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Dear Ewan

## **Review of the Privacy Act 1993 - Review of the Law of Privacy Stage 4**

### **Introduction**

The Society sets out a number of comments in response to the Law Commission's issues paper: "Review of the Privacy Act 1993", and the questions posed within that document, to assist the Law Commission with its inquiry.

### **Chapter 2: Scope, approach, and structure of the Act**

*Q1: We believe that the "principles-based", open-textured approach to information privacy regulation in New Zealand is still appropriate. Do you agree? What problems have been encountered as a result of this approach? In what circumstances has it been shown to be helpful or appropriate? What other approaches or combinations of approaches might be more appropriate?*

The "principles-based" approach recognises that agencies are different and that, in this area of law, it is appropriate that each agency uses the principles to identify and define the best privacy practices and procedures for its organisation.

*Q8: Do you find the guidance issued by the Privacy Commissioner useful? On what topics would you like more such guidance?*

The practice of having the Privacy Commissioner issuing guidelines to address needs in various sectors is endorsed.

### **Chapter 3: Key definitions**

*Q 11: Do you agree that human tissue samples should not be covered by the definition of personal information in the Privacy Act? Why, or why not?*

Human tissue samples should not be covered by the definition of personal information. While this is an area that may warrant further regulation, it is too large, complex and specialised an issue to attempt to incorporate it into the Act.

The Human Tissue Act 2008 is an appropriate place to incorporate any necessary privacy principles to the collection and use of human tissue.

*Q16: We propose that the Privacy Act should be amended to make clear that section 3(1) of the Law Reform Act 1936 applies to causes of action under the Privacy Act. Do you agree? Do you have any other suggestions about survival of Privacy Act complaints after death?*

Section 3(1) of the Law Reform Act 1936 should apply, as the exclusion is anomalous.

*Q18: We propose that the Privacy Act should be amended to make clear that, despite the general exclusion of information about legal persons from the definition of personal information, information about a legal person can be personal information if it is also clearly information about an identifiable individual. Do you agree? Would this have implications for other areas of law?*

*Q19: Should the Privacy Act be amended to clarify the circumstances in which information about a trust can be personal information?*

In answer to questions 18 and 19, it should be clear that the Act applies on the basis of the substance of the information, rather than its form. Any amendment that provides such clarity is supported. There does not appear to be any wider implications for other areas of law.

### **Chapter 4: The information privacy principles**

*Q22: Should any of the existing principles be combined?*

*Q23: Should principle 12 be removed from the principles and placed somewhere else in the Act?*

*Q24: Should any other principles be deleted?*

While there are changes that might be made logically, there is not an obvious practical reason to change familiar and well-established principles.

*Q35: We propose that principle 4 should be amended so that it clearly applies to attempts to collect information. Do you agree?*

Principle 4 should be amended as it is directed at conduct of agencies. It should not be subject to whether information is successfully collected.

*Q38: We propose that principle 9 should continue to allow retention of information for so long as it is required for the purposes for which it may lawfully be used. Do you agree?*

Agreed.

*Q39: We propose that principle 9 should continue not to specify how personal information should be disposed of. Do you agree? Would guidance on this point from the Office of the Privacy Commissioner be helpful?*

Agreed. This is better done through guidance/practice on an ongoing basis.

*Q40: Are coerced access requests a problem? If so, can the Privacy Act be amended to deal with the problem?*

Coerced access requests are a significant problem in health, for instance when health information is sought in relation to employment or insurance matters. This issue warrants broader scrutiny than can be undertaken within the context of the present review.

*Q41: We propose that where an agency is not willing to correct personal information, it should be required to inform the requester of his or her right to request that a statement be attached to the information of the correction sought but not made. Do you agree?*

Agreed. This already occurs as a matter of good practice.

*Q47: We propose that a new ground for refusal should be added to allow agencies to refuse access to information that has previously been provided to an individual, or that has previously been refused, provided that no reasonable grounds exist for the individual to request the information again. Do you agree? Do you have any other suggestions about how the Privacy Act should deal with the problem of repeated access requests for the same information?*

Agreed. This would assist the efficient functioning of the Act.

*Q49: We propose that complexity of the issues raised by a personal information request should be added to the grounds for seeking an extension of time in section 41(1). Do you agree?*

Agreed.

