matters such as name suppression) during the 2008/2009 year.⁵⁷² Currently, Privacy Act cases comprise around half of its work.
- 8.22 As noted above, the Tribunal may award a range of remedies. The most commonly awarded remedies appear to be declarations and damages. Damages may be awarded in respect of any one or more of the following:⁵⁷³
- pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose;
 - loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference; or
 - humiliation, loss of dignity and injury to the feelings of the aggrieved individual.

The Tribunal may award damages of up to \$200,000.⁵⁷⁴ The highest award of damages so far has been \$40,000.⁵⁷⁵ Generally, awards are below \$5000, although it has been suggested that large awards may be becoming more common.⁵⁷⁶

- 8.23 The Tribunal has developed some guidance about factors that it will consider in determining the level of damages. The approach may vary somewhat according to which principle is in issue. In *Hamilton v The Deanery 2000 Ltd*,⁵⁷⁷ which related to principle 11, the Tribunal set out the following relevant factors:
- the nature of the agency which disclosed the information;
 - whether there were internal standards prescribing an appropriate information handling practice;
 - the number of disclosures and width of disclosure;
 - the nature of the information;
 - motivations of the discloser;
 - knowledge of the consequences of the disclosure;
 - whether there was an admission of wrongdoing or an attempt to mitigate the injury; and
 - knowledge of the legislation.
- 8.24 If a complainant is not satisfied with the Tribunal's decision, there is a general right of appeal to the High Court.⁵⁷⁸ There may be a further appeal with leave, on a question of law, from a decision of the High Court.⁵⁷⁹

572 Office of the Privacy Commissioner *Annual Report 2009* (Wellington, 2009) 33.

573 Privacy Act 1993, s 88(1).

574 Human Rights Act 1993, s 92Q.

575 *Hamilton v The Deanery 2000 Ltd* (29 August 2003) HRRT 36/02.

576 Katrine Evans "Show Me the Money: Remedies Under the Privacy Act" (2005) 36 VUWLR 475, 486; Katrine Evans "The Rise and Rise of Damages Awards for Breaches of Privacy? *Hamilton v The Deanery 2000 Ltd*" [2003] PLPR 56.

577 (29 August 2003) HRRT 36/02.

578 Human Rights Act 1993, s 123.

579 Human Rights Act 1993, s 124.

RATIONALE FOR THE COMPLAINTS PROCESS

- 8.25 The complaints process is modelled on the Ombudsmen and Human Rights Acts. Complaints are to be made to an independent and specialist entity, the Privacy Commissioner. The Act emphasises low-cost, non-adversarial and timely resolution of complaints.⁵⁸⁰
- 8.26 Parliamentary debates on the Privacy Bill indicate that the complaints process was intended to provide speedy and informal resolution of complaints wherever possible. The priority was to be to achieve a resolution through mediation, and the Tribunal (then known as the Complaints Review Tribunal) was a last resort, to be used when conciliation had failed.⁵⁸¹
- 8.27 The key advantages of a complaints system are well stated in the Ministry of Justice's submission on the Privacy Commissioner's review of the Act:⁵⁸²
- A complaints procedure is clearly the most accessible and barrier free approach to seeking redress. The trade off for such an open mechanism is that the screening out of insubstantial complaints is difficult and resource intensive. In comparison the cost and procedural barriers of litigation in the general Courts usually provides a filter that prevents frivolous grievances progressing further, but at the same time may prevent deserving complainants from seeking redress.
- 8.28 Another advantage of a complaints-based system is that complaints can highlight deficiencies in systems. The Privacy Commissioner can then work with agencies to improve their systems, so that fewer breaches occur in the future. The courts cannot do this.

WHAT ARE THE PROBLEMS?

- 8.29 The system that we have described above appears to the Law Commission generally to be sound and working well. The process is highly effective in settling the vast majority of complaints. It is therefore a serious issue whether the policy parameters should be disturbed at all.
- 8.30 We have had the opportunity of conducting lengthy discussions with the Commissioner and her staff over a period of months. We have come to the conclusion that there are elements of the current process that are cumbersome. We think the process could be streamlined and made more efficient.
- 8.31 In particular, the structure and allocation of responsibilities between the Privacy Commissioner, the Director of Human Rights Proceedings and the Human Rights Review Tribunal, all making fresh assessments on the same set of facts, seems to us to be unnecessarily cumbersome. Furthermore, it causes delay and unnecessary expense.
- 8.32 There is a further problem. Currently, the system relies entirely on the complaints process to enforce compliance with the Privacy Principles. There are no further enforcement mechanisms. While the complaints process has been effective in providing redress in individual cases, it is not as effective as a method of

⁵⁸⁰ *Necessary and Desirable* 268.

⁵⁸¹ (20 April 1993) 534 NZPD 14729.

