

31 October 2023

Hon Ginny Andersen
Minister of Justice
Parliament Buildings
WELLINGTON

Dear Minister

**QUARTERLY REPORT OF THE PRIVACY COMMISSIONER FOR THE PERIOD
1 JULY 2023 TO 30 SEPTEMBER 2023**

Highlights

This reporting period continued the trend of high operational volumes that our Office is experiencing (see Appendix A). For example, we received 245 privacy breach notifications from agencies and 254 privacy complaints from individuals during the three-month reporting period. These sustained volumes are caused in part by the fallout of major privacy breaches, such as the March 2023 Latitude Financial breach that affected millions of New Zealanders and Australians.

We consider regulatory failure to be the most critical risk we face, and that as major privacy breaches continue to occur there is a high risk that New Zealanders will lose confidence that their privacy is being protected. We do not believe that we have sufficient funding to respond effectively to the increased volume in breaches and complaints or fully deliver on our statutory responsibilities in a way that meets the expectations of citizens and agencies (see Appendix B for financial information for this quarter).

Despite the regulatory failures occurring, our Office continues to operate well. This reporting period introduced a refreshed set of key performance indicators for our Office (see Appendices C and D) that we are on target for achieving or being close to achieving. We note that high operational volumes place pressure on timeliness related measures, such as the percentage of privacy complaints resolved within six months.

We are forecasting a deficit of \$612,000 for the year to June 2024. This deficit takes into account recent remuneration adjustments following a period of salary increase restraint, as well as having our Compliance and Enforcement team now fully staffed. We are using our cash reserves to fund this deficit for the current financial year, but we will require additional funding to sustain our activities in future years.

Developments in Australia emphasise the need for further New Zealand reform

In February 2023 the Australian Attorney-General released a review of their Privacy Act that recommended widespread reform. These reforms include providing individuals with new rights, such as rights to be forgotten, to erasure and for individuals to object to the collection, use or disclosure of their personal information. Changes for agencies include them being required to determine and record the purposes for which they will collect, use and disclose personal information and that privacy policies should set out the types of personal information that will be used in substantially automated decisions that have a legal or similarly significant effect on an individual's rights.

These proposed Australian reforms built upon 2022 amendments to their privacy regime that introduced a penalty regime where serious or repeated interferences with privacy can incur a maximum penalty of a \$50,000,000 (AUD) or three times the value of the benefit obtained directly or indirectly.

In September 2023 the Australian Government formally responded to the Privacy Act review, accepting or in-principle accepting the overwhelming majority of the Attorney-General's recommendations. Implementing these reforms will see the Australian privacy regime much more closely align with that of the European Union's General Data Protection Regulation and other similar regimes.

These upcoming changes in Australia mark an increase in pressure for further New Zealand modernisation of the Privacy Act 2020 (which had its policy approvals agreed by Government in 2013). Many countries, including now Australia, have been responding to technological developments by strengthening their privacy regimes.

New developments, such as biometrics and artificial intelligence, only increase the urgency to further modernise our Privacy Act. We are doing what we can under the existing legislative framework to assist agencies in implementing these new technologies in a privacy protective manner. In July we issued a discussion paper on a possible Code of Practice for biometric information under the Privacy Act and have reviewed the 54 submissions received to inform our decision making. In September we issued new guidance on how artificial intelligence tools can be used by agencies while ensuring they are meeting their obligations under the Privacy Act (following initial guidance in May 2023).

We support the development of the Privacy Amendment Bill to broaden the notification requirements in the Privacy Act so that individuals would be notified when an agency collects their personal information indirectly through a third party (with exceptions). This change will help individuals understand how their personal information is being used and enable them to exercise their rights to access and correct their personal information. This Bill is a necessary improvement to the Privacy Act framework, although we believe that further modernisation of the Privacy Act is also required.

Other activities of our Office

Policy and international related activities

As noted above, we continue to explore the option of issuing a Code of Practice under the Privacy Act for biometrics, including facial recognition technology. We also issued more fulsome advice on how agencies can implement artificial intelligence tools in a way that is consistent with the Privacy Act.

