

## CHAPTER 9: A DRAFT BILL ON THE PROTECTION OF PERSONAL INFORMATION

9.1 In this, the second document to be published by the Law Commission in its investigation into privacy and information protection, the Commission has tried to develop and expand the proposals that were set out in its previously published Issue Paper.<sup>1</sup>

9.2 The preliminary proposals of the Commission were summarised as follows in the Issue Paper:<sup>2</sup>

- a) privacy and data protection should be regulated by legislation;
- b) general principles of data protection should be developed and incorporated in the legislation;
- c) a statutory regulatory agency should be established;
- d) a flexible approach should be followed in which industries will develop their own codes of practice (in accordance with the principles set out in the legislation) which will be overseen by the regulatory agency.

9.3 Support from written submissions received, numerous discussions with various stakeholders and further research conducted, have strengthened the Commission's original views. These principles now form the basis of the proposed draft Bill set out in **Annexure B** to this discussion paper.

9.4 The Draft Bill comprises ten Chapters. Chapter 1 contains certain general provisions including an introductory section setting out the objects of the act. Chapter 2 deals with the application of the act. Chapter 3 sets out the conditions for the lawful processing of personal information (information protection principles) with the exemptions in Chapter 4. Chapters 5, 6 and 7 deal with the various aspects of supervision, namely the establishment and duties of the regulatory authority, notification and prior investigation and codes of conduct. Enforcement,

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<sup>1</sup> SALRC Issue Paper 24 2003.

<sup>2</sup> Para 9.8 at 269 of SALRC Issue Paper 24.

offences and sanctions are provided for in Chapters 8 and 9. Finally, the miscellaneous and transitional provisions are contained in Chapter 10.

9.5 The Act is a general information protection statute, which will be supplemented by codes of conduct for the various sectors and will be applicable to both the public and private sector. It covers both automatic and manual processing and will protect identifiable natural and juristic persons.

9.6 In general, commentators cautioned that consistency in terminology, definitions and concepts of privacy and information protection when used in different laws and regulations such as the Promotion of Access to Information Act and the Electronic Communications and Transactions Act is of the utmost importance.<sup>3</sup>

9.7 It was furthermore noted<sup>4</sup> that in information protection legislation, itself, two approaches can be identified:

- a) The EU approach which refers to "processing" of data. "Processing" being a term that, at the very least, includes the activities of the collection, use and disclosure of personal information
- b) The North American/Australian approach which refers separately to the "collection", "use" and "disclosure" of personal information.

9.8 The Commission has opted for the use of the term "processing" in order to ensure that all relevant activities are included. Other important terms used are "responsible party" (sometimes referred to as the "data controller"), "data subject" and "personal information".

9.9 The Bill gives effect to eight core information protection principles, namely processing limitation, purpose specification, further processing limitation, information quality, openness,

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<sup>3</sup> Vodacom.

<sup>4</sup> IMS.

security safeguards, individual participation and accountability. Provision is made for exceptions to the information protection principles. Exemptions are furthermore possible for specific sectors in applicable circumstances. Special provision has furthermore been made for the protection of special (sensitive) personal information.

9.10 Provision has been made for an independent Information Protection Commission with a full-time Information Commissioner to direct the work of the Commission. The Commission will be responsible for the implementation of both the Protection of Personal Information Act and the Promotion of Access to Information Act. Data subjects are under an obligation to notify the Commission of any processing of personal information before they undertake such processing and provision has also been made for prior investigations to be conducted where the information being collected warrants a stricter regime.

9.11 Codes of conduct for individual sectors may be drawn up for specific sectors. This will include the possibility of making provision for an adjudicator to be responsible for the supervision of information protection activities in the sector. The Commission will, however, retain oversight authority. The codes will accurately reflect the information protection principles as set out in the Act, but should furthermore assist in the practical application of the rules in a specific sector.

9.12 Enforcement should be through the Commission using as a first step a system of notices where conciliation or mediation has not been successful. Failure to comply with the notices is a criminal offence. The Commission may furthermore assist a data subject in claiming compensation from a responsible party for damage suffered. Obstruction of the Commission's work is regarded in a very serious light and constitutes a criminal offence.

9.13 It is the Law Commission's objective to ensure that the legislation provides an adequate level of information protection in terms of the EU Directive. In this regard a provision has been included that prohibits the transfer of personal information to countries that do not ensure an adequate level of information protection.

9.14 The proposals and Bill prepared by the Law Commission will form the subject of a further consultative process before final consideration by the Commission itself. A series of workshops will be held across the country where the draft Bill will be considered and discussed by interested parties.

9.15 Should these proposals be adopted, the protection of information privacy in South Africa will be brought into line with international requirements and developments.