⁵⁸² Cited in Office of the Privacy Commissioner *Review of the Privacy Act 1993: Complaints and Investigation Submissions* (Wellington, 1998) 8.

promoting compliance with the Act as a whole. Neither is it good at addressing systemic issues that may exist in a particular organisation or industry practice as opposed to an isolated incident that can be the topic of a complaint.

REFORM

- 8.33 To address these problems we have developed proposals for reform, which we outline below. These proposals have been developed in consultation with the Office of the Privacy Commissioner. We have considered a wide range of options. We do not detail all the options considered here, but rather present what at this stage we believe to be the best option. We emphasise that at this stage we are not making firm recommendations, but rather proposals on which we seek feedback.

Aims of reform

- 8.34 Our reform proposals aim both to preserve the most effective features of the existing practice and to address the key problems noted above by making the dispute resolution and redress role more effective and more streamlined, and providing enforcement mechanisms to address systemic problems and encourage compliance.
- 8.35 The aim must be to encourage voluntary compliance so far as possible. Nevertheless, some sanctions for non-compliance are necessary in the Law Commission's view. Similarly, there needs to be redress for people harmed by breaches of the Act.
- 8.36 In our view, the reforms described in this section should:
- continue to provide cost-effective dispute resolution;
 - maintain alternative dispute resolution methods to deal with the bulk of the complaints outside the court system;
 - more efficiently dispose of small disputes that have no significant public aspects;
 - deliver speedier outcomes where possible;
 - make the transition from the alternative dispute resolution methods at the beginning of the process to the formal determination stage later easier;
 - provide a more effective enforcement pyramid (that is, provide an escalating range of sanctions, beginning with education and persuasion to encourage voluntary compliance and escalating to sanctions in the event that voluntary compliance fails);
 - provide a better means of ensuring systemic change;
 - diminish some of the negative aspects of a complaints-driven system and provide scope for the Privacy Commissioner to redeploy her investigative resources in areas of broader public interest and importance; and
 - meet international expectations.

Description of proposed reforms

- 8.37 Essentially, we propose a reformed complaints process together with some new enforcement tools. Our proposal has several key planks. First, we propose that the harm threshold for complaints should be removed. Secondly, we propose that the Commissioner be given the power to determine complaints under principle 6. The Tribunal would become an appeals body in cases involving principle 6. Thirdly, the role of the Director would be removed in all privacy complaints. Finally, the Commissioner would have a new power to issue enforcement notices where an agency is breaching the Act.
- 8.38 We outline below the key elements of the proposal, under the headings of dispute resolution, and compliance and enforcement. The proposed system is illustrated in Figure 1 below.
- 8.39 It is important to note at the outset that the Director and the Tribunal not only have jurisdiction over complaints under the Privacy Act but also deal with complaints under the Human Rights and Health and Disability Commissioner Acts. Our proposals involve changes only to the ways in which Privacy Act complaints are handled.

Dispute resolution

Reformed complaints process

- 8.40 We believe that the current system for complaints to the Privacy Commissioner should be maintained, with some adjustments to make it work better.
- 8.41 One major change we propose to the complaints process is to remove the requirement in section 66 that there must be harm (or potential harm) in order to make a complaint. Rather, the degree of harm suffered by the complainant will be a factor taken into account in the exercise of discretions such as whether to continue an investigation or refer a complaint to the Tribunal, and in determining what, if any, remedies to award.
- 8.42 The harm threshold is intended to filter out less deserving cases, but this works imperfectly. Some potentially worthwhile complaints are currently barred because no actual harm has yet occurred or become demonstrably likely, although there has been a breach of the Act which could conceivably cause harm in the future. Conversely, some comparatively trivial complaints are allowed because there is minor harm. We think that removing harm as an absolute bar to complaining would be easier for complainants to understand, allow more consistent enforcement of the Act, and be useful in exposing systemic problems where an agency or industry is breaching the Act but no harm has yet arisen. There is a risk that the Commissioner will receive large numbers of minor complaints where there is no harm, but we think that there are sufficient mechanisms in the Act to manage this.

- 8.43 The complaints process should be further fine-tuned through implementing recommendations previously made by the Commissioner.⁵⁸³ We discuss several of the most significant of these in more detail later in this chapter. Some key aspects include:
- clarifying the ability to make representative complaints;
 - new controls around intake and pursuit of cases; and
 - enhanced procedures for getting matters before the Tribunal.
- 8.44 The Office will be likely to continue to seek to conciliate nearly all cases but will be increasingly reluctant to devote significant investigative resource to any complaints not raising systemic issues or otherwise raising issues of general importance (for example, novel issues or especially serious harm).