During this reporting period we began our engagement on children's privacy, by seeking information from professionals who work with children (such as teachers and doctors), and non-governmental organisations who advocate for children and young people. We are looking to understand their experiences with the current privacy rules and regulations and any concerns they have. Our project will ultimately consider whether the current laws and regulations protecting children's privacy rights are fit-for-purpose.

We continue to provide significant support for Approved Information Sharing Agreements made under the Privacy Act. This includes:

- Reviewing Operational Procedures for the Gang Harm Intelligence Centre
- Supporting the development of the Veterans Affairs agreement, and
- Providing input into the Department of Internal Affairs agreement relating to death information, including reviewing their Operational Protocols.

During this reporting period we made the submissions on the:

- Land Transport (Road Safety) Amendment Bill
- Corrections Amendment Bill
- Content regulation review / Safer Online Services and Media Platforms, and
- Independent Electoral Review Interim Report.

In late June the Asia Pacific Privacy Authorities Forum was held in Mexico, where representatives from country and state authorities shared information on the latest privacy developments in their jurisdictions.

For international agreements, we supported the Ministry of Foreign Affairs and Trade with the privacy related aspects of the Indo-Pacific Economic Framework for Prosperity.

Compliance and enforcement

The privacy breach notifications that we receive from agencies continue to arrive at high levels, as outlined in Appendix A. This year a key area of strategic focus for us to strengthen our Compliance and Enforcement team, who responds to privacy breach notifications and undertakes compliance investigations. During this reporting period we successfully filled all positions and significantly improved our breach notification response procedures.

We continue to engage regularly with New Zealand Police as it works towards implementing the recommendations from the compliance notice issued under the Privacy Act in December 2022. That notice required Police to cease the practice of collecting voluntary photographs and prints from youth, develop appropriate procedures and implement training relating to such photographing. Police are providing quarterly reports on progress in fulfilling the compliance notice.

In May 2023 we initiated a joint compliance investigation with the Office of the Australian Information Commissioner into the Latitude Financial (operating in New Zealand as Gem Finance) data breach that exposed the personal information of millions of Australians and New Zealanders. The focus of the compliance investigation is on Latitude's information retention policies and practices, and the security settings of the systems that held the information. Initial indications suggest that Latitude was retaining information for longer than it needed to, raising concerns under Information Privacy Principle 9. The compliance investigation is progressing well both in terms of our engagements with Latitude Financial and working with our Australian counterparts. The timeframe for resolving the matter will become clearer as we continue our enquiries with Latitude.

Investigations and dispute resolution

While the compliance investigation continues into the data breach, its causes and Latitude Financial's compliance with the Privacy Act, OPC continues to receive and collate privacy complaints from current or past customers of Latitude Financial. We have deliberately phased the compliance and individual complaint investigations to happen consecutively as the information we gather through the joint compliance investigation will help inform consideration of individual complaints and reduce the need for duplicate processes. This approach also allows for the possibility and the pros and cons of New Zealand complainants joining a potential representative (class) action through our Australian counterparts and/or the Australian Courts to be considered, should such action proceed.

The number of privacy complaints we are receiving from individuals continues to be high, and we have been focusing on early resolution. Our fast resolve process is focused on ensuring that full complaint investigations only occur when the complaint is valid and the individual cannot resolve the issue with the agency themselves. During this reporting period 189 complaints were addressed through the fast resolve process, with a resolution rate of nearly 90 percent.

Even with the fast resolve process the timeliness of our complaints process remains under pressure. Our timeliness target is to have 85 percent of complaints closed within six months, and we are currently at 83 percent. People are waiting almost 150 days before a complaint is assigned for action. The timeliness of our complaints processes is an area that privacy complainants are likely to complain to us about and has led to inappropriate and abusive behaviour. We manage this behaviour in line with our policy on Managing Unreasonable Complainant Conduct.

