

Chapter 18

Particular groups

18.1 For the most part, the Privacy Act applies in the same way to everyone. This chapter considers whether there are any ways in which special provision needs to be made within the framework of the Privacy Act for particular groups in society. We consider in particular cultural groups (especially Māori), children and young people, and adults with reduced capacity.

CULTURE AND PRIVACY

18.2 In our study paper for stage 1 of this Review, we gave some consideration to the fact that, while a desire for some form of privacy appears to be universal among human beings, the ways in which privacy is understood may differ between cultures.¹⁵⁷² We also looked more specifically at Māori understandings of privacy, and explored in a preliminary way some issues relating to Māori and privacy.¹⁵⁷³ We noted, among other things, that opinion surveys indicate a degree of divergence between Māori and non-Māori on some privacy issues.¹⁵⁷⁴

18.3 There are legislative precedents for making special provision for information of particular concern to Māori. The Local Government Official Information and Meetings Act 1987 provides that certain types of information requested under the Act may be withheld if necessary “to avoid serious offence to tikanga Māori, or to avoid the disclosure of the location of waahi tapu”.¹⁵⁷⁵ The Health (Cervical Screening (Kaitiaki)) Regulations 1995 provide for the establishment of a National Kaitiaki Group to consider, and approve when appropriate, applications for approval to disclose, use or publish information on the National Cervical Screening Register that identifies women as being Māori. The Regulations specify the matters that the Group shall have regard to in considering such applications.¹⁵⁷⁶

¹⁵⁷² New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 102–104.

¹⁵⁷³ New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 104–108.

¹⁵⁷⁴ New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 117–118.

¹⁵⁷⁵ Local Government Official Information and Meetings Act 1987, s 7(2)(ba).

¹⁵⁷⁶ Health (Cervical Screening (Kaitiaki)) Regulations 1995, reg 5(3). Although not established under specific regulations, there is also a Pacific Women’s Data Advisory Group which considers applications for the release of Pacific women’s aggregated data from the National Cervical Screening Register. See “National Kaitiaki Group” and “Pacific Women’s Data Advisory Group” on the website of the National Screening Unit, www.nsu.govt.nz (accessed 3 December 2009).

- 18.4 At this stage, we do not propose that the Privacy Act should be amended to make provision for information that is specific to Māori or any other ethnic, religious or cultural group. We do, however, think it is worth exploring whether there are any ways in which either the provisions or the application of the Privacy Act can be made more relevant to a culturally-diverse society.

Māori

- 18.5 In June 2008, the Law Commission held a meeting with a group of Māori from a range of backgrounds to discuss privacy issues that affect Māori. The key issues from that discussion are summarised below. Issues for Māori relating to privacy and the media are discussed in our report for stage 3 of this Review.¹⁵⁷⁷

Collective and individual privacy

- 18.6 The Commission was told that Western concepts of privacy focus on the individual, whereas Māori are more likely to focus on collective interests. For example, in the health field information is generally managed on an individual basis, but some Māori may feel that information about a person's health belongs not only to the individual but also to that person's whānau, hapū or iwi. This can lead to tensions between the individual and the collective, but also to conflict within groups when people have different ideas about the use of information. On the other hand, it was stressed to the Commission that individual privacy is connected to the collective, so that individual and collective privacy interests may be mutually reinforcing. We were told that privacy is based on respect for individual human dignity, which is also a fundamental value in Māori culture. An idea of privacy based on respect for dignity and autonomy should also be able to accommodate collective rights and interests.

Trust and uses of information

- 18.7 Participants in the meeting agreed that trust was a key issue for Māori: people want to know who will have their information and how it will be used, and are concerned about the potential for abuse. If Māori are confident that their information will be used in a way that is empowering or mana-enhancing, they will be more willing to agree to the collection and use of that information. If they believe that information will be used in a way that is derogatory to Māori and which diminishes mana, they will be reluctant to share information. Historically, Māori have often been reluctant to provide information to the state. This reluctance can still be seen today in lower rates of participation by Māori in the census, and unwillingness on the part of some Māori to register on the electoral roll.