*Q50: Should the Act expressly provide that disclosures within agencies can be covered by principle 11? If so, how should this be done?*

Information-sharing within agencies is properly governed by other principles, notably principles 5 and 10. Principle 11 should continue only to govern inter-agency disclosure.

*Q51: Should there be a new exception to principle 11 where the disclosure is to a person or persons who already know the information in question?*

The difficulties with such an exception are:

- (a) Identifying what is sufficient to determine that the person or persons know the information in question, without releasing personal information to those; and
- (b) In releasing personal information the agency may be providing reliable third-party confirmation of personal information which the person/s receiving the information did not already possess.

For these reasons such a new exception is not supported.

*Q52: We propose that the words “and imminent” should be deleted from principles 10(d) and 11(f). Do you agree?*

Agreed. It is appropriate to consider safeguards, such as seeking consent, where they are feasible. However, it is clear that a threat may be sufficiently serious to warrant the exception even when not yet urgent.

*Q59: Should the Privacy Act include an Openness principle? If so, what should be its content? If not, should openness be provided for in some other way?*

The Act is not an information availability statute and does not require an additional mechanism.

## **Chapter 5: Exclusions and exemptions**

*Q61: We propose that the application of the privacy principles (not necessarily by way of the Privacy Act itself) to the House of Representatives and to MPs should be considered by a committee of Parliament. Do you agree?*

Agreed. As identified in the issues paper, the issue of regulating the collection, storage, use and disclosure of personal information held by MP's constituency offices is important. It is not clear why this aspect of an MP's official duties is exempt.

*Q73: Should the meaning of “personal affairs” in section 56 be clarified? If so, how?*

The suggestions in questions 74 – 76 are supported, that is s56 will not apply:

- (a) where a person has collected information from an agency by engaging in misleading conduct;
- (b) where personal information is obtained unlawfully; and
- (c) where the collection, use or disclosure of personal information results in identifiable harm to another individual.

*Q78: Should principles 1, 5, 8 and 9 apply to the intelligence organisations?*

Agreed for the reasons discussed in the issues paper.

### **Chapter 6: Privacy Commissioner**

*Q88: We propose that a person or body other than the Privacy Commissioner should review the operation of the Act. Do you agree? If so, do you have any suggestions about who should conduct the reviews?*

It is appropriate for an independent person or body to conduct such a review. This should either be the Law Commission or a reviewer appointed by the Minister of Justice.

### **Chapter 7: Codes of practice**

*Q95: We consider that codes of practice should be implemented by ordinary regulations approved by Cabinet, rather than simply being issued by the Privacy Commissioner. Do you agree?*

Given the significance of a code such as the Health Information Privacy Code, it is appropriate that codes are implemented by regulation.

### **Chapter 8: Complaints, Enforcement and remedies**

*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: it would increase its status but consider current chairman doing a good job.*

- *the Privacy Commissioner should be given statutory power to issue enforcement notices;*  
*and*
- *non-compliance with an enforcement notice should be made an offence?*

This area of law should be regulated to maximise access to justice. As complainants are usually unrepresented individuals it is important that there is no fetter to the Privacy Commissioner assisting with the resolution of disputes in a quick and effective manner.

It is important that there is access for individuals to an expert practitioner in deserving cases, even if this results in double handling of complaint information.

The Society does not believe that there is a pressing need for the appointment of a District Court judge as Chair of the HRRT. That said, it can see some advantages in the appointment of a judge as Chair of the HRRT. The appointment of a judge may add mana to the HRRT and its decisions. In addition, a judicial appointee would enjoy security of tenure, which is an important aspect of judicial independence; under the current arrangements the Chair of the HRRT does not have security of tenure. While Privacy Act litigation is unlikely to be particularly politically controversial, other aspects of the HRRT's jurisdiction can be - in particular the jurisdiction under Part 1A of the Human Rights Act 1993 to make declarations of inconsistency. If there were to be a move to the appointment of a District Court judge as Chair of the HRRT the Society believes any such appointment would have to be a specialist appointment so as to ensure consistency and excellence in exercise of the jurisdiction

*Q98: Are any other dispute resolution or enforcement mechanisms required?*

More emphasis should be placed on alternative dispute resolution, such as mediation, as is commonly used in Employment Law and in District Court litigation.

