Privacy Commissioner
Te Mana Matapono Matatapu

Privacy Commissioner's Submission to the Law Commission on Class Actions and Litigation Funding

Executive summary

1. I am pleased to make a submission on the Law Commission's Issues Paper 45 Class Actions and Litigation Funding. While I will make some general comments about class actions and litigation funding, my submission primarily addresses question 16 of the Paper as it relates to the Privacy Act 2020:

> Do you have any concerns about how a class actions regime could impact on other kinds of group litigation or on regulatory activities? How could such concerns be managed?

2. Group litigation can facilitate access to justice and promote efficiency and economy in dispute resolution and litigation. However, as the Law Commission's Paper notes, there are issues related to class actions that need to be managed including ensuring the interests of represented plaintiffs (who may not have much direct decision-making power) are protected, and that class actions are not unduly oppressive to defendants, particularly when proceedings are supported by litigation funders.

3. I understand that the Law Commission is not intending to include the Privacy Act's bespoke representative complaints model in any proposed statutory class actions regime. If so, such a regime would not directly impact upon the group litigation procedures under the Privacy Act. Nevertheless, a statutory regime that provides an adaptable framework for managing group litigation potentially would be helpful in contexts such as the Privacy Act jurisdiction.

4. This jurisdiction is made up of dispute resolution by my Office, and then, if the matter is not satisfactorily resolved by dispute resolution or other functions and powers of my Office, an individual concerned, their representative (including a representative of a class), or the Director of Human Rights Proceedings can initiate legal proceedings in the Human Rights Review Tribunal (the Tribunal) seeking a remedy (including damages). Any express statutory regime that is developed could be drawn upon by my Office to assist in regulating the procedural matters relating to representative complaints under the Privacy Act, where appropriate. The Tribunal may also have recourse to it if a representative complaint brought to my Office cannot be satisfactorily resolved, particularly as the Tribunal is able to award damages.

5. I also note that a class actions regime that is general in scope may also provide an alternative mechanism for individuals to bring privacy claims for judicial determination using the privacy or intrusion upon seclusion torts. As it stands, individuals already have a choice about which legal route they wish to use to pursue their privacy complaints (except where a potential defendant is not subject to the Privacy Act, such as regulated news media while undertaking news activities). However, the existence of such dual mechanisms could be considered when constructing the regime, including

determining whether to permit an opt-out mechanism, and how to provide notice of the proceeding to individuals to ensure they are sufficiently informed to choose the form of proceedings best suiting their particular circumstances.

6. As the Law Commission develops its thinking further on the design of any new statutory regime and its implications for dispute resolution bodies and specialist Tribunals, I am happy to provide more detailed advice as required. You may also wish to seek input from the Director of Human Rights Proceedings and the Chair of the Human Rights Review Tribunal as you consider these matters.

Privacy Act representative complaints and proceedings

Representative complaints under the Privacy Act 1993 and the Law Commission's 2011 recommendations

7. Section 82(4) of the Privacy Act 1993 allowed the Director of Human Rights Proceedings to bring public interest privacy proceedings "on behalf of a class of individuals". As noted in the Law Commission's Issues Paper, this procedure has not been used by the Director for Privacy Act claims. Although not explicit, the 1993 Act also did not limit representative complaints as "any person" could make a complaint alleging that an action is, or appears to be, an interference with the privacy of an individual. No such group or class complaints were made, however.

8. To address this, the Law Commission, in its review of the Privacy Act in 2011, recommended that the Act should specifically provide that representative complaints are permitted.[1] It further recommended that such complaints need not be brought by those personally affected. Rather other persons or agencies, such as the Children's Commissioner and Consumer NZ should be able to lay complaints on behalf of a group of affected individuals. The Commission also considered that the Act should be more explicit about the procedure for bringing representative complaints. It suggested that when making initial complaints to the Privacy Commissioner, the complaints could be heard on an opt-out basis. This is because, although investigations into interferences with privacy may result in settlements with monetary relief, I do not have any powers to award damages. Therefore, as the matter was not yet adversarial so there was no real detriment to being included. However, if taken to the Human Rights Review Tribunal, the Chairperson should determine whether an opt-in or opt-out procedure is appropriate.