Iwi and hapū registers

- 18.8 Privacy principle 2 requires that personal information be collected directly from the individual concerned, unless one of the exceptions applies. It was explained to us that this can create a dilemma for iwi and hapū organisations that want to register people as members. It can be difficult to contact people to ask them to register when they are dispersed throughout the country and many are living

¹⁵⁷⁷ New Zealand Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLC R113, Wellington, 2010) 81–82.

overseas. It would be easier if family groups could act on behalf of their members and register them, but this would be inconsistent with principle 2, and it seems unlikely that any of the exceptions would apply. The need to get individual consent to register people can be contrasted with Māori Land Court records of entitlement to rights to Māori land, on which people can be included without express consent. The point was made that iwi and hapū are not like clubs that people have to subscribe to; people are members by virtue of descent. On the other hand, some people may not want to be registered with any tribal authority, or may not want to be registered with a particular authority because they affiliate more strongly to another iwi. It was noted that views will differ among Māori on this issue.

- 18.9 Some participants in the meeting argued strongly that this was an issue of informed consent. Māori have called on government and the private sector to operate on the basis of prior informed consent in their dealings with Māori, and Māori should operate on the same basis in their dealings with each other. For some participants, this meant that consent should be obtained before people were registered with an iwi or hapū authority. One option that was mentioned would be to register people provisionally when their consent had not been obtained, with the tribal authority then having an obligation to notify such people and seek their consent to being on the register.
- 18.10 Another issue that was raised with us concerned governance of personal information within tribal authorities. We were told that some iwi authorities keep information about registered members at the centre, without making allowance for hapū that form part of the iwi organisation to use that information for hapū purposes (such as sending out newsletters to hapū members only).¹⁵⁷⁸ It was suggested that the constitutions of tribal authorities should state clearly the purposes for which personal information about registered tribal members can be used; who has access to the information; and how the information is to be shared between the central authority and its constituent parts.
- 18.11 The Electoral Act 1993 includes specific provisions in relation to electoral information about iwi affiliation. The Act empowers the Chief Registrar of Electors to seek the consent of electors of Māori descent to the supply of their iwi affiliations and certain other personal information to a designated body.¹⁵⁷⁹ The Ministers of Justice and Māori Affairs must be satisfied that a body's information management policies and practices comply with the Privacy Act before they can designate that body as being suitable to receive information about iwi affiliations.¹⁵⁸⁰ Tūhono is the body authorised to receive this information, which it then makes available to iwi organisations representing the iwi to whom Māori electors affiliate.¹⁵⁸¹ Just over 100,000 people (around one quarter of registered electors of Māori descent) are registered with Tūhono,

1578 In New Zealand Law Commission *Waka Umanga: A Proposed New Law for Māori Governance Entities* (NZLC R92, Wellington, 2006) 46, the Law Commission commented that: "The modern tendency is for membership registers to be maintained by the central organs of a large tribal entity. This plainly departs from tradition for in the past there was no central organ, only numerous hapū." See also 49–51 of the same Report.

1579 Electoral Act 1993, ss 111B–111F.

1580 Electoral Act 1993, s 111E(3)(c).

1581 www.tuhono.net.

and Tūhono receives regular updates of information about these people from the Electoral Enrolment Centre. The iwi to whom each elector affiliates can access the person's information online, or receive automatic updates, in order to ensure that the information on their databases is up to date.

Māori and online information

- 18.12 Māori individuals, whānau and organisations are increasingly turning to the internet as a way of keeping in touch and sharing information.¹⁵⁸² For example, Ngāi Tahu is “moving toward a whānau-controlled social networking space”, but is doing so cautiously in order to ensure that privacy and intellectual property are protected.¹⁵⁸³ One issue about the move into the online environment concerns what controls, if any, there should be on the placing of whakapapa information online.¹⁵⁸⁴ Participants in our June 2008 meeting felt that this is not a matter that should be dealt with by legislation, and that Māori themselves need to address it through education about the need to respect and protect whakapapa information.

