

MINISTRY OF HEALTH SUBMISSION ON THE HEALTH INFORMATION PRIVACY CODE

New HIPC 2020 Review

Key points from Consultation

Rule 1

1. There has been a change to Information Privacy Principle (IPP) 1(2) in the Privacy Act 2020. The change is that Principle 1 has been expanded to include (2) which now includes that:

(2) If the lawful purpose for which personal information about an individual is collected does not require the collection of an individual's identifying information, the agency may not require the individual's identifying information.

2. This has been reflected in the HIPC which now makes it explicit that identifying information should not be collected by health agencies if it is not required for the lawful purpose of collection.

Rule 2

3. There has been a new exception added to the Privacy Act 2020 in IPP 2(2)(e) (v) that an agency does not need to collect the information from the individual concerned if the agency believes on reasonable grounds that non-compliance is necessary to prevent or lessen a serious threat to the life or health of the individual concerned or any other individual.
4. This new IPP has not been reflected in the HIPC as the drafters have considered that rule 2(2)(c)(iii) of the HIPC covers similar ground and therefore is more befitting to a health context. Rule 2(2) © (iii) of the HIPC is as follows:

2(1) If a health agency collects health information, the information must be collected from the individual concerned.

(2) It is not necessary for a health agency to comply with subrule (1) if the agency believes on reasonable grounds –

(C) that compliance would –

(iii) prejudice the safety of any individual

- ***Question for Submitters- Do you agree that existing rule 2(2) (c) (iii) in the HIPC means that new IPP 2(2) (e) (v) does not need to be added to rule 2?***

5. We agree, too high a threshold may deter sharing of information where it is appropriate for safety purposes such as part of health care.
6. The wording of subrules 2(1), 2(h)(i) and 2(h)(ii) have been updated to reflect the wording of the Privacy Act 2020.

- a. 2(1) reflects the additional exception added about how identifying info should not be required unless is it required for the lawful purpose of collection.
 - b. 2(h)(i) is an edit that makes more sense given the preceding sentence, no material change to the HIPC
 - c. 2(h)(ii) straightforward and reflects new Privacy Act, no material change to the HIPC
7. Reference to section 54 authorisations (now section 30 of the 2020 Act) has been removed from the IPPs. However, if granted by the Privacy Commissioner, such authorisation continues to provide an additional exception for collecting, using or disclosing personal information that would otherwise breach rules 2, and 9 – 12 of this code

• ***Question for submitters: Would you prefer express references to section 54 (now section 30 of the 2020 Act) to be retained in rule 2, even though they have been removed from information privacy principle 2?***

8. We think that express reference to a section 54 authorisation should be retained in the HIPC as it remains a reason for non-compliance. There does not seem to be a rationale for removing the reference from the IPP as the new section 30 of the 2020 Act though it provides an extended explanation for how the Commissioner may authorise a collection this itself doesn't seem to appear a reason for not noting it in the IPP. People often refer to the IPPS only without also cross referencing the Privacy Act.

Rule 3

9. The wording of subrules 3(1), (3) and (4) © of the HIPC have been updated to reflect the wording of the new Privacy Act 2020.
- a. 3(1) no material changes to the HIPC
 - b. (3) no material change and is a better wording
 - c. 4(C) no material change

Rule 4

10. The wording of rule 4 in the new HIPC has been updated to reflect the Privacy Act 2020. Additionally, as in IPP 4, the code now clarifies that the circumstances of collection by a health agency, and whether this is fair and not unreasonably intrusive, includes circumstances where health information is being collected from children or young people. This doesn't appear to create any issues within the HIPC.

Rule 5

11. The wording of sub rule 5(1)(a)(ii) in the HIPC has been updated to reflect the new wording of the Privacy Act 2020. Doesn't materially alter the HIPC.

Rule 6

12. The IPP around access to information has changed such that where before an individual concerned was entitled to request information IF the agency could readily retrieve the information now the individual is entitled to receive the information if it is held at all about them and to correct it if they wish.

13. We agree with this change and think that if the information is held then it should be able to be disclosed.
14. This change has been reflected in the new HIPC at Rule 6 (1) (2) and (3).

Rule 7

15. There is no material change here to the new HIPC but changes to the wording have been made at subrules 6(1), (2) and (3) to reflect the new wording in the Privacy Act 2020.

Rule 8

16. The wording of subrule 8(1) in the new HIPC has been updated to reflect the wording of the Privacy Act 2020. In particular, rule 8 now expressly refers to the disclosure of personal information, as well as use.

