

Privacy Commissioner's submission to the Justice Committee on the Privacy Amendment Bill (292-1)

1. I am pleased to make a submission setting out the key privacy issues and my recommendations on the Privacy Amendment Bill (the Bill).
2. The Privacy Amendment Bill amends the Privacy Act 2020 and has been introduced to address some of the current gaps in the principal Act. The key measures introduced in this Bill are:
 - improving transparency for individuals about the collection of their personal information by introducing a new requirement for an agency to notify an individual when it collects personal information about the information indirectly (i.e. from a source other than the individual concerned) and
 - technical amendments to address minor issues that have arisen since the principal Act came into force.

Key points of submission

3. The Privacy Act protects the personal information of all New Zealanders. It enables them to have trust in the companies and public agencies they interact with every day, and that collect and use their personal information to deliver them goods and services.
4. I **support** the introduction of the new information privacy principle (IPP) 3A which will improve transparency and better enable individuals to exercise their rights of access and correction.
5. I also **support** the technical changes made in part 2 of the Bill.
6. While this Bill is an important first step in strengthening the expectations of the Privacy Act to be more aligned with our key international partners, I am mindful that further changes are needed to the Privacy Act to make sure New Zealand's privacy regime is fit-for-purpose.
7. New technologies such as artificial intelligence are challenging existing privacy protections. The existing Act also lacks meaningful civil and criminal penalties to hold agencies and individuals to account for a growing number of serious privacy breaches. These and other issues mean that our Act is unable to adequately protect New Zealanders' privacy rights and is losing alignment with like-minded international countries.

The Privacy Act

8. The Privacy Act protects the personal information of all New Zealanders, whether they are dealing with a government agency or a private company, filling in a paper form or chatting with an artificial intelligence tool (AI tool).
9. The Act enables New Zealanders to have trust in the companies and government services they use every day and allows for innovation and effective and efficient delivery of services.

10. The Act has 13 Information Privacy Principles (IPPs) which set out legal requirements for agencies when collecting, handling, and disclosing personal information, and exceptions to those general requirements. These are important but flexible privacy protections for all New Zealanders.
11. Despite the current protections in place, significant privacy breaches are occurring. These breaches are directly harming individuals (for example through fraud, scams, and impersonation), are costly to agencies, and undermine trust and confidence in our institutions. It is essential that the Act is amended to become fit-for-purpose in the digital age and come into alignment with other like-minded countries. These amendments in the Bill are a first step to doing so.

New information privacy principle 3A

12. I **support** the introduction of the new information privacy principle 3A as it will increase transparency over the collection of individuals' information and enable individuals to exercise their rights to access and correction.
13. Part 1 of the Bill introduces new information privacy principle 3A (IPP 3A) which will broaden the notification requirements in the Privacy Act by introducing a notification requirement for indirect collection. When an agency (public or private) collects personal information indirectly through a third party, that agency would be required to notify the individuals, with some exceptions.
14. In general, agencies need to collect information about a person directly from that person unless an exception applies.
15. Indirect collection has significantly increased in the last decade due to technological changes and evolution in business models. The proposed amendment means individuals will be aware when their personal information is collected by an agency, even when it is not collected directly from them.
16. New Zealand is currently an outlier in not having a notification requirement for indirect collection and this amendment will bring our privacy law more in line with international privacy law. The European Commission has determined that New Zealand has an adequate level of protection for personal data transferred from the European Union, and increased alignment will also support New Zealand's retention of this adequacy status.¹
17. My office worked closely with MoJ officials and GCPO to ensure that the compliance burden will be manageable for agencies and proportionate to the benefits of the change. Proposed IPP3A(3) means that an agency which indirectly collects information about an individual will not need to notify the individual if the individual has previously been made aware of the requirements. In practice, I expect that where one agency regularly passes information on to another third agency, for example an insurer and an underwriter, the agency who directly collects the information from the individual will inform them at that time that this will be passed on.

¹ https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en

Exceptions

18. There are a number of proposed exceptions to the notification of indirect collection requirement. I **support** the proposed exceptions.

Contrary to the interests of the child

19. Cabinet initially agreed to a “contrary to the interest of a child” exception. Officials advised that there appeared to be sufficient existing exceptions in IPP3A(4), along with other relevant legislation (including the Oranga Tamariki Act 1989). When consulted by officials, Oranga Tamariki considered that these should sufficiently cover scenarios where notification would not be appropriate, and Cabinet agreed to the removal of this exception. If other child welfare organisations should raise situations in which these exceptions are insufficient and consideration of a broader contrary to the interest of a child exception is warranted, my office is available to discuss this with officials.²

Archiving in the public interest

20. Cabinet also initially agreed to an “archiving in the public interest” exception, and this exception was ultimately removed from the Bill due to advice from officials on its potential intersections with other IPPs and potential implications beyond IPP3A. In the paper to the Cabinet Legislation Committee of 4 September 2023 seeking approval for introduction for this Bill (proactively released by the Ministry of Justice), it was noted that if following further consideration of this exception it was still warranted, consideration of this exception may be progressed at a later stage of the Parliamentary process for the Bill. If this is the case, my office is available to discuss any potential amendment with officials.³

Technical Changes

21. In addition to the introduction of IPP 3A, the Bill makes a number of technical amendments to the principal Act to address minor issues that have arisen since it came into force in 2020. My office provided advice to officials on these changes.
22. I **support** these technical changes.

Further modernisation of the Act

23. While this Bill is an important first step in strengthening the Privacy Act and ensuring it is more aligned with our key international partners, I believe that the Privacy Act ultimately requires more significant modernisation to protect the privacy rights of individuals today and ensure there are adequate incentives for businesses and public sector agencies to safeguard privacy.