Addressing Māori privacy concerns

- 18.13 We have indicated in chapter 3 that we do not believe that the Privacy Act can easily accommodate the idea of collective or group rights to privacy. To the extent that Māori may see some types of information as belonging to groups rather than individuals, this belief may be better pursued through other areas of the law, such as the developing field of indigenous intellectual property rights. Special mechanisms may also be needed for certain types of sensitive information relating to Māori, even where this information has been anonymised or aggregated so that it does not identify individuals. The creation of the National Kaitiaki Group to oversee the use of information about Māori women from the National Cervical Screening Register is an example of such a mechanism. This would seem to be a matter to be dealt with in specific statutes, rather than within the generic framework of the Privacy Act. There is, however, one mechanism available in the Privacy Act which we believe could be used to recognise privacy interests that go beyond the individual: the ability to bring representative complaints on behalf of a group of individuals who have been affected in similar ways by a privacy breach. We believe there is potential for representative complaints to be brought by whānau, hapū or iwi if an agency were to breach privacy principles in ways that affected the members of Māori collectivities. We ask in chapter 8 whether the Privacy Act should make better provision for representative complaints.
- 18.14 Our current view is that other privacy issues of particular concern to Māori are probably not matters that can be resolved through amendments to the Act. It was suggested by participants in the meeting we held in June 2008 that the Privacy Commissioner could produce guidance material on the application of the Privacy Act for Māori tribal and other authorities, and could perhaps review provisions about information-handling in the constitutions of Māori authorities. We think there could be a role for the Privacy Commissioner in providing

1582 See Lee Suckling “Cyber Connections” (Makariri/Winter 2009) *Te Karaka* (Ngāi Tahu magazine) 21–23.

1583 Lee Suckling “Cyber Connections” (Makariri/Winter 2009) *Te Karaka* (Ngāi Tahu magazine) 23, quoting Te Rūnanga o Ngāi Tahu Communications Manager Phil Tumataroa.

1584 See discussion in New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 106–107.

information and guidance tailored to Māori organisations. We would be interested to receive views on this suggestion, and on whether there are any other ways in which the Privacy Commissioner could better meet the needs of Māori.

- 18.15 Agencies that handle personal information about Māori can also help to accommodate Māori needs and preferences. Using the flexibility inherent in the Privacy Act, such agencies can modify their handling of Māori personal information in response to Māori concerns.
- 18.16 While we have no specific proposals for reform in relation to Māori and the Privacy Act, we would welcome suggestions for reforms to either the provisions or the implementation of the Privacy Act to address the issues discussed above, or other issues of particular concern to Māori.

Q185 Are there any ways in which the Privacy Act or the Office of the Privacy Commissioner could better provide for the needs of Māori?

Other cultural groups

- 18.17 With the exception of Māori, the Law Commission has not looked in any detail at the privacy attitudes and concerns of people from non-European cultural traditions, although we are aware of some research on this issue.¹⁵⁸⁵ In the Australian state of Victoria, the Office of the Privacy Commissioner commissioned a social research report on privacy issues among indigenous communities and communities from a non-English-speaking background,¹⁵⁸⁶ and similar research here could be helpful. It would also seem desirable to provide information about people's rights under the Privacy Act in languages other than English.¹⁵⁸⁷ The Law Commission would welcome other suggestions for action that could be taken to ensure that the Privacy Act meets the needs of people from all cultural and religious backgrounds in New Zealand.

Q186 Are there any ways in which the needs and concerns of particular cultural or religious groups in relation to privacy could be better met?

CHILDREN AND YOUNG PEOPLE

- 18.18 Children and young people raise special privacy issues. Young children, in particular, are comparatively defenceless and less able to give free consent than adults.¹⁵⁸⁸ Young people may not have the same understanding of privacy issues or of the consequences of their actions as adults. Consequently, children and young people

1585 See in particular Rowena Cullen "Culture, Identity, and Information Privacy in the Context of Digital Government" (paper presented at the Managing Identity in New Zealand conference, Wellington, 29–30 April 2008); published as "Culture, Identity and Information Privacy in the Age of Digital Government" (2009) 33 Online Information Review 405.

