

Privacy Commissioner's Submission to the Ministry of Health on the Drug and Substance Checking Legislation Bill (No 2) 2021

Executive summary

1. I am pleased to provide a submission on the Drug and Substance Checking Legislation Bill (No 2) 2021 (the Bill).
2. The Bill amends the Misuse of Drugs Act 1975 (the Principal Act), the Psychoactive Substances Act 2013 and the Medicines Act 1981 to allow drug and substance checking service providers (service providers) to operate with legal certainty, and to thereby minimise drug and substance harm in New Zealand.
3. The Privacy Act 2020 is New Zealand's main privacy law. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
4. Overall, the Bill appears to have been drafted with a view to protecting the individual privacy of service users. However, I have a number of concerns about the Bill in its current form, as detailed below:
 - The Bill does not provide safeguards against the risk of NZ Police officers monitoring, and potentially photographing or obtaining video footage of, individuals entering and/or leaving drug and substance checking facilities.
 - While service providers will be prohibited from collecting service users' personal information, they will still be permitted to collect demographic information, which carries a risk of service users being re-identified.
 - An explicit connection between the failure to comply with the legislative prohibition on collecting, using, maintaining or disclosing service users' personal information and the penalty associated with breach of a service user's licence conditions is absent from the Bill.
 - While the Bill proposes to render inadmissible in criminal proceedings against a service user the result of any test carried out by a service provider, this provision is not sufficiently broad.
5. I support the policy intent of the Bill to minimise drug and substance harm by allowing service providers to operate with legal certainty, but consider that further legislative amendments are required to adequately protect the privacy and associated interests of drug and substance checking service users.

The Bill

6. Currently, the Drug and Substance Checking Legislation Act 2020 protects service providers from being charged with possession or supply if they handle controlled drugs. However, these legislative protections are due to be repealed on 7 December 2021.
7. The current Bill proposes to introduce a permanent regulatory scheme to ensure service providers can continue to operate with legal certainty. The scheme will require service providers to obtain a licence to operate from the Director-General of Health. The licencing scheme will impose clear obligations on service providers and will establish oversight mechanisms.

Provisions with privacy implications

8. The Bill appears to have been drafted with a view to protecting privacy, as it will impose a blanket prohibition (through section 35DG of the Principal Act) on service providers collecting, maintaining, using or disclosing any personal information related to individual service users, thereby encouraging individuals to use drug and substance checking services.
9. Service providers must obtain a licence from the Director-General of Health in order to operate, and it will be an offence (pursuant to section 35DE of the Principal Act) for a service provider to breach a condition of their licence, attracting a penalty of up to \$5,000. The Bill also empowers the Governor-General (pursuant to section 37(1)(aa) of the Principal Act) to make regulations related to the issuing of licences to service providers.
10. The Bill does not prohibit the collection of demographic information from service users, and the Ministry of Health (MoH) is likely interested in obtaining such demographic data from service providers in order to direct harm prevention interventions to the types of people accessing drug and substance checking services.

Concerns and recommendations about the Bill and its operationalisation

Service users being observed, photographed or recorded

11. Drug and substance checking services typically operate at festivals and similar events where police presence may also be required. For this reason, as the NZ Drug Foundation notes, it is essential for service providers to '[b]uild

relationships with local Police and emergency services'.¹ Ideally, NZ Police and service providers will work together so that drug and substance checking facilities are not set up in areas where a police presence is required for security reasons, and police officers will work cooperatively with service providers to avoid drug and substance checking areas wherever possible.

12. Even where cooperation exists between service providers and NZ Police, there is potential for police officers to observe individuals accessing drug and substance checking facilities at concerts or festivals. Police officers may end up being stationed, for operational purposes or otherwise, in a position that allows them to view and potentially photograph individuals entering and/or leaving checking facilities. Further, in the event that body-worn cameras are rolled out for mandatory use by NZ Police, officers may potentially record video footage of such individuals.
13. Where an individual in their personal capacity takes a photograph or records video footage of people in public, it is generally not an issue under the Privacy Act 2020. However, where representatives of an agency, such as NZ Police, take photographs or record footage in public, obligations around the collection of personal information must be considered. Pursuant to Information Privacy Principle 1 (IPP 1), NZ Police could legitimately take photographs or record video footage of individuals entering or leaving drug and substance checking facilities if doing so was necessary to fulfil a lawful purpose connected with one or more of their functions or activities.² Without an express provision in the Bill prohibiting police taking photographs or recording footage in this context (with limited exceptions for public safety) it may be relatively simple for police officers to satisfy IPP 1. If this were to become common practice, it would likely undermine the intention of the Bill.
14. I recommend that the MoH consult with NZ Police regarding operationalisation of the Bill, particularly in relation to police officers and service providers working cooperatively to ensure that officers are not stationed near drug and substance checking facilities and that service providers do not set up checking facilities in areas where police officers need to be located for operational reasons.
15. I further recommend the inclusion of an express prohibition on police taking photographs of individuals entering or leaving checking facilities, with limited exceptions such as where an assault or other violent crime is underway.