Access determinations

- 8.45 We propose a further change in the way complaints under principle 6, as well as equivalent provisions in codes of practice, are handled. In our view, these complaints, which we will term access reviews here,⁵⁸⁴ should be determined by the Commissioner rather than the Tribunal. Complaints about breaches of all other principles, codes of practice or information matching would continue to be determined by the Tribunal if they cannot be settled. A Commissioner determination of an access case may be appealed to the Tribunal but, if not challenged in this way, would become binding and enforceable. For this category of complaints, then, the Tribunal would be recast as an appellate body.
- 8.46 There is a question as to whether complaints under principle 7 should also be handled in this way. The two principles of access to and correction of personal information often go together. There are, however, differences. A principle 6 complaint effectively involves a review of a file, the contents of which even the complainant does not know. It is essentially a review of an agency decision. Principle 7 complaints are not so much reviews as complaints about an agency's actions or failures to act. Moreover, what a determination under principle 7 would involve is less clear. Currently, an agency does not have to correct personal information, but only has to take such steps as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, a statement of the correction sought but not made.⁵⁸⁵ The question, therefore, is whether, if the Commissioner could "decide" a principle 7 complaint, she would need power to order that the material actually be corrected. Currently, then, we confine our proposal to access complaints under principle 6.

583 *Necessary and Desirable* and supplements, recommendations 29, 37B, 58A, 66, 101A-101F, 102A, 103, 104, 104A, 105, 106, 107, 107A, 109, 110, 111, 112, 112A, 112B, 113B, 113C, 114, 115, 116A, 144, 146, 148, 149, 149A and 150.

584 "Access reviews" refers to complaints of refusal to give access to information, and could be extended to encompass all principle 6 cases (for example, failure to meet time limits).

585 See discussion in Paul Roth *Privacy Law and Practice* (loose leaf, LexisNexis, Wellington, last updated 2007) PVA6.10(b), 6.10(d).

- 8.47 We would envisage that the Commissioner would be able to determine the complaint by making an order, for example that the personal information requested be made available. There would need to be provision for enforcement of such determinations. A possible method of enforcement could be through the Commissioner issuing an enforcement notice. We discuss our proposal for these notices later in this chapter. Another model could be the provisions of the OIA relating to the Ombudsmen's recommendations: departments are required to produce the relevant information as soon as reasonably practicable and no later than 20 working days after the day they receive notification. The organisation is under a public duty to observe the recommendation.⁵⁸⁶ We anticipate that the complainant, and possibly also the Commissioner, would be able to seek enforcement of a determination.
- 8.48 The Commissioner's office may need to use a "Chinese wall" between staff working on investigation/conciliation and determination if the merits of alternative dispute resolution are to be maintained. There are models available for doing that. Another possibility would be to have a dedicated officer, such as an Assistant Commissioner, within the Office responsible for determinations.
- 8.49 There are several reasons why we believe this change would be beneficial. First, access cases make up about half of the Commissioner's complaints workload, so efficiencies gained here will assist significantly in making the system more efficient overall. The Ombudsmen have a similar jurisdiction in relation to access to official information.⁵⁸⁷ Furthermore, although the statute uses the generic term complaints, complaints involving refusal to give access to information are really reviews of the agency's grounds for refusal. The Commissioner's office examines the relevant file and assesses whether the agency's decision complies with the Act. This is quite different from the way other complaints are dealt with, and lends itself to being resolved on the papers. Conversely, at present if the Commissioner cannot settle the matter the process must restart at the Tribunal stage. The Tribunal conducts an adversarial hearing and often does not examine the documents in issue until near the end of the hearing. This model is not well suited to access reviews.

Removing the Director of Human Rights Proceedings from the process

- 8.50 At present, the Act separates conciliation and litigation functions, so that the Commissioner's ability to conciliate is not undermined by also having an enforcement role. However, the separation seems to us to add unnecessary complexity and delay, causes confusion for complainants, and may also undermine the coherence of the specialist Privacy Commissioner model. We therefore propose that the Director no longer be involved in privacy cases. The current Director's functions would then be carried out by the Commissioner.
- 8.51 The Director currently performs a role similar to that of a Prosecutor, which we envisage the Commissioner would take over. That is, the Commissioner would act as the plaintiff in the Tribunal. The current power of the Director in section 20 to institute proceedings for a declaratory judgment would also vest in the Commissioner. These new responsibilities would require resources to deepen

586 Official Information Act 1982, ss 29A and 32.

587 Official Information Act 1982, Part 5.

the Office's litigation capability. It may be necessary to create a "Chinese wall" between staff involved in investigating or settling cases and those taking cases to the Tribunal, so as not to interfere with conciliation. Some overseas Privacy Commissioners operate this kind of system, as does the Office of the Health and Disability Commissioner.

- 8.52 We note again that the Director has other jurisdictions. We are concerned only with the Director's jurisdiction in privacy.