1586 Office of the Victorian Privacy Commissioner *Privacy in Diverse Victoria: Attitudes Towards Information Privacy Among Selected Non-English Speaking Background and Indigenous Groups in Victoria* (Melbourne, 2002).

1587 In Australia, the Federal and Victorian Offices of the Privacy Commissioner provide information sheets in non-English languages, as does the Broadcasting Standards Authority in New Zealand.

1588 New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 203.

can be more vulnerable to invasions of their privacy and may need special protection. At the same time, however, today's young people are sometimes thought to care less about their privacy than previous generations.

- 18.19 The subject of children and young people's privacy, particularly in the online environment, is one that is increasingly receiving attention internationally. There is growing recognition of young people's vulnerability, and a feeling that special protections may be required.¹⁵⁸⁹
- 18.20 Health information about children and young people raises some complex issues, which we do not deal with here. The Law Commission's approach to health information is discussed in chapter 19.

Young people's attitudes to privacy¹⁵⁹⁰

- 18.21 Attitudes to privacy vary between generations. It has been suggested that today's young people, who have grown up in the world of the internet and mobile phones, may be developing a very different attitude to privacy to that of older generations. Young people's experience of constant connectivity means that their ideas about limiting access to themselves and their information may be different from those of previous generations. Many young people freely make personal information publicly available through blogs and online social networks.
- 18.22 However, the reality may well be more complex. Studies carried out overseas have found that young people exhibit a range of attitudes to privacy. The majority do exercise some caution in relation to disclosing their personal information online. The privacy issues that concern young people may well be different from the issues that concern older generations: for example, the Australian Law Reform Commission (ALRC) found that young people tended to be less concerned about government accessing their personal information than older generations.¹⁵⁹¹ Nonetheless, young people place high importance on being able to exercise control over their own information. Furthermore, some young people's apparent willingness to disclose personal information may stem from a lack of understanding of the potential privacy risks involved, or from young people's tendency to take risks, or from a desire to fit in with their peer group,¹⁵⁹² rather than necessarily reflecting a lack of concern for their privacy.

1589 See, eg, Resolution on Children's Online Privacy (30th International Conference of Data Protection and Privacy Commissioners, Strasbourg, 15–17 October 2008); Article 29 Data Protection Working Party "Opinion 2/2009 on the protection of children's personal data" (11 February 2009) 398/09/EN WP160.

1590 We have explored this topic more fully in New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 108–113. See also Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) ch 67; John Palfrey and Urs Gasser *Born Digital: Understanding the First Generation of Digital Natives* (Basic Books, New York, 2008) chs 1–4.

1591 Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) para 67.46.

1592 See, for example, Danielle Wong "Popularity Outweighs Facebook Privacy Fears" (25 August 2009) *The Star* Canada www.thestar.com (accessed 20 January 2010).

Young people and the Privacy Act

- 18.23 The Privacy Act does not generally make specific provision for information relating to young people at present. The Act applies in the same way to everyone, regardless of age. The only specific mention of age is in section 29(1)(d), which provides that an agency may refuse to disclose personal information requested under principle 6 if, in the case of an individual under the age of 16, the disclosure of that information would be contrary to that individual's interests.
- 18.24 The Health Act 1956 and the Health Information Privacy Code 1994 (HIPC), which modifies the privacy principles for the health sector, also make some provision for young people. Section 22F(1) of the Health Act provides that:

Every person who holds health information of any kind shall, at the request of the individual about whom the information is held, or a representative of that individual, or any other person that is providing, or is to provide, services to that individual, disclose that information to that individual or, as the case requires, to that representative or to that other person.

