

# Education and Training (System Reform)

## Amendment Bill 228—1

Submission by the Privacy Commissioner to the Education and Workforce Committee

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### Introduction

- 1.1 I welcome the chance to submit on this Bill. This submission focuses on provisions for transfer of personal information.
- 1.2 I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

### I support appropriately tailored transfer provisions

- 1.3 The Privacy Act 2020 is the main legislation governing how organisations collect, use, and share information in New Zealand.
- 1.4 The present Bill includes provisions dealing with the transfer of personal information. Transfer provisions are common in legislation. They can help to make it clear to relevant agencies and to New Zealanders who is responsible for looking after personal information under the Privacy Act.
- 1.5 I have no objection to the use of clear and appropriately scoped legislative provisions for the transfer of personal information. That includes provisions which override the normal operation of the Privacy Act where there is a clear policy case showing this override is justified, proportionate, and tailored to what is necessary to achieve the policy purpose.

### In my view the Bill's transfer provisions are broader than needed

- 1.6 The Bill adds a new Part 8 to Schedule 1 of the Education and Training Act 2020, which includes provisions for the transfer of Ministry of Education functions to the New Zealand School Property Agency (NZSPA). Provisions dealing with the transfer of personal information are broadly worded.



- 1.7 Clause 141(c) provides that “[n]othing effected or authorised by clauses 135 to 140 ... places any person in breach of any legislation, rule of law, or contractual provision prohibiting, restricting, or regulating the assignment or transfer of property or the disclosure of information”.
- 1.8 Clause 136(1)(a) provides that “[o]n and after the commencement date ... information (including personal information) held by the Ministry or the Secretary in relation to transferred functions before the commencement date is to be treated as having been held by the NZSPA”.
- 1.9 I understand that the policy intent is to authorise the transfer of personal information from the Ministry to the NZSPA and to provide that the transfer of information should not constitute an action that is an interference with the privacy of an individual under section 69 of the Privacy Act 2020. An interference with privacy occurs when an agency or organisation breaches one of the privacy principles of the Privacy Act and that breach harms an individual. A breach of a privacy principle that does not cause harm is not usually an interference with privacy.
- 1.10 I am concerned that the current transfer provisions are broader than needed for this purpose as it would preclude any breach of privacy (not just a finding of an interference with privacy) and would exclude the application of the Privacy Act in ways that are not desirable.
- 1.11 The wording “nothing effected or authorised ... places any person in breach” could be read as totally excluding normal Privacy Act responsibilities and remedies for steps taken as part of the transfer. For example, if there was a failure to apply adequate security safeguards during the transfer (or any safeguards at all) and this led to a preventable loss or leak of information, the wording of these transfer provisions might exclude normal Privacy Act protections and requirements, exposing New Zealanders to privacy harms by:
- a)** Potentially overriding the normal requirement for an agency to notify New Zealanders of a serious data breach, meaning affected people and my Office might not be informed about actual and potential privacy harms.
  - b)** Potentially denying New Zealanders access to normal processes and remedies under the Privacy Act.



## I recommend changes to align transfer rules with the Privacy Act

1.12 There are much more tailored drafting approaches which could achieve the intended outcome, for example:

- c) **Permit or require the transfer in legislation:** the Bill could instead say that the Ministry may or must transfer relevant information to the NZSPA, or
- d) **Specifically exclude the transfer from the IPP11:** Information Privacy Principle 11 (IPP11) sets out requirements for an agency to disclose personal information. The Bill could instead say that relevant transfer of personal information from the Ministry does not breach IPP11, or
- e) **Retain cl 141(c) but exclude the Privacy Act from its scope** to ensure that the transfer doesn't breach other legislation or contract.

1.13 I recommend the Committee consider one of the above more tailored transfer provisions to achieve the policy intent while preserving normal Privacy Act protections.



Michael Webster

**Privacy Commissioner**