Human Rights Review Tribunal

- 8.53 We envisage that the Tribunal would have a new appeal jurisdiction in relation to access determinations and enforcement notices (discussed below). These appeals could be brought by the respondent or the complainant rather than only by complainants (through the Director or on their own motion), as happens now. Significantly, allowing the respondent to bring an appeal throws the onus back upon an agency subject to an adverse determination to comply with the obligation to do as the Act requires or else launch appeal proceedings. Under the current system, a non-complying agency can simply sit back and wait to see if the Commissioner, the Director or the aggrieved individual are serious about suing the agency and, if need be, settle at the eleventh hour. In the context of access the change in dynamics should work significantly in favour of promoting compliance, especially with uncooperative respondents.
- 8.54 Civil proceedings before the Tribunal to resolve complaints other than access reviews would remain much the same, albeit with some changes brought about through the refinements suggested in paragraph 8.43.
- 8.55 A greater portion of cases that do proceed would be appeals rather than the resource intensive *de novo* hearings under the current system. The change will play to the analytical legal strengths of the Tribunal.
- 8.56 A further important change we propose is to require that the Chair of the Tribunal be a District Court Judge. It is inappropriate that Chairs currently do not have security of tenure when they have a jurisdiction of such power and width. To exercise the powers of the Human Rights Review Tribunal without judicial independence is constitutionally unsound.⁵⁸⁸ Although this proposal would affect all the Tribunal's jurisdictions, not only privacy, we think this an important reform.

⁵⁸⁸ See further New Zealand Law Commission *Tribunal Reform* (NZLC SP20, Wellington, 2008) 85.

Compliance and enforcement

8.57 We propose to strengthen enforcement through the introduction of an important new tool, the power to issue enforcement notices. This will provide greater powers to address non-compliance, as well as providing an incentive to comply voluntarily. Other proposals discussed in this paper should also provide more tools to enforce compliance with the Act. These include mandatory audit powers, discussed in chapter 6. The new power for the Commissioner to make determinations in access cases should also encourage compliance, because it more firmly places the onus upon agencies to comply or take steps to challenge a ruling of the Commissioner before the Tribunal, rather than being able to simply sit back and wait.

Enforcement Notices

8.58 The key reform we propose to the Act's enforcement machinery is to give the Commissioner power to issue binding enforcement notices. These would involve the Commissioner identifying a breach or breaches of the Act by an agency and requiring certain action within a specified period of time to comply with the Act.⁵⁸⁹ We envisage that the respondent would be able to appeal to the Tribunal against a notice. If not appealed within a certain time, or appealed unsuccessfully, the notice would become enforceable, either in the Tribunal or in the District Court. If appealed, the matter would be considered in the Tribunal and disallowed or issued as a Tribunal order.⁵⁹⁰ Models for this can be found in New Zealand statutes such as the Resource Management Act 1991 and in overseas privacy legislation.⁵⁹¹

8.59 There would be consequences for failure to comply with a notice or order. We envisage that non-compliance with an enforcement notice would be an offence. There may be advantage in having escalating sanctions such as civil pecuniary penalties as well as offence provisions (including continuing offences). The enforcement pyramid works best when there is a prospect of escalating the sanctions.

8.60 Enforcement notices would not be contingent upon a complaint about the breach in question: if the Commissioner became aware of non-compliance, for example through an audit, he or she could issue a notice. The Commissioner's powers of inquiry under section 13(1)(m) could also be used to uncover breaches. Notification under a mandatory breach notification obligation (discussed in chapter 16) could be a further way to identify non-compliance. Indeed, one of the benefits of introducing enforcement notices is that they allow the Commissioner to enforce the Act where there is non-compliance but no complaints have been made.

589 See Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) R50-1 for a similar recommendation.

590 The process has similarities to the abatement notice/order processes under the Resource Management Act 1991.

591 See, for example, Information Privacy Act 2000 (Vic), Part 6. See also UK Information Commissioner www.ico.gov.uk/what_we_cover/data_protection/enforcement.aspx for examples of enforcement notices that have been issued in the UK.

- 8.61 Notices might also be issued after investigation of a complaint. For example, if a complaint revealed a breach of the Act, and there was evidence of a systemic failure, the Commissioner could issue a notice. Using enforcement notices in the context of complaints would need careful consideration, because some might see them as cutting across the principles of the complaints process: that the Commissioner conciliates but cannot formally determine the complaint (although we have proposed to change this for access complaints). However, in reality there is no conflict: correcting an agency's behaviour, and resolving a complaint vis-à-vis the particular complainant, are not the same thing.
- 8.62 Enforcement notices could also be a useful tool in relation to enforcement of assurances given as part of a settlement of a complaint. The Act anticipates that assurances against repetition of the complained-about behaviour will often form part of a settlement.⁵⁹² However, currently the Act does not provide for enforcement if an assurance is breached. The Commissioner has previously recommended changes to the Act to allow action in the Tribunal where an assurance is breached.⁵⁹³ Enforcement notices could be an alternative or additional means of enforcing assurances in particular cases, and if an agency then did not comply with a notice there would be consequences, as discussed above. Draft enforcement notices might be served on an agency and as a result a negotiated enforceable assurance might be agreed.⁵⁹⁴
- 8.63 Consideration will need to be given to how the decision to issue an enforcement notice should be made. The power to issue enforcement notices is a significant new power, and it is important that it be applied consistently. We would anticipate that criteria would be developed to guide decisions about when an enforcement notice is an appropriate response to a breach of the Act. The UK Information Commissioner has five key principles of transparency, accountability, proportionality, consistency and targeting to guide decisions about the exercise of powers including enforcement notices. The Information Commissioner's Office applies criteria including:⁵⁹⁵
- the seriousness of the detriment to an individual caused by a breach;
 - whether so many people are affected that action is justified;
 - whether there is a need to clarify an important point of law or principle;
 - whether the breach is likely to have an ongoing effect or to recur;
 - whether there is a need to set an example for a particular sector or activity;
 - whether the cost to the agency of taking remedial action is reasonable;
 - whether the agency has failed to follow relevant guidance or accepted business practice;
 - whether the agency has taken a deliberate, wilful or cavalier approach;
 - whether it would be more appropriate or effective for action to be taken by other means;
 - the level of public interest in the case;
 - whether taking action is an effective use of limited resources; and