The largest focus of privacy complaints continues to be complaints from individuals about issues they have in exercising their right to access the personal information that agencies hold about them. We expect complaints relating to the storage and retention of personal information to increase as privacy breaches increase (such as through cyber attacks).

Communication and education

During this quarter we achieved strong media coverage by promoting the Commissioner's AI guidance, gaining the most coverage this issue has had since our initial guidance was released in May 2023. A range of outlets across all media types covered this story, and several times the guidance was provided in full. In support of the guidance, the Privacy Commissioner also spoke about AI as a panellist at the AI Summit in Auckland and by Zoom to the Employers and Manufacturers Association.

We proactively spoke on several privacy issues this period, with highlights being:

- Encouraging submissions to the Consumer and Product Data Bill, and to our consultation on children's privacy.
- Naming What Does My Landlord Own in a media release that focused on education around merging data sets.
- Announcing that New Zealand was a signatory to a global effort on data scraping.
- Commenting on CCTV and school bathrooms as a privacy issue

The management of organisational risk

We maintain an ongoing assessment of the critical operational risks we face us and our mitigations. Our Senior Leadership Team and Legislative Compliance Working Group monitor these risks regularly throughout the year.

Our most critical risk is regulatory failure, where New Zealanders lose confidence that their privacy is being protected, likely due to a series of high-profile serious privacy breaches. Our efforts to address this risk include implementing *Poupou Matatapu – Doing Privacy Well*, a programme of clear guidance to agencies that identifies how to meet the key requirements of the Privacy Act. However, we do not believe that we have sufficient funding to respond effectively to the increase volume in breaches and complaints or fully deliver on our statutory responsibilities in a way that meets the expectations of citizens and agencies.

Other areas of high risk include the possible failure to target our activities for maximum impact, meeting our statutory responsibility to take account of cultural perspectives on privacy and failure to attract and retain people. Mitigations have been identified for these areas. Mitigations have also been identified for some areas of medium risk such as medium-term financial sustainability, loss of credibility, health safety and wellbeing and IT security.

Financial report

Financial information and performance against our Statements of Performance Expectations are appended to this report. We are reporting a deficit in excess of the deficit budgeted for in the first quarter mainly as a result of various changes in staffing and increased computer and network related costs.

The annual audit of the 2022/23 results is substantially completed and the audit report is expected to be provided by the 31 October 2023 as required.

We are currently forecasting a deficit of \$612,000 for the year to June 2024. This deficit takes into account recent remuneration adjustments following a period of salary increase restraint as well as now having a fully established Compliance and Enforcement team in place. While we are making use of our cash reserves to fund this deficit for the current financial year, additional funding will be required for us to sustain our activities in future years.