¹ <https://www.drugfoundation.org.nz/info/drugs-in-bars/festivals/>

² Privacy Act 2020, section 22 – Information Privacy Principle 1(a).

Risk of re-identification

16. Government agencies, like the MoH, have an interest in collecting demographic data from service users to help identify where intervention is most needed, to tailor interventions to service users and to evaluate the effectiveness of current policies, procedures and interventions. There is strong justification for collecting and relying on such datasets to inform evidence-based approaches and use tax-payer funds more efficiently and effectively.
17. However, wherever data is collected, there is a risk that individuals may be re-identified. There have been a number of high profile instances overseas where individuals in anonymised datasets have been re-identified, leading to a range of privacy harms and the de-railing of public and private sector initiatives.³ The risk of re-identification is heightened where an individual service user is part of a minority group, as such individuals may have unique gender or racial characteristics that make them easier to identify from larger groups of persons.
18. The Bill proposes to prohibit the collection of personal information about service users by service providers. However, as the Bill does not propose to prohibit the collection of demographic data about service users, appropriate measures need to be in place to reduce the risk of individual service users being re-identified where demographic data is collected.
19. In the present case, privacy risks associated the collection, transmission and storage of demographic data are heightened by the fact that this information will not be collected by a single agency but by a range of individual service providers with varying degrees of data anonymisation expertise.
20. To mitigate the risk of re-identification, I recommend that the collection, storage and transfer of any demographic data collected by service providers about service users be covered by the proposed licencing conditions and that there be appropriate monitoring and enforcement of compliance with these conditions.

³ *Report to the Minister of Justice under Section 26 of the Privacy Act* - six examples were set out in an appendix to the report, outlining high profile reidentification events in the United States, the United Kingdom and Australia between 1997 and 2016.

Prohibition on collecting, maintaining, using or disclosing personal information

21. To help achieve the Bill's purpose of minimising drug and substance harm in New Zealand, a new section 35DG in the Principal Act will encourage individuals to engage with service providers by prohibiting the collection, maintenance, use and disclosure of any personal information related to service users. Further, section 35DE of the Principal Act will make it an offence for a service provider to breach any term or condition of their licence, with an associated penalty of up to \$5,000.
22. To ensure that the offence in section 35DE will apply in situations where a service provider breaches section 35DG of the Principal Act, I recommend that the prohibition on service providers collecting, maintaining, using or disclosing personal information in section 35DG be a licence condition, breach of which may attract the associated penalty.

Inadmissibility of evidence in criminal proceedings against a service user

23. While the Bill proposes to render inadmissible in criminal proceedings against a service user the result of any test carried out by a service provider, this provision is not sufficiently broad. In its current form, the Bill would allow evidence to be admitted which shows that a defendant used a drug and substance checking service on one or more occasions.
24. In recent months community groups have raised concerns about possible racial profiling by NZ Police officers taking photographs of Pasifika and Māori young people in the street, apparently without sufficient cause. Regardless of whether there is substance to these claims, it is possible that Pasifika and Māori young people would avoid using drug and substance checking services if it is possible, not only that police officers might photograph them entering and/or leaving drug and substance checking facilities, but also that such photographic evidence might be admissible in criminal proceedings against them.
25. To support the legislative intent of the Bill, I recommend that the proposed amendment to the Principal Act through section 35DI be broadened to render inadmissible in criminal proceedings evidence that a defendant accessed drug and substance checking services.

Addressing my concerns

26. As outlined above, I have several recommendations to reduce risks to service users' privacy associated with the proposed legislation. These include:

- The MoH consults with NZ Police regarding operationalisation of the Bill, to reduce the likelihood of officers being stationed near drug and substance checking facilities.
- Including in the Bill an express prohibition on police taking photographs of individuals entering or leaving checking facilities, with limited exceptions such as where an assault or other violent crime is underway.
- Ensuring that the collection, storage and transfer of any demographic data collected by service providers about service users is covered by the proposed licencing conditions and that there be appropriate monitoring and enforcement of compliance with these conditions.
- Ensuring that the prohibition on service providers collecting, maintaining, using or disclosing personal information in section 35DG of the Principal Act be a licence condition, breach of which may attract the associated penalty.
- Broadening the proposed section 35DI to render inadmissible in criminal proceedings evidence that a defendant accessed drug and substance checking services.

Conclusions

27. While I support the policy intent of the Bill, I consider that implementation of the above recommendations is required to adequately protect the privacy and associated interests of drug and substance checking service users and service providers.
28. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



John Edwards
Privacy Commissioner

23 June 2021