Rule 11(4) of the Code provides:

Where, under section 22F(1) of the Health Act 1956, the individual concerned or a representative of that individual requests the disclosure of health information to that individual or representative, a health agency—

- (a) must treat any request by that individual as if it were a health information privacy request made under rule 6; and
- (b) may refuse to disclose information to the representative if—
 - (i) the disclosure of the information would be contrary to the individual's interests; or
 - (ii) the agency has reasonable grounds for believing that the individual does not or would not wish the information to be disclosed; or
 - (iii) there would be good grounds for withholding the information under Part 4 of the Act if the request had been made by the individual concerned.

The Code defines a representative as:

- (a) where that individual is dead, that individual's personal representative; or
- (b) where the individual is under the age of 16 years, that individual's parent or guardian; or
- (c) where the individual, not being an individual referred to in paragraphs (a) or (b), is unable to give his or her consent or authority, or exercise his or her rights, a person appearing to be lawfully acting on the individual's behalf or in his or her interests.

In other words, parents or guardians of children under 16 may access their children's health information, but health agencies may also legitimately withhold such information from parents or guardians in some cases.

- 18.25 There have sometimes been perceptions that the Privacy Act prevents parents from finding out information about their children. For example, there have been stories of the Act being used to withhold children's school reports from their parents, but in most cases there are no grounds for withholding such reports

under the Privacy Act or other legislation.¹⁵⁹³ While such perceptions are usually exaggerated or untrue, the Act does treat children and young people as individuals capable of exercising rights. As such, parents are not automatically entitled to access their children's personal information in all situations. We consider in the next section whether the Act should make provision for the age at which young people are presumed to have the capacity to give consent and exercise rights under the Act.

Issues for reform

Should the Act contain additional protections for young people?

- 18.26 Given the issues we have noted regarding the vulnerability of children and young people, it is worth asking whether the Act should contain additional safeguards for them. The South African Law Reform Commission has suggested that “children should ... first of all be protected against their own immaturity and, secondly, against malicious third parties.”¹⁵⁹⁴
- 18.27 We outline below some areas where additional protections might be considered, but welcome any submissions.
- 18.28 Non-legal actions could also be valuable in this area. Educating children and young people about privacy risks and how to avoid or mitigate them would go a long way to address some of the privacy concerns about children and young people. The Privacy Commissioner's education functions can usefully be exercised to this end, and indeed the Commissioner is already doing so. OPC has recently established a focus group of young people to assist with its work in this area. The organisation Netsafe is also carrying out valuable educational work about online privacy and safety issues for children and young people in New Zealand.¹⁵⁹⁵ The ALRC has recommended that the Office of the Federal Privacy Commissioner should develop and publish educational material about privacy issues aimed at children and young people, and also that education about privacy, particularly online, should be incorporated into school curricula.¹⁵⁹⁶

Online privacy

- 18.29 Privacy in the online environment is one area that has been identified where children and young people may need special protections. Particular risks for young people online include invasion of privacy, cyber bullying and sexual exploitation.¹⁵⁹⁷ Young people's seeming willingness to disclose information

1593 See Kathryn Dalziel *Privacy in Schools: A Guide to the Privacy Act for Principals, Teachers and Boards of Trustees* (Office of the Privacy Commissioner, Wellington, 2009) 30.

1594 South African Law Reform Commission *Privacy and Data Protection: Report* (SALRC Project 124, Pretoria, 2009) para 4.3.18.

1595 www.netsafe.org.nz.

1596 Australian Law Reform Commission *For Your Information: Australian Privacy Law And Practice* (ALRC R108, Sydney, 2008) recommendations 67-2, 67-3 and 67-4.

1597 Working Group of Canadian Privacy Commissioners and Child and Youth Advocates *There Ought to be a Law: Protecting Children's Online Privacy in the 21st Century* (2009) 8–12.

about themselves over the internet may mean that they put themselves at risks (for example, of identity crime) or disclose information that they later may wish to be private.