A more challenging privacy environment

24. New technologies such as AI tools and biometrics and the ‘internet of things’ are increasingly becoming a part of everyday life and introducing a new set of privacy

² Privacy Act Amendment Bill 2023: Approval for Introduction, https://www.justice.govt.nz/assets/Documents/Publications/Privacy-Amendment-Bill-2023-Approval-for-introduction_FINAL.pdf at [18]

³ Ibid at [19]

challenges. While the Act is technology neutral, it is missing key obligations, rights and powers that have been deployed internationally to address these technological developments.

25. This technology change is occurring at a time of rising privacy breaches. In the last year my office has seen the highest number of breaches reported to date. Between March last year and March this year privacy complaints from individuals rose 44% and serious breach notifications from agencies jumped by 31%. This is unlikely to be a full reflection of the actual breaches occurring in the economy.
26. The 2021 attack on Waikato DHB and the 2023 Latitude Financial privacy breach has led to the exposure of millions of New Zealanders' sensitive personal information and illustrates the growing risk to all agencies of any laxity in protection of personal information.
27. New Zealand's Privacy Act does not contain a civil penalty regime, and the criminal offences in the Act are of limited practical use for enforcing serious breaches of privacy. Many agencies are aware of the lack of meaningful financial penalties and limited compliance powers and so are not incentivised to consider privacy in the same way they consider other standards, such as financial reporting requirements and health and safety.
28. Results from a Talbott Mills and Kordia Cyber Security survey show that 60% of respondents are dissatisfied with the current fines for cyber breaches and that three quarters of business leaders surveyed want to see stronger penalties for failing to protect personal information.^{4 5}

New Zealanders are becoming more concerned about privacy

29. Results from my office's biennial survey illustrates that many individuals are concerned about privacy and protection of personal information with 51% of respondents indicating concern about their privacy.⁶ 63% of respondents noted that protection of their personal information is a major concern for them, and this rose to 79% for Māori respondents.
30. People are not only becoming more aware of privacy but acting on these concerns, with 70% of respondents stating that they would consider changing service providers in response to an agency having poor privacy and security practices.
31. The highest levels of concern among respondents were organisations sharing data, the use of artificial intelligence (AI) in decision making, and cyber-attacks.
32. Many New Zealanders would like to see law changes to improve privacy protections further; for example, over 80% supported a right to be notified when automated systems make decisions about them.

⁴Talbott Mills 2024 <https://www.anthem.co.nz/new-zealanders-in-favour-of-introducing-greater-accountability-measures-for-cybersecurity-breaches-survey-says/>

⁵ Kordia 2023 <https://www.anthem.co.nz/new-zealanders-in-favour-of-introducing-greater-accountability-measures-for-cybersecurity-breaches-survey-says/>

⁶ OPC Biennial Survey 2024 <https://www.privacy.org.nz/publications/surveys/2024-biennial-survey-on/>

International alignment

33. The policy approvals for the Privacy Act were agreed to by Government in 2013, following a Law Commission review that made recommendations in 2011, and without being updated to reflect subsequent technological and international developments.
34. The past decade has seen international privacy legislation around the world strengthen significantly as like-minded countries respond to a rapidly changing environment.
35. Developments that have gone beyond our privacy legislation include:
 - The European Union General Data Protection Regulation (GDPR) came into force in 2018, pioneering a significant penalty regime and new privacy rights (such as the 'right to erasure')⁷
 - The United Kingdom passed the Data Protection Act 2018 to implement GDPR
 - The Australian Government introduced a penalty regime for their privacy legislation and has recently accepted and announced widespread reforms of their privacy legislation, which will align it much closer to the GDPR
 - The Canadian Parliament is currently advancing significant privacy law reform.
36. Our Act is beginning to lose alignment with international best practice which may lead to consequences for international cooperation and trade.
37. This amendment Bill is a consequence of misalignment with international best practice, and it is likely that we will need to consider further legislation in future.

Strengthening the Act

38. While I acknowledge that the focus on the present Bill is targeted at a specific gap with the current Privacy Act – an amendment I strongly support – I would like to **invite** the Committee to consider the broader case for Privacy Act modernisation.
39. As noted above, we have many examples of best practice from other countries that could be considered for inclusion into the Privacy Act, such as:
 - stronger powers and penalties for me to hold agencies to account for any breaches of the Privacy Act;
 - requiring agencies to report, on request, on the steps they have taken or propose to take to ensure compliance with their privacy obligations;
 - introducing a right to erasure;
 - considering whether to introduce a new privacy principle to address automated decision-making and algorithmic transparency (which would support the effective management of the privacy risks posed by AI).

⁷ The right to erasure refers to the right to request an agency to delete your data. Otherwise known as the right to be forgotten.

40. I would support a process of further consideration of these and other potential changes to the Privacy Act. My office would of course work closely with officials to support this work.
41. It would get us ahead of what is likely to be inevitable pressure on New Zealand to elevate our standards when it comes to protecting privacy, so we remain a trusted digital economy and afford all New Zealanders the necessary protections to flourish in the digital age.

Conclusion

42. The new notification requirements in IPP3A will improve transparency for individuals about the collection of their personal information and enable individuals to exercise their rights of access and correction. I **support** the introduction of IPP3A.
43. I **support** the technical amendments in part 2 of the Bill that address the minor issues that have arisen since the principal Act came into force.
44. While this Bill is an important first step, I **invite** the Committee to consider the broader case for Privacy Act modernisation, so as to protect the privacy rights of individuals today and ensure that there are adequate incentives for businesses and public sector agencies to safeguard privacy.
45. I trust my comments are of use to the Committee. I seek to present this submission to the Committee in person and be available to answer any questions.



Michael Webster
Privacy Commissioner

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