592 See Privacy Act 1993, ss 74 and 77.

593 *Necessary and Desirable* recommendation 112.

594 See UK approach www.ico.gov.uk/what_we_cover/data_protection/enforcement.aspx (accessed 26 January 2010).

595 Information Commissioner's Office *A Strategy for Data Protection Regulatory Action* (2005).

- whether there is a risk to the credibility of the law or the Commissioner's office in not taking action.

We would expect some criteria of this type to be developed in New Zealand, whether they are developed by the OPC over time or established more formally.

8.64 Some further questions that will need to be considered are:

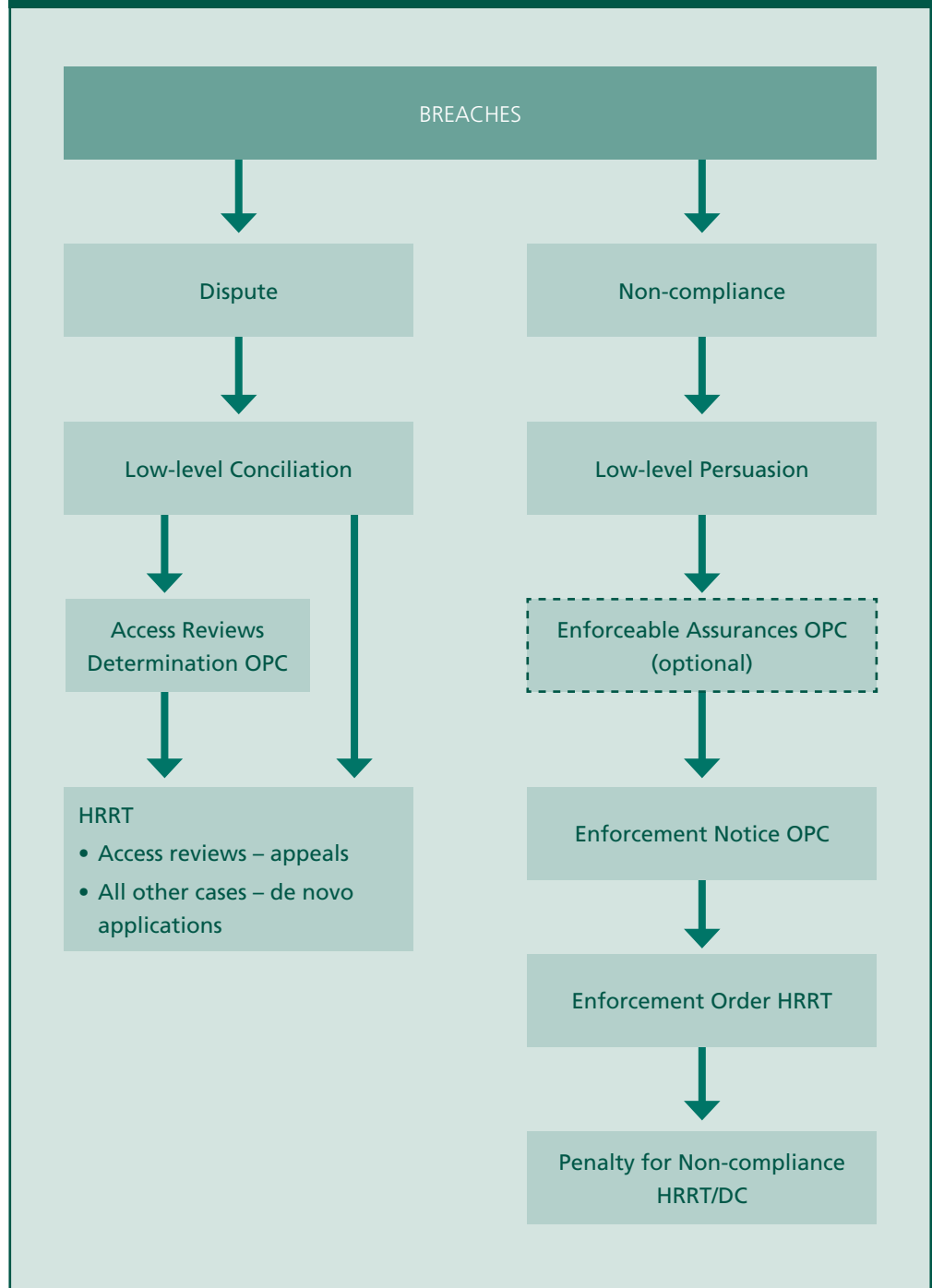
- Who would notices be issued to? That is, should they only be able to be issued to an individual agency or, if the Commissioner became aware of a systemic problem affecting an entire industry, could they be issued to a wider group?
- What evidence of breach would be required for the issue of a notice?
- If enforcement notices are to be available for complaints, how will it be determined when to use the power in relation to complaints?
- Should notices be enforced only by the Commissioner or should others (such as complainants if a notice is issued in relation to a complaint, or an individual or group seeking to enforce a notice in the public interest) also be able to take enforcement proceedings?

