

# *New Irish data protection law*

Report by Professor Robert Clark

**I**RELAND HAS BEEN PROSECUTED in the European Court for delay in transposing the EU Data Protection Directive. But following further delay resulting from May's general election, the new data protection law is expected to be passed later this year.

The existing Irish legislation in force is the Data Protection Act 1988. The Act was passed to give effect to the Strasbourg Convention (1981) and applies to electronic personal data, but does not include manual files. Data protection principles are set out in section 2, whilst access rights are provided in sections 4-6, with exemptions such as law enforcement and state security being set out therein. Registration of data controllers is selective, based on either identity (eg. government departments, ISPs) or the sensitivity of the personal data kept. All data processors must register.

The Act is enforced either by the individual or the Data Protection Commissioner, who has powers to investigate complaints, seek information and make enforcement orders. Data subjects may sue in tort (section 7) for breach of a duty of care.

The 1995 EU Data Protection Directive has not yet been transposed, but the Data Protection (Amendment) Bill 2002 completed all its Seanad stages on April 24th 2002 and now goes to the Dail for completion later in 2002. The security provisions in the 1995 Directive and the section dealing with the transfer of personal data to third countries were the subject of a statutory instrument (No. 626 of 2001) that came into effect on April 1st 2002.

The EU Telecoms Directive (97/66/EC) was transposed in S.I. No. 192 of 2002, effective May 8th 2002. The data protection issues in that directive are addressed and the S.I. also integrates these provisions with ONP Directive 98/10/EC (Voice Telephony & Universal Service). The traffic data and billing data provisions of the 1997 Directive are transposed by cross-ref-

erence, as are the calling line and called line identification rules. Subscriber directory and direct marketing issues are dealt with but there are no spam provisions. Enforcement is a duty of the Data Protection Commissioner.

## **DATA PROTECTION CLAUSES IN OTHER STATUTES**

Social Welfare legislation contains provisions that allow personal data sharing as between government agencies and law enforcement bodies. The Health (Provision of Information) Act 1997 allows personal data to be disclosed for health screening purposes. There are personal data access provisions in the Consumer Credit Act 1995. The Criminal Damage Act 1991 indirectly protects personal data by making unauthorised access to data via a computer, a criminal offence. Article 10 of the Distance Contracts Directive 1997 is transposed in SI No. 207 of 2001.

## **FREEDOM OF INFORMATION (FOI)**

The 1997 FOI Act came into force on April 21st 1998. Government departments and related agencies were subject to FOI requests, with health boards and local authorities included from October 1998. Other bodies such as voluntary hospitals and centrally funded health agencies, cultural organisations and universities were subsequently covered following ministerial orders.

The Act provides the public with the right of access to official information to the greatest possible extent, consistent with the right of privacy and the public interest. Access rights to information held about the individual are also provided. Decisions that affect individuals or groups may also be scrutinised: ie.

the criteria by which such decisions have been made are to be disclosed. There are a number of exempt records relating to key areas of government, Parliament, and the operation of the courts. Access denials on these grounds may in most cases have to be justified by reference to an "injury test" or a "public interest" test, although certain documents such as cabinet documents are restricted because of the nature of the class of document itself. Commercially sensitive information may also be exempt from FOI.

Enforcement is achieved through an independent agency, the Information Commissioner, which has statutory powers of investigation and enforcement. There are ministerial certification procedures which relate to law enforcement functions. In this regard decisions covered by a certificate cannot be reviewed by the Commissioner. The Commissioner has powers to enter premises, remove records for a reasonable period, require information and the attendance of witnesses. Non-compliance constitutes a criminal offence. The Commissioner has no power to award damages or impose financial penalties on FOI bodies.

## **RIGHT TO PRIVACY**

The Irish Constitution's Article 40.3.1, unenumerated rights has been held to include a constitutional right to privacy, and in *Kennedy vs Ireland* [1987] I.R. 587 the right was held to include the right to privacy in telecommunications messages.

*Professor Robert Clark is a lawyer and consultant to law firm Arthur Cox and a member of the Faculty of Law, University College, Dublin. For further information contact: mark.rasdale@arthurcox.ie*