- 18.30 Commercialisation of children’s online space has also been raised as a concern. Many sites targeted at children collect personal information from children, for example through participation in online quizzes and games which record the user’s likes and dislikes. This information is then used for marketing purposes. It may not be apparent to children that their information will be used in this way. Furthermore, many of these sites blend commercial content and entertainment. Children typically cannot differentiate between online content and advertising as well as adults can, so are more susceptible to marketing through these sites.
- 18.31 There have been overseas law reform initiatives to address this issue. The most notable is the United States Children’s Online Privacy Protection Act of 1998.¹⁵⁹⁸ The law applies to operators of commercial websites directed at children that collect personal information from children under the age of 13. Website operators must obtain “verifiable” parental consent before collecting personal information from children under 13. In practice, this has meant that the operator must make reasonable efforts to provide parents with notice of its information collecting practices and ensure that they give consent on this basis. The Act has been criticised as being ineffective for a number of reasons, including difficulties in verifying parental consent, and the fact that many website privacy policies are difficult to understand and are not read by users.¹⁵⁹⁹

Direct marketing to children and young people

- 18.32 A related issue is direct marketing to young people. We discuss direct marketing in chapter 13. However, there are some concerns specific to young people.¹⁶⁰⁰ Children may be more susceptible to commercial influence, and less able to recognise some forms of advertising, than adults. Furthermore, the internet has enabled direct marketers to target children in an environment where they are often unsupervised. There have been suggestions that direct marketing to children and young people should be limited or banned outright. The Advertising Standards Authority has a Code for Advertising to Children, which draws attention to principle 3 of the Privacy Act and states that:¹⁶⁰¹

Extreme care should be taken in requesting or recording the names, addresses and other personal details of children to ensure that children’s privacy rights are fully protected and the information is not used in an inappropriate manner.

1598 91 USC § 6501–6506.

1599 Working Group of Canadian Privacy Commissioners and Child and Youth Advocates *There Ought to be a Law: Protecting Children’s Online Privacy in the 21st Century* (2009) 13.

1600 Anna Fielder, Will Gardner, Agnes Nairn and Jillian Pitt *Fair Game? Assessing Commercial Activity on Children’s Favourite Websites and Online Environments* (National Consumer Council, London, 2007); Working Group of Canadian Privacy Commissioners and Child and Youth Advocates *There Ought to be a Law: Protecting Children’s Online Privacy in the 21st Century* (2009) 7–9.

1601 Advertising Standards Authority *Code of Advertising to Children* (2006) Guideline 4(c) www.asa.co.nz/code_children.php.

- 18.33 The Law Commission does not at this stage propose any reforms in this area, but is interested in submitters' views on this subject.

Q187 Are any particular protections for young people required in relation to online privacy or direct marketing?

Q188 Are any other new, specific protections for young people needed in the Act?

Age of presumption of capacity

- 18.34 Issues may arise with children and young people because they are still developing physically and mentally. In practice, children often need to exercise their rights under the Act through a representative, usually a parent or guardian. However, the child's best interest can sometimes confer upon the child privacy rights which may override the wishes of parents or other representatives. As children mature they can be expected to become more involved in decisions relating to their personal information, and are increasingly able to exercise their own rights.¹⁶⁰²
- 18.35 Currently, decisions about whether a young person has sufficient understanding and maturity to be capable of exercising rights under the Act seem to be dealt with on a case-by-case basis. Exceptions to the privacy principles will often apply to allow parents to act on behalf of a child: for example, information may be collected from parents rather than directly from the child under one of the exceptions to principle 2.
- 18.36 There is a question about whether the Act should make specific provision regarding the age at which one can exercise rights, such as the right to consent to collection of personal information or to make an access request.
- 18.37 Such a provision would perhaps provide more clarity for agencies dealing with young people, such as schools and hospitals. However, there are some potential problems, such as verifying age. Often personal information is collected over the phone or internet, so it would be difficult for agencies to assess whether the person they are dealing with is of the required age. A specified age at which rights under the Act can be exercised also seems rather inflexible compared to the current position. It could deprive young people of the opportunity to take responsibility for their own personal information in situations where they are capable of doing so but are under the requisite age.
- 18.38 Another option would be to provide that an assessment of the child or young person's maturity should be carried out in order to determine whether they have capacity to exercise their own rights. This seems to be the position in fact now, but there may be thought to be advantages in specifying it clearly, even though implementation of it might often raise considerable practical difficulties.

