

COMPLAINTS, INVESTIGATIONS AND DISPUTES UNDER THE PROPOSED PRIVACY ACT EXTENSION TO THE PRIVATE SECTOR

Mick Batskos*

In September this year, the Federal Attorney-General published a discussion paper entitled *Privacy Protection in the Private Sector*. The discussion paper proposes that the Privacy Act 1988 (Cth) should be extended to organisations and individuals in the private sector so far as it is within the Commonwealth's constitutional power to do so. The paper also proposes a "co-regulatory approach" to privacy in the private sector, based on provision for Codes of Practice to be developed in relation to specified information, activities, organisations, industries or professions.

This article briefly outlines the following matters relating to complaints, investigations and disputes contained in the discussion paper:

- (a) when an individual can complain to the Privacy Commissioner;
- (b) what is an interference with privacy;
- (c) how complaints can be made;
- (d) when the Privacy Commissioner should have power to investigate the activities of an organisation¹;
- (e) how investigations are conducted;

- (f) how complaints can be resolved;
- (g) when organisations may be taken to court; and
- (h) what types of remedies are available for an interference with privacy.

Complaints

The discussion paper proposes that an individual would be able to make a complaint to the Privacy Commissioner about an act or practice of an organisation that:

- (a) *might* be an interference with privacy; or
- (b) *might* otherwise adversely affect the privacy of an individual and is inconsistent with guidelines issued by the Privacy Commissioner (eg as is proposed in the telemarketing and optical surveillance areas). This article focuses on interferences with privacy.

There are three types of acts or practices of organisations which might give rise to an "interference with privacy". First, where one or more of the Information Privacy Principles ("IPPs") or a Code of Practice is breached in relation to the personal information of an individual. Secondly, where the organisation concerned makes a decision about fees. Thirdly, where the organisation makes a decision about extending time limits within which a decision about access must be made. The last category will be an interference with privacy only if, in addition, the Privacy

* Mick Batskos is a Senior Associate, Mallesons Stephen Jaques, Solicitors, Melbourne

Commissioner believes that there was no proper basis for the decision to extend the time limits.

Another interesting feature of the discussion paper is the proposal for representative complaints. This could lead to a "class" type of complaint made by an individual on behalf of a group or class of individuals. Currently, s.6(1) of the Privacy Act defines the term "representative complaint" as:

a complaint where the persons on whose behalf the complaint was made include persons other than the complainant, but does not include a complaint that the Commissioner has determined should no longer be continued as a representative complaint.

At present, s.38 of the Privacy Act permits a representative complaint to be made if:-

- (a) the class members have complaints against the same person; and
- (b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) all the complaints give rise to a substantial common issue of law or fact.

A representative complaint must:

- (a) describe or otherwise identify the class members and
- (b) specify the nature of the complaints made on behalf of the class members; and
- (c) specify the nature of the relief sought; and
- (d) specify the questions of law or fact that are common to the complaints of the class members.

In describing or otherwise identifying the members of the class, it is not necessary to name them or specify how many there

are. A representative complaint may be lodged without the consent of class members.

A complaint must be in writing. The staff in the office of the Privacy Commissioner will provide assistance to a person wishing to make a complaint.

Investigations: when are they to be conducted?

Apart from certain exceptions, the discussion paper suggests that the Privacy Commissioner would be required to investigate acts or practices which could give rise to an interference with privacy (or which could otherwise affect the privacy of an individual because it was inconsistent with one of the Privacy Commissioner's guidelines) either upon receiving a complaint, or upon his or her own motion, if he or she considered it desirable.

Thus, if the Commissioner does not consider it desirable to investigate an interference with privacy by a private sector organisation, the Commission will have a discretion not to investigate. This differs markedly from the current provisions in the Privacy Act which state that the Privacy Commissioner **shall** investigate an act or practice if the act or practice may be an interference with the privacy of an individual and a complaint about the act or practice has been made. The Privacy Commissioner **may** also investigate an act or practice which may be an interference with privacy if it is thought desirable to do so. Under the current provisions, the need to determine whether or not the investigation is desirable only arises where the Privacy Commissioner (without receiving a complaint from another person) considers an act or practice may be an interference with privacy.²

The Privacy Commissioner would be able to decide not to investigate or further

investigate an act or practice if satisfied that:

- (a) there was no interference with privacy (or privacy was not adversely affected);
- (b) no person aggrieved wanted the investigation;
- (c) the complainant had not first complained to the organisation about the act or practice;
- (d) the organisation had dealt or was dealing adequately with the complaint or had not had an opportunity to do so;
- (e) the complaint was made more than 12 months after the matter came to the complainant's attention;
- (f) the complaint was frivolous, vexalious, misconceived or lacking in substance;
- (g) the complaint was being dealt with under other Commonwealth legislation;
- (h) another remedy had been or was being sought which had disposed or was adequately disposing of the complaint;
- (i) if the complaint related to a Code of Practice which set out a complaints procedure, that procedure was not fully pursued where it would have been reasonable to do so;
- (j) another more appropriate remedy was reasonably available.