Rule 9

17. No change has been made to any of the wording in IPP 9 or rule 9 of the HIPC

Rule 10

18. The wording of subrules 10(1), (1)(b), (1)(e) and (1)(f) has been updated to reflect the wording of the Privacy Act 2020. These changes do not appear to materially alter the content of the HIPC.
19. Rule 10 has also been renumbered where it was no longer sequential after previous amendments. Additionally, previous subrule (g), providing an exception to collection of information in accordance with an authority granted under section 54 (now section 30) of the Privacy Act has been removed. See the commentary relating to rule 2 above.
 - **Question for submitters: Would you prefer express references to section 54 (now section 30 of the 2020 Act) to be retained in rule 10, even though they have been removed from IPP10?**
20. We make the same comment as above for rule 2. It remains a reason for non-compliance with the limits on the use of health information and therefore should be expressly referenced in the HIPC rule.

Rule 11

21. The wording of subrule 11(2)(g), and (2)(j))(i) of the HIPC have been updated to reflect the wording of the Privacy Act 2020. Subrule 11(8) is new and reflects the new cross-border disclosure rules set out in rule 12. Rule 12 has also been renumbered where it was no longer sequential after previous amendments. Previous subrule (2)(k) of the HIPC which provides an exception to collection of information in accordance with an authority granted under section 54 (now section 30) of the Privacy Act has been removed. See the commentary relating to rule 2 above.

22. Question for submitters: Would you prefer express references to section 54 (now section 30 of the 2020 Act) to be retained in rule 11, even though they have been removed from IPP 11?

- We make the same comment as for Rule 2 and 10 above. Disclosure of health information is permitted if it is in accordance with an authority granted under section 54. The exception underscores the ability of the Privacy Commissioner to make a decision weighing the public interest versus the right to privacy. Though Section 30 sets out this balancing exercise in detail, a reference to the exception within the rule itself is useful for clarity as many who use the HIPC will look primarily to the rules themselves for guidance.

Rule 12

23. This is a new rule that reflects new IPP 12 in the Privacy Act 2020. This new rule imposes additional obligations on health agencies when disclosing information overseas to ensure the protection of that information. This principle has been modified slightly in this rule to expressly allow authorisation by an individual's representative where that individual is dead or is unable to exercise their rights under these rules, aligning with rules: **11(1)(b) and 11(2)(a)**

Full new rule at page 16 of the consultation document

- **Question for submitters: Do you agree with the way in which we have implemented new information privacy principle 12 into the code?**

24. It could possibly read better. It currently reads at subrule 12 (1) (a):

- a. the individual concerned or that individual's representative where the individual is dead or is unable to exercise their rights under these rules, authorises the disclosure to B after being expressly informed by A that B may not be required to protect the information in a way that, overall, provides comparable safeguards to those in this code; or

A rewording suggestion as follows:

- b. the individual concerned or where that individual is dead or unable to exercise their rights under this code, that individual's representative, authorises disclosure to B after being expressly informed by A that B may not be required to protect the information in a way that, overall, provides comparable safeguards to those in this code; or

25. In general the use of A and B is potentially a little confusing for the reader but not sure on what an alternative could be apart from going back to the wording of the old HIPC.

Rule 13

26. The wording of subrule 13(1) has been updated to reflect the wording of the Privacy Act 2020.
27. Subrule 13(2) is new and reflects IPP 13(2) which now includes an exception where a unique identifier is used for statistical and research purposes and no other purposes.
28. Subrule 13(5) is new. It implements new IPP 13(3) in the Privacy Act 2020 which clarifies that an agency that simply records a unique identifier assigned by another agency to locate its records is not assigning the unique identifier for use in its own operations.
29. Subrule 13(6) (b) is new. It implements new IPP 13(4)(b) which requires that before disclosing a unique identifier, agencies must take all reasonable steps to minimise the risk of misuse of that identifier.
30. Subrules 13(8) and (9) reflect section 26 of the Privacy Act 2020. Subrule 13(8) ensures that subrules 13(1), (2)(a) – (b), (5) and (6)(a) apply only to the assignment of unique identifiers after the Privacy Act 1993 was in force.
31. Subrule 13(9) clarifies that a justice sector agency cannot, after 1 July 1993, assign a unique identifier previously assigned to that individual, whether the previous assignment was before or after 1 July 1993.
 - **Question for submitters: Do you agree that the application of rule 13 to health agencies should reflect section 26 of the Privacy Act 2020?**
32. We think rule 13 (old Rule 12) reads better with “ a health agency” as in the old HIPC rather than “A” “B”, as it becomes hard to follow/interpret.