[1] Law Commission, *Review of the Privacy Act 1993: Review of the Law of Privacy – Stage 4* (NZLC R123, 2011) at [6.52] – [6.57] and recommendation 60. In this context, the Law Commission was referring to a complaint brought by a representative person or body on behalf of a group, all of whose members would be able to make a complaint individually if they chose.

Representative complaints under the Privacy Act 2020

9. The Law Commission's recommendation to expressly recognise class or representative complaints was implemented in the Privacy Act 2020. Section 71 of the Act provides that "[a]ny person may make a complaint" and that a "complaint may be made on behalf of 1 or more aggrieved individuals". This usefully clarifies that representative complaints can be made to my Office. The Director of Human Rights Proceedings continues to be able to bring proceedings on behalf of a class of aggrieved individuals[2] and additionally "a representative lawfully acting on behalf of a class of aggrieved individuals" may also commence proceedings in the Tribunal after the complaint has been investigated by my Office.[3] Finally, where representative proceedings are brought before the Tribunal, it may award damages of up to $350,000 to each individual.[4]

10. Standing to bring a claim does not depend on personal interest. The representative need not be a member of the class themselves. However, there are filtering provisions in section 74 of the Privacy Act, which confer the Commissioner the discretion to decline to investigate where a complainant has insufficient interest in the complaint or where the individual affected does not want the matter to be pursued. Given the sensitivity of claims in a human rights jurisdiction such as the Privacy Act, this mechanism can be used to prevent "busybody" complaints, while still allowing for agencies with a public interest mandate such as NGOs to bring complaints on behalf of groups of individuals who may benefit from representation.[5] There is also scope for an iwi group or other cultural or religious group to bring a matter to my Office for investigation on the basis that a group of individuals is affected by a practice or action.[6]

11. Procedural matters, however, have not been prescribed in the new Act, so the specifics of representative actions (for instance, whether an opt-in or opt-out model is appropriate) has been left to be regulated by the Commissioner under section 82 (the discretion to adopt any procedure considered appropriate that is not inconsistent with the Act or regulations) and the Tribunal in accordance with natural justice, in a manner that is fair and reasonable and accords with equity and good conscience.[7]

12. However, I note that the Tribunal requires a representative "lawfully acting on behalf" of a group of individuals, which is a higher threshold than representative complaints to my Office. This requirement may require an additional level of assessment at the Tribunal level, after they have been investigated by my Office and may steer the

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[2] Privacy Act 2020, s 97(6).
[3] Privacy Act 2020, s 98(1).
[4] Privacy Act 2020, s 103(2).
[5] Although not an example of a representative or class action, see my 2019 inquiry into the collection of personal information from beneficiaries in fraud investigations by the Ministry of Social Development, which was a response to issues raised by NGOs/ community law centres. Similarly, in circumstances where there is a group of individuals who are affected by an issue in the same way, there would be scope for an NGO or public interest group to bring a class complaint to my Office for consideration.
[6] See Privacy Act 2020, s 21(c).
[7] Human Rights Act 1993, s 105.

Tribunal towards an opt-in model.[8] If so, this could limit the flexibility for my Office to determine what procedure is appropriate in the circumstances of a particular complaint.

Areas of intersection between a class actions regime and Privacy Act representative complaints

13. I understand that the Law Commission is not proposing to incorporate Privacy Act representative complaints into a statutory class action regime. However, if class actions in other contexts are subject to a statutory regime with access to justice as its guiding principle, my Office is likely to draw upon it when determining the best way to proceed with a representative complaint, particularly in light of the threshold for bringing representative complaints in the Tribunal. Although there may be areas where the practice of my Office diverges from a statutory regime, depending upon where the Law Commission lands with its review (such as allowing representatives who are not members of the class to bring claims), a new statutory model for procedure in class actions could provide a useful benchmark by which the Privacy Act regime can be assessed, and further developed if necessary.

