

Law Commission Review of Privacy Act

Introduction

1. This article provides a summary of the key concerns and issues surrounding privacy laws identified by the Law Commission in its Issues Paper on the Review of the Privacy Act 1993.
2. This Issues Paper is part of stage 4 of the Law Commission's investigations into the Privacy Act, following on from stage 1: Policy Overview, stage 2: Public Registers and stage 3: Invasions of Privacy.

Purpose of Review

3. The purpose of the Law Commission's Issues Paper on the Review of the Privacy Act 1993 ("the Issues Paper") is to investigate what amendments should be made, if any, to improve the Privacy Act 1993 ("the Act").
4. The Law Commission ("the Commission") raises issues of considerable importance, such as how to monitor and control the privacy implications of new technology; to what extent government departments should be able to share information about citizens and whether agencies should have an obligation to notify people if information about them is wrongly released or lost. The Commission is considering dealing more directly with direct marketing, and giving the Privacy Commissioner new powers for example, to issue enforcement notices to agencies breaching the Act.
5. The Commission seeks feedback on the various issues and concerns raised in the Issues Paper. Submissions close on the 30th of April 2010. Both the full copy and the summary of the Paper are available at www.talklaw.co.nz. Submissions can be emailed to the Commission from this site.

Key concerns and issues raised

Scope, approach and structure

6. The Commission is concerned about whether the Act currently strikes the right balance between privacy and other important human and social values such as health and safety. It wants to know if people find the Act easy to understand, and if they do not, how it might be better structured and better expressed to make it clearer.

Key definitions

7. The Commission is concerned that the definitions of the key terms "personal information", "individual" and "collect" can cause difficulty in their application. For example, should human tissue samples be classified as personal information and therefore protected under the Act? Should the Act make provision for the privacy of deceased persons?

Privacy principles

8. The Commission makes a lot of suggestions about whether the existing privacy principles require amendment. A few of the more significant or controversial suggestions are:

- a. Should the current test about whether the collection of the information is "necessary" to achieve the purpose, be replaced by a test of "reasonable necessity"?
- b. Should a qualification relating to the purpose of access be included in the Act to deal with the problem of "browsing" (where employees of an agency are authorised to have access to a range of information for the purposes of their employment, but use their access for improper purposes)?
- c. Should there be more clear guidance as to how to handle cases where information about the requestor is mixed with information about someone else?
- d. Should there be clear guidance as to how to deal with persons who repeatedly ask for the same information?
- e. Should the principles be amended to make it clear about whether there has been disclosure in a situation where information is disclosed between persons in the same agency?

Exclusions and exemptions

9. The Act currently excludes some persons or organisations from the definition of agency, with the consequence that the Privacy Principles do not apply to them. The Commission is in favour of amending the Act so that the Parliamentary Service Commission, Parliamentary Service and the Ombudsman are subject to the Act.

Privacy Commissioner

10. The Commission considers that some of the functions of the Privacy Commissioner should be amended. For example, the power of the Commissioner to review the Act should be removed. A significant issue raised is whether the Commissioner should have the power to initiate mandatory audits to incentivise compliance and effectively uncover systematic problems.

Codes of Practice

11. Codes of Practice can be issued by the Commissioner to modify the application of any one or more of the Privacy principles. Given the importance and strength of the Codes, the Commission believes that the Codes should be made as ordinary regulations.

Complaints, enforcement and remedies

12. The Commission proposes various methods for simplifying the process of receiving and investigating complaints about breaches of privacy such as removing the Director of Human Rights Proceedings from the process. The Commission proposes to strengthen the Act's enforcement machinery by giving the Commissioner a power to issue enforcement notices. Also, the Commission considers whether new offences should be created such as pre-texting (impersonating an individual) and knowingly destroying documents.

Information matching and Information Sharing

13. Information matching is a process involving the comparison of personal information from one source against personal information from another source for the purpose of obtaining information about an identifiable individual. The Commission makes a number of significant suggestions, including making

amendments so that the information matching controls in the Act are extended to the private as well as the public sector and that the information matching rules can only be changed by an Act of parliament.

14. The Commission provides a range of options to help improve the position regarding the extent to which Government agencies can share information about an individual, such as, establishing guidelines, a code of practice, or a national strategy to enhance the existing legal framework to ensure agencies have more confidence in using it.

Law enforcement

15. The Commission raises the issue as to whether the "maintenance of the law" exceptions are sufficient and asks a number of questions in relation to the disclosure of information by agencies, including individuals, to law enforcement agencies and the exchange of information between law enforcement agencies.

Technology and Trans-border data flows

16. The Issues Paper describes some recent technological developments which have significant privacy implications, such as the internet, search engines and websites and social networking sites. The Commission is seeking reaction and feedback and is interested in suggestions for how these developments can properly be monitored and, if necessary, further regulated.
17. The Commission provides various options for dealing with the problems entailed with trans-boarder flows of personal information such as establishing a general statutory prohibition on exporting data to a country unless it has similar data privacy standards to New Zealand's or developing a special exception regime, whereby restrictions are imposed on transfers of certain categories of personal information which are particularly sensitive and would not be adequately protected in other countries.

Direct marketing

18. Direct Marketing refers to the making of marketing approaches to individuals by commercial marketers or businesses. While it is a useful tool for businesses to distribute information about their products and services and to gain new customers, there can be privacy implications. The Commission considers whether the Act should make express provision for direct marketing by including a new privacy principle on the issue, or whether a Code of Practice should be established for Direct Marketing.

Data breach notification and identity crime

19. A significant question posed by the Commission is whether New Zealand should have a mandatory requirement to notify data breaches, enacted in the Act and whether New Zealand needs further legislation and in particular any amendments to the Privacy Act, to control identity crime.

Feedback and Submissions

20. The Commission seeks reactions and feedback on all of the above issues, concerns and suggestions. Submissions close on 30 April 2010.

Sarah-Jane Weir
Partner