

# We don't spam, do we?

The proposed anti-spam legislation isn't just about dodgy spammers pushing pills and prize draws. The new law will affect most public and private sector organisations in their normal operations. It goes much wider than the carefully misspelt advertisement in your in-box.

The Select Committee's report on the Unsolicited Electronic Messages Bill morphs the legislation to force more change and risk for organisations.

We'll focus on the changes (assuming Parliament adopts) and what organisations need to know.

While it looks likely that the Act won't bite until mid-2007, organisations can take action now to ease the transition to the new regime.

## Why does this affect us?

With limited exceptions (eg, for some public sector messages), the new law will impact email and text messages sent by organisations that promote goods and services. Messages that are captured by the proposed legislation cover wide ground, ranging from direct marketing campaigns to one-off emails. Pretty well all organisations are caught one way or another. Breach can lead to penalties under the Act and adverse publicity. Many current practices have to change.

## Three questions for all organisations

Commercial electronic messages can't be

sent without the consent of the recipient. Organisations should ask themselves three questions:

- Is the message commercial? If so ...
- Have we got consent? (This can be express, inferred or deemed.)
- Have we included an unsubscribe facility and accurate sender information in the message?

## Commercial messages

Commercial electronic messages are ones that market or promote goods, services, land, investment and business opportunities. This is broad, but there are some exclusions (eg supplying quotes, confirming transactions, information about an account).

The legislation is less of an issue for government because messages that provide the recipient with 'information about goods or services offered or supplied by a government body' are not commercial and so are not caught by the legislation. Government bodies include ministries, departments and crown entities, but not local authorities and related organisations.

## Select Committee changes

We think the following changes by the Select Committee have the most impact:

- The 'primary purpose' qualifier has been deleted. This means messages with any commercial element – no matter how small – will be caught.

- 'Promotional messages' have gone.
- Complaints are now sent directly to DIA, rather than via the ISPs.
- Use of the unsubscribe facility must be at no cost. This may be a headache for text-marketing campaigns.
- There's a new 5-working-day deadline to comply with unsubscribe requests.
- The transition period has been increased from 4 months to 6.

## Easing transition

It's expected that the Bill will be passed shortly. Because of the transition period, compliance is unlikely to be required till around June 2007, but there are things that can be done now to ease transition.

Making existing databases usable from after the transition will be a critical issue. There's huge value in these databases, many of which have been built up over a number of years. To start afresh would be a nightmare for a marketing department.

A step in the right direction is to provide unsubscribe facilities in your messages now. If a recipient hasn't taken advantage of them, this strengthens an inference of consent (and therefore makes it more likely that databases can continue to be used beyond mid-2007). However, caution is needed in this area as unsubscribe facilities are not the silver bullet for achieving consent, although they may help.

Bear in mind also that the requirements



of the Privacy Act cut across this whole area.

Start thinking about how you can get consent from new customers and prospects. Although, be wary of burying the express consent provision in the small print.

The proposed legislation means we all need to think twice about whether we're in the spam can as the pill-pusher with the same server offshore.

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