*Q100: Should there be new offences of:*

- 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*
- knowingly destroying documents containing personal information to which an individual has sought access in order to evade an access request?*

The creation of such offences are supported, given the significance of such breaches. In particular, international concerns about identity theft warrant such a response as set in sub-para (a).

## **Chapter 9: Information matching**

*Q104: Should there be greater openness about data mining by public agencies? For example, should public agencies be required to report annually on their data mining activities?*

*Q105: We consider that the current controls on information matching by public sector agencies are appropriate and should be retained. Do you agree?*

Both of these recommendations are supported for the reasons discussed in the issues paper.

## **Chapter 10: Information sharing**

*Q122: We have presented the following mechanisms as possible means of regulating information sharing:*

- *guidelines;*
- *a code of practice;*
- *a national public sector information sharing strategy;*
- *a rebuttal presumption that personal information held by one public sector agency can be shared with other public sector agencies if such sharing is for the benefit of the individual concerned and is for a purpose that is broadly similar to that for which the information was obtained;*
- *allowing the Privacy Commissioner to issue binding or advance rulings;*
- *the enactment of a set of information sharing guidelines similar to the information matching guidelines in section 98;*
- *requiring greater openness about information sharing by public sector agencies (such as requiring them to report annually on their information sharing activities);*
- *the addition of a new “welfare” exception to principle 11;*
- *an extension of the current section 54 exemption power;*
- *a schedule of authorised information sharing activities;*
- *a new regime similar to the existing information matching regime; and*
- *a “common or integrated programme or service” exception.*

*What are your views on any of these mechanisms?*

Without commenting on any of the mechanisms listed, the importance of regulating information sharing is endorsed.

### **Chapter 11: Interaction with other laws**

*Q129: Do you have any comments about the interaction of the privacy principles with the common law?*

There should be clarity in respect of principle 11 and the common law duty of confidentiality. Principle 11 requires agencies not to release personal information to third parties however the agency **may** do so if an exception applies. This can be misleading to agencies that may not be aware that common law principles of confidentiality may apply in the exercise of the discretion.

*Q135: Should consideration be given to combining all, or any parts, of the Privacy Act, the Official Information Act and the Public Records Act?*

The Privacy Commissioner, the Ombudsman and the Chief Archivist should, together, prepare guidelines for government agencies in respect of public records.

### **Chapter 12: Law enforcement**

*Q145: Would it be helpful if the Privacy Commissioner provided information or commentary about the law enforcement grounds for refusing access?*

*Q149: Would it be helpful if the Privacy Commissioner provided information or commentary about the maintenance of the law exception to the use and disclosure principles?*

In answer to these questions, 145 and 149, the Privacy Commissioner issuing guidelines from time to time is endorsed.

### **Chapter 15: Direct marketing**

*Q167: Are any regulatory controls on direct marketing needed? If so, which forms of direct marketing require further controls:*

- *telemarketing;*
- *unsolicited mail;*
- *door to door marketing;*
- *autodialling;*
- *electronic spam;*
- *fax marketing;*

- *charitable solicitations;*
- *political donation solicitations; or*
- *other?*

Without considering the forms of direct marketing, the issues are suited to either a code of practice or guidelines issued by the Privacy Commissioner.

It is important that wider consumer issues (such as misleading or deceptive conduct) are not confused with privacy issues.

### **Chapter 16: Data breach notification**

*Q170: Should the Privacy Act include a mandatory breach notification requirement, or is a voluntary notification model more appropriate? How should a data breach be defined?*

In line with overseas developments, the move to a mandatory breach notification model is preferred.

In developing the model, care must be taken to ensure that compliance is not too oppressive for New Zealand's small to medium enterprise.

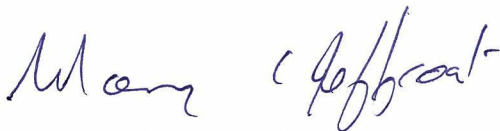
### **Chapter 19: Health information and workplace privacy**

*Q193: Is there a need for a separate review of health information and/or new health information legislation?*

Agreed. These are broad and current issues and require separate consideration on a regular basis.

In line with overseas practices (in particular Canada and the United States of America), consideration should also be given to the benefits of compulsory privacy impact assessment for medical databases.

Yours sincerely



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**Vice-President**