¹⁶⁰² See Article 29 Data Protection Working Party "Opinion 2/2009 on the Protection of Children's Personal Data" (11 February 2009) 398/09/EN WP160 paras 4–7.

18.39 Internationally, most privacy legislation takes a similar approach to New Zealand's, treating all individuals the same, regardless of age. This is in line with obligations under the United Nations Convention on the Rights of the Child to respect children's right to privacy.¹⁶⁰³

18.40 The ALRC has recommended that the Australian Privacy Act be amended to provide that where it is reasonable and practicable to make an assessment about the capacity of an individual under the age of 18 to give consent, make a request or exercise a right of access under the Act, an assessment about the individual's capacity should be undertaken. Where an assessment of capacity is not reasonable or practicable, then an individual:

- (a) aged 15 or over is presumed to be capable of giving consent, making a request or exercising a right of access; and
- (b) under the age of 15 is presumed to be incapable of giving consent, making a request or exercising a right of access.¹⁶⁰⁴

At the time of writing, the Australian government had not yet responded to this recommendation.

Q189 Should the Act provide more specifically for when a child or young person should be treated as having capacity to exercise rights under the Act? If so, should there be a set age or a more individual test?

Q190 Do you have any other concerns about the privacy of children and young people?

ADULTS WITH REDUCED CAPACITY

18.41 For various reasons, some adults have a reduced capacity to act on their own behalf, and particularly to exercise the power to give or withhold consent to the collection, use or disclosure of their personal information. This includes individuals with various forms of intellectual disability and mental illness. The Privacy Act makes no specific provision for such people.

18.42 There is a presumption in common law that all adults have capacity until the contrary is proved. This presumption is also included in section 5 of the Protection of Personal and Property Rights Act 1988. Except as provided for under that Act, all persons subject to an order made under the Act are presumed to have the same legal capacity as any other person.¹⁶⁰⁵ The Protection of Personal and Property Rights Act also provides that, in relation to applications made under the Act, courts are to make the least-restrictive intervention possible in the lives of those in respect of whom applications are made, and are to encourage those persons to exercise such capacity as they have to the greatest extent possible.¹⁶⁰⁶

¹⁶⁰³ Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, art 16.

¹⁶⁰⁴ Australian Law Reform Commission *For Your Information: Australian Privacy Law And Practice* (ALRC R108, Sydney, 2008) recommendation 68-1.

¹⁶⁰⁵ Protection of Personal and Property Rights Act 1988, s 4.

¹⁶⁰⁶ Protection of Personal and Property Rights Act 1988, s 8.

- 18.43 New Zealand law provides various forms of recognition of the need in some circumstances for another person to make decisions on behalf of a person with a temporary or permanent incapacity. These include welfare guardianship, enduring powers of attorney, and advance directives.
- 18.44 The key questions for consideration are:
- Does the Privacy Act need to make express provision for people who are acting under legal authority for other individuals who are affected by some form of incapacity?
 - Does the Privacy Act need to make any provision for adults with reduced capacity, where such adults do not have a legally-recognised representative?
- 18.45 The ALRC considered issues relating to adults with a temporary or permanent incapacity, and came to the following conclusions in its final report:¹⁶⁰⁷
- A test for assessment of capacity should not be set out in the Privacy Act 1988 (Cth), but should be dealt with by guidance from the Office of the Privacy Commissioner.
 - Substitute decision-makers are already empowered by relevant laws to act on behalf of an individual, and it is not necessary for the Privacy Act to provide for substitute decision-makers authorised by law.
 - The Privacy Act should not recognise informal representatives (such as family members) who are not substitute decision-makers authorised by law and who are not acting with the consent of the individual concerned. Such recognition would constitute an unacceptable risk to privacy.
- 18.46 It is important to note that the New Zealand Privacy Act does not have a positive requirement of consent to the collection, use or disclosure of personal information. Rather, consent is one of a number of exceptions to the privacy principles. Thus, it is not necessarily the case that the consent of a person with reduced capacity is required in order to collect, use or disclose that person's information – it may be possible to rely on one of the other exceptions. Nonetheless, there will be situations in which none of the other exceptions apply, and the question of consent is central to the handling of an individual's information. The 1996 Mason Inquiry into mental health services referred to what it called the “patient veto” on disclosure of personal information where “a patient is clearly unwell and has lost the insight to act in his or her best interests”. The inquiry's report suggested that:¹⁶⁰⁸

