NEW ZEALAND INTRODUCES NEW PRIVACY BILL

New Zealand's Justice Minister approved the draft of a new Privacy Bill in February and asked for comments from interested parties by April 6th, reports Paul Molineaux, Wanganui Computer Centre Privacy Commissioner. Existing provisions for the protection of privacy are rather "piecemeal, fragmented and incomplete," in the words of his annual report published last year. For this report, PL&B has also interviewed Tim McBride, author of a study for the New Zealand government identifying its privacy policy options.

Privacy provisions are fragmented in that they consist principally of the Human Rights Commission Act 1976, the Wanganui Computer Centre Act 1976, part 4 of the Official Information Act 1982, and case law. Molineaux summarizes their separate roles in his report:

"The Human Rights Commission exercises....an overall supervisory role in matters relating to privacy including advising the government on the need for or desirability of legislation. A limited degree of protection is available under the Wanganui system in the area of law enforcement. Access rights to some types of personal information are accorded under the Official Information Act. In the private sector, there is no statutory provision for the protection of privacy of personal information."

After reviewing the privacy legislation in Europe, Australia, the USA and Canada, he concludes that a single agency applying a set of legislated principles similar to the OECD Guidelines would provide "a more even handed rationalisation of effort." Access requests would be processed first by the user department and any complaints would be handled by the new data protection commission or privacy commissioner. In such a scheme, "access to personal information throughout the public sector and parts of the private sector would thus become unified."

With a general election due in October this year, the government seems committed to fulfilling its previous election manifesto promise by introducing a Personal Information Privacy Bill. Molineaux has written to PL&B explaining what he expects to see when the bill is published. It is likely to be similar to Australia's Privacy Act but without such an emphasis on the tax file number system (PL&B Nov '88 p.18). The bill would establish a general statute incorporating the OECD Guidelines' principles and set up a Data Protection Authority with power to monitor privacy issues, conduct audits and play a leading role in increasing public awareness of the need for a greater level of responsiblity on the part of data owners. The bill would cover both the public and private sectors, but with a role for sectoral codes of practice.

This imminent data protection bill perhaps explains why privacy was omitted from the Bill of Rights which was introduced into the legislature in late 1989 and is about to be examined by a select committee. The Bill of Rights contains many of the civil and political rights of the UN Covenant but privacy is omitted. As the current Prime Minister, Geoffrey Palmer, is a former Justice Minister and a former law teacher, the omission is unlikely to be an oversight.

The courts

In the absence of a general statutory right to privacy, the New Zealand courts have recognized some privacy interests on the basis of common law principles:

* In one case, a man needed money for a highly expensive heart operation in Australia. A public fund was set up. Then it was revealed in the news media that many years before he had been convicted of sexual offences involving children. His name had not been suppressed at that time. The man brought an action against the news media, alleging among other things, an invasion of his right to privacy. The court held that the action was too late - the damage had been done. The judge observed, however, that he was in favour of extending the Common Law in New Zealand to cover the situation where an invasion of personal privacy occurs by the publication of private facts (Tucker v. News Media Ownership Ltd. (1986)).

* A young mother who killed her 2 year old daughter was sent to prison on grounds of manslaughter (unintentional killing). The woman had been seen by many social workers who had failed to prevent the killing. A committee was established to make recommendations to prevent a similar incident in the future. A newspaper planned to write a report but the woman sought an injunction to prevent publication on grounds of invasion of privacy. The newspaper's defence was that the material to be published was in the public interest. The court held that publication of such details about a named person would be an actionable breach of confidence and issued an order to restrain publication indefinitely (T v. AG (1988)).

The conclusion to be drawn from these cases is that in the absence of a privacy law, the New Zealand courts have made it clear that they will recognize a right to privacy in appropriate cases, where there is no alternative legal remedy.

The Official Information Act 1982

Before ending its 5 year term in June 1988, the Information Authority made a recommendation that privacy principles should be written into the Official Information Act. In case of complaint, the Ombudsman could investigate but his decisions would not be directly enforceable. At present, Part IV of this Act gives individuals a right of access to records on themselves, with no fee. This is a qualified right because an individual may not violate the rights of others. The Ombudsman has a right to review cases where individuals have difficulty in obtaining access to records on themselves. In 1987, the Official Information Act was extended to regional and local government, area health boards and educational institutions.

The McBride report

The McBride report, published in December 1987, had the purpose of supplementing the Information Authority's recommendations, by concentrating on the private sector. The McBride report covered a broad scope such as the concept of privacy, the impact of technology, privacy principles and developments in Europe. He set out 14 possible policy options.

At one end of the spectrum is the option of doing nothing, which means retaining the existing institutions such as the Press Council, the Broadcasting Standards Authority, and professional regulations, such as those for doctors, lawyers and psychologists. The disadvantage is that some of these remedies for invasion of privacy are directly enforceable while others are indirectly enforceable.

Other options included the merits of a licensing or registration system, which he did not recommend; common law action involving the tort of privacy; amending the law relating to breach of confidence; possible legislation covering particular sectors; and the creation of a new privacy guardian.

The McBride recommendations

As a result of his research, Tim McBride recommends the following approach for New Zealand:

* One privacy law for the public and private sectors, including state agencies, state owned enterprises, and all private sector users handling personal information. This would replace part IV the Official Information Act.

* Both automated and manual data should be covered.

* The privacy law should be enforceable by

  - a Privacy Commissioner reporting directly to Parliament

  - court action by aggrieved persons in certain circumstances

* An alternative arrangement for enforcement in the private sector would be for the Privacy Commissioner to be one of the Human Rights Commissioners with a right to deal with complaints. (Currently, the Human Rights Commission has no complaints role).

When the government's bill is published, Privacy Laws & Business will report on which, if any, of these options have been pursued.

Tim McBride is a barrister (advocate) of the High Court of New Zealand, a Senior Law Lecturer at the University of Auckland, and a former President of the Auckland Council for Civil Liberties.

Paul Molineaux is Wanganui Computer Centre Privacy Commissioner and a former senior magistrate in New Zealand and a number of Pacific islands.