New Zealand's new Privacy A

Blair Stewart outlines aspects of New Zealand's *Privacy Act* 1993

New Zealand has enacted perhaps the world's most comprehensive national information privacy legislation. Unlike many of the European data protection statutes, the *Privacy Act* 1993 does not restrict its application to automatically processed data. Unlike the regimes in Canada and Australia, coverage extends across both public and private sectors.

Legislative history

The Privacy of Information Bill was introduced into the New Zealand Parliament by the National Government in August 1991. It followed considerable preparatory work undertaken by its predecessor Labour Government (1984-1990) which had commissioned an options paper by T.J. McBride, which was published in 1987. Following the 1990 election, the (by then) Opposition MP, Peter Dunne, introduced his own Information Privacy Bill. The similarities between the Dunne and Government Bills were greater than the differences. The bipartisan support for privacy legislation is a significant feature in the remarkably broad scope of the Act that ultimately emerged. The Bill was referred to a select committee which heard submissions and studied the legislation for over 18 months before reporting in March 1993.

The Bill proposed comprehensive information privacy principles to apply to both public and private sector agencies. It also provided for certain information matching to be regulated between Government departments and agencies, which was directed to the detection and deterrence of welfare and compensation fraud. In November 1991 the Government decided to enact part of the Bill as the *Privacy Commissioner Act* 1991 to authorise the information matching programmes and to appoint a Privacy Commissioner who would be able to review the Bill, assist the Select Committee and make recommendations to the Government. Bruce Slane was appointed to the position of Privacy Commissioner in April 1992.

The Select Committee made a number of changes to the Bill. Two of the more notable were the introduction of codes of practice and an exemption for the news media (discussed below). It changed the name of the Bill to the *Privacy Act* which emphasises the broad remit on privacy issues beyond information privacy.

The Bill completed its committee stage and third reading on 5 May 1993. The Act has now passed into law and came into effect (subject to a number of transitional provisions) on 1 July 1993.

General features

Once the Act is fully in effect all agencies holding personal information will be subject to the 12 Information Privacy Principles ("IPPs") contained in the Act. The IPPs differ in detail from the eleven principles found in the Australian *Privacy Act* 1988 but they cover similar ground. Both have their genesis in the OECD guidelines governing the protection of privacy and transborder flows of personal data.

The Act will establish a complaint mechanism whereby individuals who consider that their privacy has been interfered with, may complain about a breach of an IPP to the Privacy Commissioner. If a breach is established and a settlement cannot be reached by conciliation, the matter may in due course proceed to the Complaints Review Tribunal for adjudication. The Tribunal will be able to award up to NZ$200,000 compensation. However, during the Act's first three years only breaches of four of the twelve principles can be taken to the Tribunal, with others dealt with by way of an Ombudsman-type recommendation by the Privacy Commissioner. Furthermore, a breach of a principle does not, of itself, give rise to any entitlement to compensation. There must also be some detriment, either financial or in the nature of (for example) significant humiliation or embarrassment.

The Commissioner also has various powers and functions independent of the IPPs, such as the power to inquire into proposed or existing legislation or practices, whether governmental or non-governmental, or any technical development, if it appears that the privacy of individuals may be infringed. These powers are not limited to information privacy and may, for example, require the Commissioner to examine physical privacy issues.

Codes of Practice

Under the Act, the Commissioner will have the authority to issue codes of practice for particular activities or industries which can be stricter or less strict than the principles laid down in the Act. Provision for codes of practice, combined with a three-year transition period, have largely met the considerable opposition from some private sector organisations, particularly the direct marketing lobby, which had earlier opposed aspects of the Bill.

Although codes of practice do not provide for self-regulation, it is expected that industry groups will have a significant part to play in initiating codes and shaping their content. However, ultimately the Commissioner must be satisfied that a code of practice is warranted and it is the Commissioner, rather than the industry group, which issues the code.

Telecommunications lawyers have already seen the codes of practice provision as sufficient to cover some of the privacy concerns expressed in the Longworth report published by the Ministry of Commerce in 1992. The issues touched upon in the Longworth report included interception of electronic communications, voice logging, telecommunications transaction-generated information, customer information, telemarketing, automatic calling equipment and electronic bulletin boards.