There may need to be a specially designated person or office holder who could adjudicate or decide [in circumstances where a mentally unwell patient gives express instructions not to disclose information] as to whether or not there should be disclosure and if so to what extent. Another possibility may be a provision that disclosure of particular information to a particular class of persons would not constitute an interference with privacy under the Privacy Act 1993.

¹⁶⁰⁷ Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) 2344–2361.

¹⁶⁰⁸ Ken Mason, June Johnston and Jim Crowe *Inquiry under Section 47 of the Health and Disability Services Act 1993 in Respect of Certain Mental Health Services: Report of the Ministerial Inquiry to the Minister of Health Hon Jenny Shipley* (1996) 53.

18.47 As we have already noted in relation to children and young people, the HIPC includes provisions relating to disclosure of health information to a person's representative. "Representative" as defined in the Code includes "a person appearing to be lawfully acting" on behalf of, or in the interests of, an individual who is unable to give his or her consent or authority, or to exercise his or her rights. Rule 11(1) of the HIPC allows for the disclosure of an individual's health information when such disclosure is to, or is authorised by, the individual's representative, and where the individual is unable to exercise his or her rights or to give his or her authority.¹⁶⁰⁹ Section 22F(1) of the Health Act 1956 and HIPC rule 11(4), quoted in the section on children and young people above, also allow for disclosure of health information to a person's representative, although at the same time they provide for such information to be withheld on certain grounds.

18.48 In addition, HIPC rule 11(2)(b) allows the disclosure of an individual's health information to a person nominated by the individual, to the individual's principal caregiver, or to a near relative of the individual if it is not desirable or not practical to obtain the individual's authorisation and the disclosure is not contrary to the expressed request of the individual or his or her representative. The Privacy Commissioner's Commentary on this sub-rule states that:¹⁶¹⁰

Difficulties may arise with patients who move in and out of psychiatric institutions and the care of a family member or caregiver. Often at the time of re-admission such patients may be hostile to their caregivers and veto the giving of any information to them. There is no easy solution to this issue but the rule does require respect for clear instructions by the patient.

18.49 In recognition of the fact that mental health information raises some particularly complex issues, OPC and the Mental Health Commissioner have developed guidance material for health practitioners in relation to such information.¹⁶¹¹ This guidance includes discussion of dealing with representatives and families.

Q191 Should the Privacy Act include any special provisions for adults with reduced capacity?

OTHER GROUPS 18.50 There may be other groups within the wider society that have particular privacy needs and concerns: for example, people with disabilities. The Law Commission would welcome submissions identifying such needs and concerns, and suggesting ways of addressing them.

Q192 Are there any other groups that have particular needs in relation to the Privacy Act? If so, how should these be provided for?

1609 Health Information Privacy Code 1994, r 11(1)(a)(ii) and (b)(ii).

1610 Privacy Commissioner *Health Information Privacy Code 1994 Incorporating Amendments and Including Revised Commentary* (Office of the Privacy Commissioner, Wellington, 2008) 63.

1611 The Privacy Commissioner has recently sought public comment on a revised version of this guidance: Mental Health Commission and Office of the Privacy Commissioner *Guidance Material for Health Practitioners on Mental Health Information* (2009).