Again, these provisions are similar to existing provisions in the Privacy Act.⁹ What they suggest is that it is in the interests of organisations wishing to maximise their chances of avoiding investigations by the Privacy Commissioner to introduce appropriate

internal procedures for handling complaints about privacy. These procedures should be well documented and actually applied in practice; they should not just be a token gesture

Investigations: how are they to be conducted?

The discussion paper states that the investigation procedures are intended to be flexible and informal⁴. Although informality and flexibility may arise in practice, this is not necessarily reflected in the types of powers the Privacy Commissioner will have even though the investigation procedures proposed are very similar to those which currently exist in the Privacy Act.⁵

Before an investigation is commenced, the Privacy Commissioner will be required to inform the organisation concerned of the impending investigation. Investigations would be conducted in private as the Commissioner thinks fit. The Commissioner will be able to obtain such information and make such inquiries as thought fit. Ordinarily, that would be by informal and personal inquiry and by discussions or correspondence with relevant persons.

However, there would also be substantial powers of compulsion including the power to:

- give persons notice to provide relevant information, answer questions or produce relevant documents;
- require persons to attend in order to provide information or answer questions on oath;
- direct persons to attend a compulsory conference (to try and settle a complaint) where a failure to attend without reasonable excuse would be an offence;

- conduct compulsory conferences in private to try and settle complaints. Neither the complainant nor the organisation would be able to be legally represented; however, an organisation can be represented by an employee, member or officer. This gives organisations a potential advantage where they have in-house lawyers who can attend on their behalf;
- transfer complaints to the Human Rights and Equal Opportunity Commission where a complaint would be more appropriately dealt with by that body.

Settlement, court proceedings and civil penalties

If the Privacy Commissioner considers that a complaint is substantiated, he would be required to use his best endeavours to secure a settlement between the parties. The Attorney-General envisages that as part of this process the Privacy Commissioner would make constructive suggestions with a view to resolving complaints.⁶ The settlement process might involve obtaining assurances that the act or practice which lead to the investigation, or a similar act or practice, would not re-occur.

The Privacy Commissioner would be able to issue an assessment of the organisation's compliance with the IPPs (or the relevant Code of Practice) and issue an assessment of any appropriate remedy, including compensation.

A complainant alleging an interference with privacy would be able to commence Federal Court proceedings to consider the whole matter afresh. This would not be by way of a review of the Privacy Commissioner's assessment nor would such proceedings be able to be commenced to enforce any settlement agreement. Federal Court proceedings will be able to be commenced in three

circumstances. They are where the Privacy Commissioner:

- (a) was unable to secure a settlement; or
- (b) considers that the matter was not suitable for settlement; or
- (c) considers that the matter raised public interest concerns.

The Federal Court would be able to order organisations to pay compensation, refrain from acts or practices which would constitute an interference with privacy and to undertake actions necessary to avoid an interference with privacy.

In addition, the Privacy Commissioner would have the power to seek an order for civil penalties from the Federal Court for:

- (a) unauthorised disclosure of personal information for profit; and
- (b) obtaining personal information by false pretences.

In hearing these types of cases the Federal Court would apply the rules of evidence and procedures which usually apply to civil matters.

By contrast, where a matter would involve an adverse effect on the privacy of an individual (eg. in telemarketing and optical surveillance), the Privacy Commissioner would only have power to make recommendations as to consistency with guidelines and as to an appropriate remedy. No Federal Court proceedings could be commenced.

The discussion paper is silent on whether or not injunctions will be available to stop an interference with privacy. There is no equivalent proposed (it would seem) to s.98 of the Privacy Act. That section enables an injunction to be sought where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a

contravention of the Act. It can be sought by the Privacy Commissioner or *any person*. The applicant need not have any special interest to have standing. Accordingly, interest groups are able to seek injunctions without the need to establish an interest greater than any member of the public. Further, where an injunction is sought to stop a breach of the Act, no undertaking as to damages need be given: s.98(7).

As representative complaints will be possible, I presume that the Privacy Act provisions will be extended in relation to identification of the class to be affected by any determination about a representative complaint, and the manner in which members of the class may participate in or benefit from any such determination.

Endnotes

- 1 For "organisation" read "organisation or individual". To avoid confusion when referring to individuals, this article refers to organisations only.
- 2 See Section 40 of the Privacy Act 1988.
- 3 See Section 41 of the Privacy Act 1988.
- 4 See also text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 51.
- 5 See Sections 43-48 Privacy Act 1988.
- 6 See text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 53.