

Reflections on Ten Years of the Privacy Act

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Over the past 10 years, the strengths and weaknesses of the Privacy Act, as well as of various agencies that have dealt with or worked under it, have had a chance to make themselves evident. These are my reflections:

The Privacy Act

- Overall, a success in so far as implementation of the modest objects set out in the Long Title to the Act are concerned. The Act indeed “promotes and protects individual privacy in general accordance with” the OECD Guidelines. However, it should be noted that these Guidelines are very general and leave a lot up to further elaboration or limitation.
- Generally speaking, the centrepiece of the legislation, the information privacy principles are complex and somewhat repetitive, and probably admit of too many qualifications and exceptions. If they have nevertheless been successful in promoting and protecting privacy, it is because they seem more formidable than they actually are.
- The Act tends to be less effective in institutional settings, such as employment, where there is a power imbalance between the individual and the agency that is collecting information. In particular, the scope of what is “necessary” for an agency to collect in fulfilling any purpose “connected with a function or activity of the agency” has been interpreted too loosely.
- The Act does not regulate the surreptitious collection of personal information through video or other technical means.¹
- Health care professionals should be exempt from the Privacy Act in relation to their professional practice. There is now a confusing regulatory overlap involving professional disciplinary processes; disciplinary processes that can be invoked pursuant to employment agreements; the jurisdiction of the Health and Disability Commissioner; and the requirements of the Health Act. Adding the Privacy Act to this regulatory mix is confusing and therefore counter-productive.

¹ See Paul Roth, “The Privacy Act 1993: Workplace Testing, Monitoring and Surveillance”, (1997) 3(2) *Human Rights Law and Practice* 113-127; Robert Stevens, “Move Openly to Jail: Do Not Pass Go? Questioning Dr Roth’s Interpretation of “Directly” in the Privacy Act 1993”, [1998] 4(2) *Human Rights Law And Practice* 116-119; Paul Roth, “The Unfinished Business of Regulating High-Tech Surveillance: A Reply to Robert Stevens”, [1998] 4(2) *Human Rights Law And Practice* 120-122; and Paul Roth, “Surveillance Cameras in the Workplace” [2002] *Employment Law Bulletin* 54-60.

The Office of the Privacy Commissioner

- The Office of the Privacy Commissioner has done a tremendous job in handling thousands of cases and inquiries over the years.
- Having said that, I am not 100% convinced from the cases that we hear about in the Privacy Commissioner's case notes and in the Human Rights Review Tribunal that they are all worthy of the amount of resources that go into dealing with them. I wonder if there are further ways of winnowing out the minor and more speculative types of cases.
- Perhaps not widely recognised has been the great amount of work put into writing reports to the Minister of Justice and others on Parliamentary bills and other issues, and the monitoring role in respect of information matching. This is the great unsung work of the Office of the Privacy Commissioner and should receive greater public recognition than it has.

The Tribunal and Courts

- The grasp of privacy issues by the judicial system has generally been disappointing, as illustrated by the Court of Appeal majority's decision in *Harder v Proceedings Commissioner* [2000] 3 NZLR 80. This lack of judicial facility with privacy issues is a problem that has also been identified in overseas privacy jurisdictions.² It can be attributed in part to the highly specialised nature of the area; the existence of data protection authorities who mainly interpret and apply the law on a day-to-day basis; and to the infrequency with which issues come to the courts of general jurisdiction.
- The Human Rights Review Tribunal (formerly the Complaints Review Tribunal) has had its ups and downs over the years. Under the previous chairperson, the Tribunal issued robust decisions that tended to be grounded more often in common sense than close legal reasoning. There was also a marked tendency to strike out cases before the plaintiff had a chance "to have their day in court". Against this, however, must be balanced the fact that many of the cases that were given short shrift involved unrepresented laypeople whose cases neither the Director of Human Rights Proceedings (formerly the "Proceedings Commissioner") nor the Privacy Commissioner apparently thought worthwhile taking further. Now under "new management", the Tribunal thus far appears to be going to the opposite extreme of taking each plaintiff's complaints quite seriously, no matter how minor, and applying a careful -- perhaps even at times over-cautious -- legal analysis to all issues that might arise.
- The role of panel members on the Human Rights Review Tribunal is not obvious, as is the need for them to sit on appeals to the High Court where questions of fact arise. To an outsider like myself, they seem like ciphers who are "along for the ride". In only one case has there been an express "dissent" by a panel member (*M v New Zealand Police*, Decision No 13/97, 29 April 1997), after which that panel member does not appear to have been invited to sit on subsequent cases. When there used to

² See Lee Bygrave, "Where have all the judges gone? Reflections on judicial involvement in developing data protection law" (2000) 7 *Privacy Law & Policy Reporter*, 11- 14 and 33-36.

be panel members in industrial law cases, panel members often gave their views on the matter.

The Government

- The government appears to have ignored the Privacy Commissioner's recommendations upon his first periodic review of the Privacy Act, and subsequent supplements to that.
- The government has also not acted with any urgency on making the Privacy Act compliant with European Union "adequacy" standards.
- Instead, the government appears to have some sort of parallel agenda that involved spending \$50,000 on a "scoping" report from Chen & Palmer and instructing the Law Commission to look into the adequacy of aspects of the Privacy Act. Both efforts were marked by haste and a poor understanding of the area.
- It should be noted that most cases that are litigated before the Tribunal, and a good proportion of those that have gone on to the High Court, involve public sector agencies. Can the expenditure involved in fighting such cases be justified?