News media exemption

The information privacy regime in the *Privacy Act* is limited to "agencies", a term defined in the Bill. The definition of agency in the Act is naturally wider than the definition of "agency" in the Australian *Privacy Act* since it also encompasses the private sector.

The first part of the definition of "agency" sets out what is included within the terms. The second part of the definition sets out specific persons or classes of person who are expressly stated not to be an "agency". The first part of the definition states:

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"Agency" — (a) means any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector, and, for the avoidance of doubt, includes a Department.

The second part of the definition provides inter alia that:

"Agency" — (b) — does not include:

(xiii) in relation to its news activities, any news medium.

The terms "news activities" and "news medium" are defined as follows:

"News Activity" means:

a) the gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public;

(b) the dissemination, to the public or any section of the public, of any article or programme of or concerning:

(i) News;

(ii) Observations on news;

(iii) Current affairs.

"News medium" means any agency whose business, or part of whose business, consists of a news activity, but in relation to principles 6 and 7 does not include Radio New Zealand Limited or Television New Zealand Limited.

The exemption was granted to the news media to allay concerns about any possible intrusion into the freedom of the press. The exemption is relatively generous but has some aspects that require comment.

Firstly, the agency definition applies only to information privacy aspects. As already mentioned, the Bill has certain aspects that go beyond just the IPPs. For example, the Commissioner has power to inquire into practices that might appear to infringe individual privacy unduly. The kind of practices identified in the Calcutt Report published in 1993 highlight the intrusions into physical privacy that the Commissioner may inquire into such as physical intrusion onto private property, surveillance, intrusive photography and press "harassment".

Secondly, many news media agencies are involved in activities which fall outside the definitions of "news activity" and "news medium" and to which the IPPs may apply. For example, a newspaper's advertising activities will fall outside the exceptions. A news magazine's use of its subscription list will be subject to privacy principles. News agencies will also hold personal information on employees and so will be subject to the access and correction provisions with regard to that information.

Thirdly, Radio New Zealand and Television New Zealand will be subject to principles 6 and 7. Those principles essentially continue existing obligations imposed on those state-owned enterprises under New Zealand's freedom of information legislation. Finally, the Commissioner is required to formally keep the Act under review. The Select Committee has indicated that the news media exemption is one specific aspect that may need to be examined again in due course.

European community

The EC draft directive on protection of personal data has been of interest in both Australia and New Zealand. Undoubtedly it was a major spur towards New Zealand's adoption of privacy legislation. It is expected that the EC will adopt a regime which prohibits, or places controls on, the transfer of automatically processed data from EC countries to countries outside the EC, unless they have suitable information privacy legislation. The current debate seems to be whether countries should be required to have "equivalent" data protection laws or "adequate" laws. There seems little doubt that New Zealand's Act will comply with or exceed even the more stringent "equivalent" test.

Crimes Act

The Privacy Bill concurrently amended a number of other statutes. One of these was the *Crimes Act* into which a new section 105B was inserted. This provision outlaws the use of corruptly disclosed information for advantage or pecuniary gain and mirrors some of the recommendations of the Australian ICAC report.

Conclusion

In a short note of this kind it is difficult to more than touch upon some of the significant issues in this Act. The scope of the Bill, which avoids artificial distinctions based upon whether information is held in the private or public sectors or the manner in which it is processed, may become a model to be followed by other countries seeking to establish a comprehensive information privacy framework suitable for the late 1990s.

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successor to the Tribunal, and nobody has ever suggested it represents an unconsionable fetter on the freedom of the media. But for print, any suggestion of accountability is said to be an unprecedented interference with the hallowed freedom of the press. Unmerited the suggestion may be, abused it certainly is, but unexamined it must remain. In other words, the media may shape our lives — but we cannot ask it questions.

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1993 CAMLA Executive

At CAMLA's Annual General Meeting on 28 April 1993 the following persons were elected to the Executive:

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