



Communicating interpretations: Building confidence in principles

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Interpreting Privacy Principles:

Chaos or Consistency?

Sydney, 17 May 2006

Reprise: Why reporting decisions is important

- Adverse consequences of lack of availability
 - Interpretation unknown to parties / legal advisers
 - No privacy jurisprudence is possible
 - Past remedies ('tariff') unknown
 - Privacy remains 'Cinderella' of legal practice
 - Deficiencies in laws do not become apparent
 - Commissioners can 'bury their mistakes'
 - Justice is not seen to be done
 - Deterrent effect is lost
 - No accountability for high public expenditure

See G Greenleaf [*Reforming reporting of privacy cases: A proposal for improving accountability of Asia-Pacific Privacy Commissioners*](#) (2003)

Reasons for confidence in Commissioner's decisions

What factors can give us confidence that Commissioners correctly interpret the law?

1. Rights of appeal, or alternative means of enforcement

If PCOs get it wrong, complainants go elsewhere

2. Decisions are public and open to criticism

If PCOs get it wrong, this can become apparent

Problem - not all decisions can be published

3. Selection of decisions is justifiable and verified

Question - are enough decisions being published?

How to develop criteria for deciding which to publish?

How to develop verification mechanism?

1 Do rights of appeal, or alternative avenues, exist?

- An alternative enforcement route is as good as a right of appeal from a PCO
- Position varies greatly b/w APPA members
 - Aust. Fed.: no appeal (only judicial review), and direct enforcement through injunction is not used
 - NSW: alternative route via NSW ADT is effective in providing access to remedies and the Courts
 - Vic: effective right of appeal to VCAT and Courts
 - NZ: alternative route to HRRT and courts
 - HK: no appeal beyond AAB, and alternative s66 route to damages via Court is not used

2 Is publication accessible?

- All APPA PCs (except NSW) publish on website details of selected complaints resolved
 - All also allow republication in WorldLII's [Privacy Law Library](#), with a common search engine
- Timeliness of publication - Still very variable:
 - Aust. Fed to April 2006
 - Vic to 2006
 - NZ to mid-2005
 - Korea to 2004 (at least)
 - HK to 2003
 - NSW N/A
- Common citation format adopted by APPA
- Considerable advances since 2003

3.1 Is publication in sufficient quantity?

- Number of decisions published/ month
 - Aust Fed: 65 in 42 months from 2002 (1.5)
 - Vic: 34 in 34 months from 2003 (1)
 - plus 9 VCAT decisions
 - NZ: 122 in 114 months from 1996 (1)
 - plus a larger number of HRRT decisions
 - Korea: 35 in 2002-04 (in English) (1)
 - HK: 39 from 1997-2003 (under 0.5)
 - plus 21 AAB summaries (by PCO) since 1997
 - NSW: 0 from NSW OPC (0)
 - plus 26 ADT summaries 2001-04
 - plus 81 NSW ADT decisions since 2001

3.2 A 'best practice' standard for publication?

- Are numbers of complaints published significant?
 - Numbers published are relatively small: meaningful?
 - Not relative to complaints received or closed, or breaches found
 - Could have an objective standard of a percentage (eg 10%) of all complaints resolved. Useful, but does not address criteria for selection, and risk of self-serving selection.
- Alternative based on criteria of seriousness
 - Requires publicly stated criteria of seriousness
 - All complaints meeting the criteria to be published
 - Some method of PCO verifying it has adhered to this standard (each annual report?)
 - Criteria might give greater confidence if based on a regional (APPA) standard

Some possible criteria justifying publication

1. Exercise of enforcement / recommendation powers by Commissioner
2. Settled complaint involving new interpretation of law, or new context
3. Dismissed complaint involving new interpretation or application of law
4. Availability of a remedy in a new context or on a new scale
5. Example of a very common or important type of complaint not previously reported
6. Findings strongly contested by one party
7. Illustrative complaint in a new industry

3.3 Verification

- Whatever standard adopted, verified adherence to it increases confidence
- External verification seems unnecessary
- Annual Report could verify adherence to reporting standard over last 12 months, when reporting statistics
 - Can also state as % of completed complaints
 - Can also state as % of where remedies awarded

Some ways ahead

- The resources issue
 - PCOs often want more resources before doing complaint summaries (they become last priority)
 - This undervalues benefits of publication
 - Can closing summaries be a management tool?
- Should APPA suggest
 - a reporting % based on number of complaints resolved?
 - a standard of seriousness justifying reporting?
 - Annual verification of adherence to standard chosen?