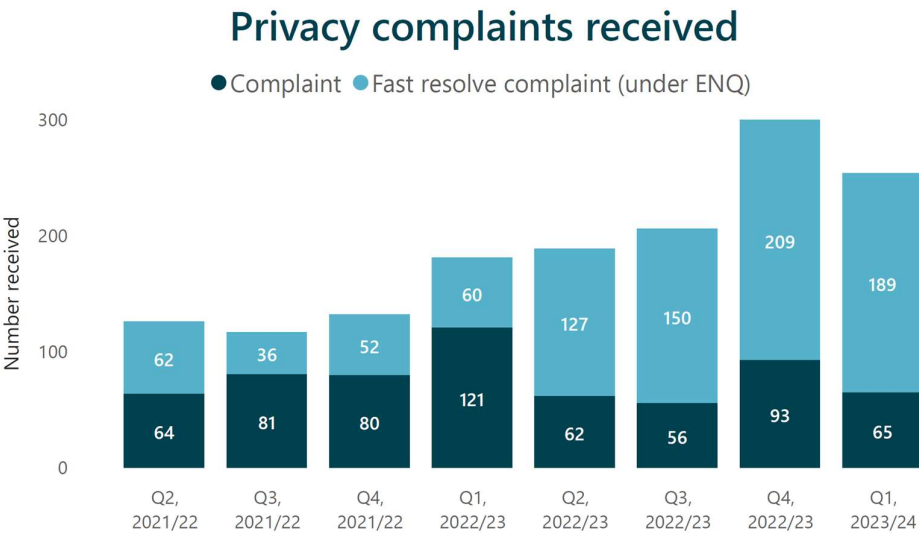
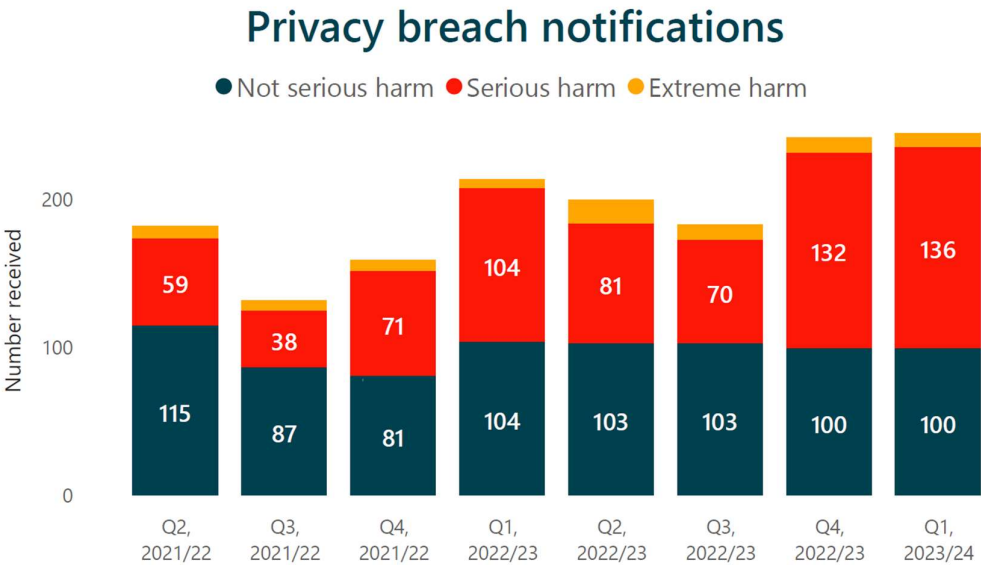
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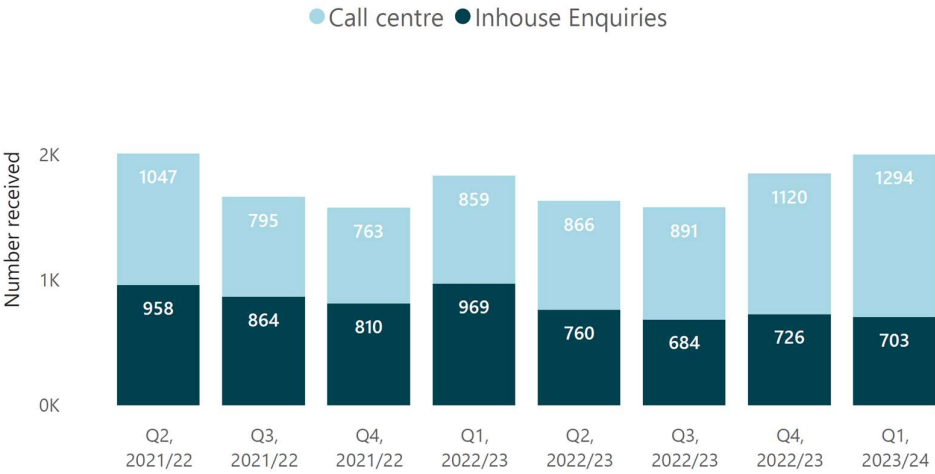
Michael Webster
Privacy Commissioner

Encl: Appendix A: Key operational volumes
 Appendix B: Financials for period ending 30 September 2023
 Appendix C: Performance against Statement of Performance Expectations - Year to Date
 Appendix D: Q1 KPI Trend Report – September 2023

Appendix A: Key operational volumes



Public enquiries incl. Call Centre



Media enquiries