8.65 With the new enforcement model, the Office will probably give greater attention to assurances which will become enforceable. A monitoring regime would check adherence. Agencies may be more willing to give assurances and adhere to them because the alternative may be to have an enforcement notice issued.

8.66 The Office of the Privacy Commissioner would also develop proactive systems to identify non-compliance and not just wait for complaints. An enforcement strategy would be developed given the new range of enforcement tools. Monitoring of assurances would be strengthened. Public interest groups would see more point in drawing matters to the attention of the Office, as the Commissioner could take action without receiving an individual complaint. This enhancement of Office activities is particularly suited to the environment of the information revolution where issues of real concern may be largely invisible to the general public and therefore fail to generate complaints.

8.67 It is anticipated that there would be appropriate transparency for these enforcement processes. In the UK the Information Commissioner posts both assurances against repeated breach and enforcement notices on the Commissioner's website. Name and shame is a potent compliance weapon that is not yet used in the New Zealand context. An Office enforcement strategy would develop an approach to this which might also include naming respondents in serious dispute resolution cases.

FIGURE ONE



Anticipated advantages of reforms

- 8.68 We see the key advantages of our proposals as streamlining the system and making it more efficient, promoting compliance with the Act, assisting the Commissioner's office to focus enforcement methods more effectively and improving public understanding of the system.
- 8.69 The suggested reforms should have an impact even before the Commissioner receives a complaint. The prospect of more serious enforcement of statutory obligations should influence management in agencies towards taking privacy and information security issues more seriously. Better voluntary compliance may result. Also when problems arise, or a consumer complaint is received, there may be a greater willingness to act quickly to take the appropriate remedial action. On the other hand, however, there is a risk that agencies might become less likely to admit breaches, knowing that there are greater enforcement powers available.
- 8.70 The introduction of stronger enforcement powers is likely to have a good effect on some recalcitrant respondents and facilitate further settlements.
- 8.71 The current system places the emphasis upon settling individual disputes. While we envisage that individual dispute resolution will continue to have a high priority, new tools will exist for exposing and addressing systemic issues.
- 8.72 Handling of complaints at the intake point would continue the current emphasis on seeking informal resolution where possible, quick responses rather than delayed, and investigation only where warranted. However, there will be a shift of emphasis at an early point to also identify and isolate the systemic and public interest features. This would be informed by an enforcement strategy developed in the Office of the Privacy Commissioner.
- 8.73 The complaints jurisdiction will move from allegations of an "interference with privacy" to simple allegations of a breach of the Act. Through this change it is anticipated that a broader spectrum of complaints will come before the Commissioner, including some having serious systemic aspects but limited actual harm to the individual complainant. Currently, cases where actual harm is not apparent or envisaged are prevented from entering the system.
- 8.74 There will also be a slightly broadened discretion to refuse to investigate or to discontinue cases, for example by excluding "stale" cases. More importantly, there would be a greater willingness to use the existing powers to end involvement in small cases where effective enforcement is being taken on the systemic issue. At the moment, there may be unwillingness by both the Office and complainant to "let go" of an unpromising complaint given that it is the only leverage available to address an issue. The enforcement powers should change the dynamic.
- 8.75 The main source of enforcement cases is likely to remain individual complaints. However, Commissioner-initiated inquiries would likely increase in number and significance, given that the outcome might include enforcement.
- 8.76 Finally, the new system should be better understood by complainants, with the question of harm raised not as an opening threshold issue, but rather when the OPC explores how best to pursue or finally dispose of the matter.

Q97 We propose that the complaints, enforcement and remedies provisions of the Privacy Act should be reformed in the manner outlined in paragraphs 8.33–8.76. Do you agree? In particular do you agree that:

- the harm threshold in section 66 of the Act should be removed;
- the role of the Director of Human Rights Proceedings should be discontinued for privacy cases;
- for access reviews the Privacy Commissioner should determine the complaint and the role of the Human Rights Review Tribunal should be that of an appellate body;
- the Human Rights Review Tribunal should be chaired by a District Court Judge;
- the Privacy Commissioner should be given statutory power to issue enforcement notices; and
- non-compliance with an enforcement notice should be made an offence?