14. As the Law Commission develops its thinking, it may wish to further consider (with input from interested submitters) whether greater system-wide consistency of procedure would be beneficial. It could consider, for instance, whether a statutory model should expressly include a mechanism for specialist jurisdictions to adopt certain aspects of the proposed regime to supplement their own procedures as necessary and appropriate. Specialist jurisdictions, such as the Human Rights Review Tribunal, link to the higher courts through appeals and judicial review proceedings. Therefore, a commonly recognised approach or approaches to group litigation that can be accessed by the specialist jurisdictions as necessary could have benefits in streamlining issues on appeal or review for the courts. It could reduce the risk that the specialist jurisdictions are limited in accessing the clarity and efficiencies of the new regime and improve access to justice for individuals by removing unintended or inconsistent procedural obstacles.

15. Finally, if the Law Commission adopts a class actions regime that is general in scope, there may be some overlap between class actions brought under the privacy or intrusion upon seclusion torts, and the Privacy Act framework. Individuals already have a choice about which legal route they wish to use to pursue their privacy complaints (except where a potential defendant is not subject to the Privacy Act, such as regulated news media when undertaking news activities). For example, the public disclosure of private facts could raise both a disclosure issue under IPP 11 of the Privacy Act or be addressed by the courts in a privacy tort proceeding. Intimate covert filming may raise an issue about the unlawful collection of personal information under IPP 4 but could also be addressed by the courts under the tort of intrusion upon seclusion

[8] The authors of *Privacy Law and Practice* consider that an individual would be effectively "opting in" by lawfully appointing a representative: see P Roth and B Stewart *Privacy Law and Practice* (online ed) at [PA98.8(a)].

16. This overlap is not new. Individuals can choose the legal basis upon which to bring proceedings when more than one is available. In the context of class actions, however, having more than one method of addressing a privacy issue raises the possibility of parallel proceedings in the High Court, and through my Office and the Tribunal (and whether that is appropriate). Furthermore, the existence of such dual mechanisms could be considered when constructing the regime, including determining whether to permit an opt-out mechanism, and how to provide notice of the proceeding to individuals. For instance, if an opt-out model is adopted, it would require a well-publicised notification process to ensure individuals are sufficiently informed to choose the form of proceedings that best suits their circumstances.

Litigation funding

17. As the Privacy Act jurisdiction is intended to be accessible and affordable, we are not currently aware of litigation funders assisting individuals when making complaints. The process is set up to facilitate early resolution of complaints either through my Office or the Tribunal, which does not require legal representation. Self-represented litigants are common, as well as representation by non-lawyers on another's behalf (for instance, a parent representing their child).

18. However, we are mindful that data protection issues increasingly have global reach, and often intersect with consumer protection and fair-trading issues. Privacy or data breaches can negatively impact millions of people in multiple jurisdictions simultaneously.[9] In this context, the Privacy Act now has an express statement of its jurisdictional reach to offshore entities that carry on business in New Zealand. It is therefore possible that we will see litigation funders moving into the data protection space where privacy breaches cause an interference with privacy under the Privacy Act affecting a broad class such as customers, patients, or social media users. Egregious privacy or data breaches may also trigger tort proceedings where a class is adversely affected by the same breach in the same manner such as suffering financial or reputational damage. Accordingly, I think it is appropriate that the Law Commission is considering options to regulate litigation funding in New Zealand.

Conclusion

19. I welcome the Law Commission's consideration of class actions and litigation funding. A statutory regime would provide a useful benchmark for good practice in group proceedings, which, depending on the final form of any proposed model, my Office could draw upon in the Privacy Act context as appropriate.

20. I would be happy to speak with the Law Commission or to provide any further information that will assist the Law Commission in relation to this important review.

[9] For example, the Facebook-Cambridge Analytica data scandal affected millions world-wide.