

Privacy Commissioner's submission to the Finance and Expenditure Committee on the Water Services Entities Bill (136-1)

1. I am pleased to provide a submission on the Water Services Entities Bill (the Bill).
2. The Privacy Act 2020 is New Zealand's main privacy statute. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
3. I have only one significant concern to raise about the Bill, which is that the status of the new water services entities under the Privacy Act appears to be uncertain. I am broadly comfortable with the Bill's other provisions as they relate to personal information.

Application of the Privacy Act to water services entities

4. As the Bill is currently drafted, the status of the new water services entities under the Privacy Act is unclear. Specifically, it is unclear whether they are 'public sector agencies' or 'private sector agencies' for the purposes of the Privacy Act.
5. The Privacy Act applies to 'New Zealand agencies' (Privacy Act, section 4(1)(a)), unless they are excluded from the Act's coverage by section 8(b) of the Act. Under section 8(a) of the Privacy Act, New Zealand agencies can be individuals, public sector agencies, private sector agencies, or courts or tribunals. As the new water services entities would clearly not be individuals, courts or tribunals, they must be either public or private sector agencies for the purposes of the Privacy Act.
6. Section 7(1) of the Privacy Act defines '**private sector agency**' as 'an agency that is not a public sector agency'; and '**public sector agency**' as 'an agency that is a Minister, a Parliamentary Under-Secretary, a department, an organisation, or a local authority', or an unincorporated body (such as a board or committee) associated with such an agency.
7. To be public sector agencies under the Privacy Act, therefore, the water services entities would need to fall within the Privacy Act's definitions of 'department', 'organisation' or 'local authority', or to be specifically listed in the definition of 'public sector agency'.
8. In the Bill as drafted, the water services entities would not be public sector agencies for the purposes of the Privacy Act because they would not be entities listed in:
 - Parts 1 or 2 of Schedule 1 of the Ombudsmen Act 1975
 - Schedule 1 of the Official Information Act 1982
 - Schedule 1 of the Local Government Official Information and Meetings Act 1987 (LGOIMA).¹
9. The Bill provides that Parts 1 to 6 of the LGOIMA apply to the water services entities as *if* they were local authorities (cl 61), but it does not amend the LGOIMA to include the entities in Schedule 1 of that Act. The application of the LGOIMA to the water services entities indicates that they are considered to be exercising public functions.

¹ See the definitions of 'department', 'organisation' and 'local authority' in section 7(1) of the Privacy Act 2020.

10. The Privacy Act applies in the same way to public and private sector agencies in most, but not all respects. For example:
 - the right of individuals to access their personal information is a legal right enforceable in the courts only in respect of information held by public sector agencies (Privacy Act, section 31(2))
 - the ability to impose a charge for providing individuals with access to or correction of their personal information differs between public and private sector agencies (Privacy Act, section 66).
11. It is therefore important to clarify whether water services entities will be public or private sector agencies for the purposes of the Privacy Act. If the entities are not brought within the definition of public sector agency, they will by default be private sector agencies.
12. It appears to me that the water services entities should be public sector agencies for the purposes of the Privacy Act. While they are a new type of statutory entity, they are more akin to other public sector agencies than to private sector agencies. They will be publicly owned and deliver public services. However, there may be policy arguments I am unaware of for treating them as private sector agencies. I recommend that the Committee seek advice from officials on this point.
13. If the policy intent is that the water services entities should be public sector agencies for the purposes of the Privacy Act, the Bill should be amended to make this status clear. This could be done in a number of ways, including by amending the definitions of 'local authority' or 'organisation' in the Privacy Act to refer to water services entities. My Office is available to provide advice on options for such an amendment.
14. The same issue appears to apply to the regional representative groups established by the Bill.

Powers to obtain information under the Bill

15. A number of clauses of the Bill provide for powers to obtain and disclose information (particularly cls 114, 170, 193, 198, and sch 1, cl 11). I am satisfied that these clauses give adequate consideration to the need to protect privacy if the information in question is personal information.
16. I note that clause 171(1)(a) is somewhat unusual in that it allows information requested by the monitor to be withheld to protect the privacy of a person, whether or not a natural person or a deceased person. This clause closely mirrors section 134 of the Crown Entities Act 2004. It is worth noting that the Privacy Act generally only applies to information about living natural persons. There are legislative precedents for considering the privacy of deceased individuals, such as section 9(2)(a) of the Official Information Act. Privacy of legal persons is a more challenging concept, and I suggest it could be difficult to apply in practice.

Conclusion

17. I **recommend** that the Committee seek advice from officials on whether the water services entities and regional representative groups established by the Bill should be public sector agencies or private sector agencies for the purposes of the Privacy Act. If they should be public sector agencies, the Bill should include an appropriate amendment to this effect. My Office is available to provide advice about the form of this amendment.
18. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



Michael Webster
Privacy Commissioner

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