Q98 Are any other dispute resolution or enforcement mechanisms required?

FURTHER ISSUES

- 8.77 This section discusses in more detail several of the Privacy Commissioner's previous recommendations, which we noted in paragraph 8.43, as well as considering the Ombudsmen's ability to review decisions on complaints under the Privacy Act.

Representative complaints

- 8.78 The Commissioner has made recommendations about representative complaints, by which we mean a complaint brought by a representative person or body on behalf of a group, all the members of which would be able to make complaints individually if they chose. The result applies to all the members of the group. The concept is similar to a class action in litigation.
- 8.79 As it stands, the Privacy Act does not prohibit representative complaints, and even contemplates them. Section 67(1) states that:

any person may make a complaint to the Commissioner alleging that any action is or appears to be an interference with the privacy of an individual.

It seems that the person who makes that complaint and the individual whose privacy has allegedly been interfered with do not have to be the same person. The Commissioner does, however, have discretion to take no action if, in her opinion, the complainant does not have a sufficient personal interest in the subject-matter of the complaint.⁵⁹⁶

⁵⁹⁶ Privacy Act 1993, s 71(1)(e).

8.80 The provisions about action in the Tribunal specifically refer to class actions.⁵⁹⁷

The Director of Human Rights Proceedings may, under subsection (2) of this section, bring proceedings on behalf of a class of individuals, and may seek on behalf of individuals who belong to the class any of the remedies described in section 85 of this Act, where the Director of Human Rights Proceedings considers that a person to whom this section applies is carrying on a practice which affects that class and which is an interference with the privacy of an individual.

Individuals can also bring cases to the Tribunal under section 83. It is not clear whether an individual could do so on behalf of a group.⁵⁹⁸

8.81 While on their face these provisions allow representative complaints, the Commissioner has recommended that consideration be given to providing more guidance in the Act for the registration and handling of representative complaints.⁵⁹⁹ Currently, the Act gives no guidance on issues such as how a class should be established and how the proceedings should be handled. The Commissioner felt that the current provisions are unlikely to be used in the absence of more specific mechanisms in the Act.

8.82 It has been suggested that privacy breaches are well suited to resolution through representative action. Some reasons for this include:⁶⁰⁰

- In an ordinary complaint, the person who has suffered an invasion of privacy must identify him- or herself and allow the Privacy Commissioner to look into the facts, which could be seen as exacerbating the original loss of privacy. In contrast, in a representative complaint another person can do this, so these difficulties are mitigated somewhat.
- It provides more scope to address systemic issues. Some privacy breaches may appear minor to an individual, who might not bother to complain. However, the breach may in fact affect a large number of people or reveal a problem in an agency's practices. Complaints which may not be worthwhile for an individual to pursue may be easier to justify for a class.
- A representative complaint may provide a greater deterrent than an individual complaint. Representative complaints may have a higher profile and thus a greater risk that the agency complained about will attract negative publicity.
- There are practical benefits, such as spreading the costs of the complaint across a group.

597 Privacy Act 1993, s 82(4).

598 In *New Zealand Freedom from Discrimination Group v New Zealand Grand Lodge of Freemasons* (1984) EOC 92-008, the Equal Opportunities Tribunal did not resolve the question of whether a group of aggrieved persons could pursue a class action where the Human Rights Commission or Race Relations Conciliator declined to proceed on their behalf.

599 *3rd Supplement to Necessary and Desirable* para 2.13, recommendation 102A.

600 Chris Connolly and Nawaz Isaji "Representative Complaints – A New Approach to Making Privacy Laws Work for Consumers" (Paper presented to Surveillance and Privacy 2003 Conference, Sydney, 8–9 September 2003) 3–4.

- 8.83 Given these potential benefits, we think that the Act should provide more detail with regard to representative complaints. There are a number of options for how such complaints could work, and consideration would need to be given to questions such as:
- whether the representative (that is, the person who makes the complaint on behalf of the group) needs to be part of the affected group or whether an unaffected person could complain on behalf of others;
 - whether the consent of the other members of the group should be required; and
 - whether the group should be formed on an opt-in or opt-out basis – that is, whether members should have to affirmatively join the complaint or whether everyone affected by the relevant breach would be presumed part of the complaint unless they opted out.⁶⁰¹
- 8.84 There are provisions in relation to representative complaints in the Privacy Act 1988 (Cth),⁶⁰² and these provisions could perhaps provide a model for clarifying how representative complaints are to be handled under the New Zealand Privacy Act.

Q99 Should the Act provide more specifically for the taking of representative complaints? If so:

- Should the representative be required to be personally affected by the alleged breach?
- Should the consent of other members of the group be required?
- Should the group be formed on an opt-in or opt-out basis?

Offences

- 8.85 The Privacy Commissioner has recommended that two new offences be added to the Act. The Commissioner noted that the Act is primarily enforced through civil remedies, rather than the criminal law, and that in general this approach is preferable to including a lot of criminal offences. However, the Commissioner felt that there was a case for introducing these offences because they related to wilful and unacceptable behaviour which the civil law was not capable of constraining.

601 In the UK, the Civil Justice Council has recently reviewed the law on collective actions in the courts. The report and government response contain some useful discussion about some of these points. See Civil Justice Council *Improving Access to Justice through Collective Actions* (2008); Ministry of Justice *The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (2009); Civil Justice Council *Draft Court Rules for Collective Proceedings* (2010).

602 Privacy Act 1988 (Cth), ss 38, 38A, 38B, 38C, 39. See also discussion in Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) 1636–1638.

- 8.86 The first is an offence of intentionally misleading an agency by:
- impersonating the individual concerned; or
 - misrepresenting the existence or nature of authorisation from the individual concerned;
- in order to obtain personal information or to have that personal information used, altered or destroyed.⁶⁰³
- 8.87 This proposed offence would address the growing problem of “pretexting”. The Commissioner recently noted that worrying practices have been exposed overseas, involving systematically misleading agencies to obtain personal information, which may then be traded.⁶⁰⁴ Currently, an individual whose personal information has been exposed may be able to complain against the agency for disclosing the information or failing to keep it secure, but such a complaint may not succeed. There is no remedy against the person who engaged in deception to obtain personal information.
- 8.88 The second proposed offence is knowingly destroying documents containing personal information to which the individual concerned has sought access in order to evade an access request.⁶⁰⁵ The Commissioner felt that it would be appropriate to create an offence for this conduct because the civil law response, which would be a complaint and a review of the reasons for refusing access, has been deliberately thwarted. If the information has been destroyed it would be almost impossible to evaluate a complaint. Furthermore, the Commissioner felt that deliberately denying people their entitlements is unacceptable conduct which ought not to be permitted.
- 8.89 There are international precedents for such offences.⁶⁰⁶ We think that their inclusion in the Act is worth considering.

Q100 Should there be new offences of:

- (a) intentionally misleading an agency by impersonating an individual or misrepresenting the existence or nature of authorisation from an individual in order to obtain personal information or to have personal information used, altered or destroyed; and/or
- (b) knowingly destroying documents containing personal information to which an individual has sought access in order to evade an access request?

Q101 Should the Act contain any further offences?

603 *Necessary and Desirable* paras 12.16.5–12.16.8, recommendation 148.

604 *4th Supplement to Necessary and Desirable* para 2.22. See also Information Commissioner *What Price Privacy?* (London, 2006), exposing extensive illegal trade in personal information.

605 *Necessary and Desirable* paras 12.16.9–12.16.12, recommendation 149; *1st Supplement to Necessary and Desirable* paras 3.9.1–3.9.6; *3rd Supplement to Necessary and Desirable* paras 2.22.1–2.22.3.

606 See, for example, Data Protection Act 1998 (UK), s 55; Personal Information Protection and Electronic Documents Act SC 2000 c 5, ss 8(8) and 28.

Ombudsmen reviews of the Commissioner's investigation of complaints

- 8.90 The Ombudsmen may investigate any decision or recommendation made, or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his, her or its personal capacity, by government departments and organisations including the Privacy Commissioner.⁶⁰⁷
- 8.91 Generally speaking, when the Ombudsmen investigate actions of the Privacy Commissioner they will be concerned with matters of process. But, potentially, an investigation could extend beyond this and enter into substantive matters. If the statutory language were clear and reasonably open to only one interpretation, then it would be open to the Ombudsmen to find that a different interpretation is incorrect. In such a case, they may form the view that an opinion of the Privacy Commissioner was based, either wholly or partly, on a mistake of law.⁶⁰⁸ Even if there were more than one possible interpretation, they may still find that it was unreasonable in the context to adopt a particular interpretation. If this happened it could result in the Ombudsmen substituting their view of the correct interpretation of the Privacy Act for the Privacy Commissioner's view on a complaint.
- 8.92 It could, in other words, result in one agency substituting its view for that of another in what is effectively a quasi-judicial inquiry. We are interested to know whether there should be a narrower statutory definition of the Ombudsmen's power to investigate actions of the Privacy Commissioner, and indeed whether the Privacy Commissioner should be subject to the Ombudsmen Act at all.

Q102 Are any changes needed to clarify the Ombudsmen's role in investigating the Privacy Commissioner's handling of complaints under the Privacy Act?

Q103 Do you have any further comments on the Act's provisions regarding complaints, enforcement and remedies?

⁶⁰⁷ Ombudsmen Act 1975, s 13(1).

⁶⁰⁸ Ombudsmen Act 1975, s 22.