Amendment No 7 to the Telecommunications Information Privacy Code 2003

Background Paper on Changes to Notified Amendment

Proposed Amendment No 7 to the Telecommunications Information Privacy Code 2003 was publicly notified by the Privacy Commissioner on 29 January 2020, with an invitation to make submissions.

35 submissions were received. 23 submitters were supportive of the extensions in principle. Of these, eight supported the extensions outright and felt that proposed safeguards were appropriate, and 15 felt that some improvements could be made to ensure public safety *and* privacy interests were met. 12 submitters opposed the extensions in principle, though four of these conceded that some aspect of the extensions was warranted.

All submissions have been carefully considered by the Commissioner before issuing the amendment and will be made available at www.privacy.org.nz. Having considered the submissions, the Commissioner issued the amendment on 8 April 2020 with both substantive and technical changes. This paper briefly explains the changes.

Changes to the proposed amendment

The amendment as issued differs from the proposed amendment in the following substantive ways, as a result of submissions.

1. Requirement to provide individual notification

A new clause 3A has been added to Schedule 4 that requires an emergency service provider to notify an individual as soon as reasonably practicable after device location information (DLI) has been collected. It provides an exception where notification might prejudice the safety, or physical or mental health of an individual.

See: Clause 12 of the Amendment.

2. Reduction in scope of device extension

The amendment will no longer permit the collection of DLI from a broad range of location capable devices. Relevant definitions have been changed, with the result that emergency caller location information (ECLI) may be collected from telecommunication devices but DLI may be collected only from cellular devices. In recognition of this reduction in scope, Internet service providers are no longer included in Schedule 4.

See: Clauses 9(1) and 9(2) of the Amendment.

3. Clarification of information that may be collected from network operators

An unintended gap in the drafting, which may have permitted a broader collection of location information from network operators than directly from devices, has been addressed. Both ECLI and DLI may only be collected from a network operator in relation to devices that are in scope.

See: Clauses 9(1) and 9(2) of the Amendment.

4. Addition of two emergency service providers, with some limits

New Zealand Search and Rescue and Maritime New Zealand have been added to the definition of emergency service provider, on the basis that these agencies have a clear role in emergency response. However, these agencies do not need direct access to the Emergency Location Information System (ELIS); a location request must still be initiated by either Police, Fire and Emergency NZ, or an ambulance service.

See: Clauses 9(2) and 11(4) of the Amendment.

5. MBIE must consult with the Commissioner before approving additional emergency service providers

Schedule 4 previously required only that the Commissioner be notified of the approval of a new emergency service provider. Consultation will allow the Commissioner to have a greater input into a decision to increase access to very sensitive personal information.

See: Clause 10(2) of the Amendment.

6. The disclosure log requirement has been clarified

Clause 6(3) of Schedule 4 has been expanded to include a prescriptive list of matters to be included in the disclosure log. This will facilitate greater accountability and assurance in respect of system use.

See: Clause 15(3) of the Amendment.

7. Collection, use or disclosure of emergency location information must be <u>necessary</u> for a permitted primary or secondary purpose

Clause 3(1)(a) has been amended to add a necessity test. This will ensure the threshold is applied consistently with the thresholds already applied in the Privacy Act and Code.

See: Clause 11(3) of the Amendment.

8. Obligations on network operators have been clarified throughout the Code

Schedule 4 only applies to location information processed within the ELIS. However, previous drafting left some location agencies unsure about which obligations applied. Network operators in particular have limited control over the design, implementation and operation of the ELIS. Several parts of the Code and Schedule 4 have been amended to clarify that certain obligations do not apply to network operators.

Further, rule 11(1(ha) of the Code has been amended to clarify that network operators do not themselves need to be satisfied that the serious threat threshold has been met before disclosing information to the ELIS.

See: Clauses 7, 11(5) and 11(6) of the Amendment.

Submissions noted that have not resulted in changes

Some submissions received, while not resulting in changes to the amendment, warrant comment.

Addressing security risks created by the ELIS

One industry submitter expressed concern that the ELIS could expose individuals to an increased risk of "spoofing", whereby unauthorised people or agencies exploited the system to gain access to location information from a device.

MBIE has provided us with an assurance that it has taken reasonable steps to address any such security concerns, including the implementation of extensive security controls, active monitoring that identifies and prevents access by unauthorised and unauthenticated entities, and frequent, rigorous testing of these controls and safeguards.

The Commissioner is satisfied that MBIE is aware of, and has addressed, these issues. However, we will monitor this situation and take any incidents into account as part of our review of Schedule 4 in due course.

General concerns about system misuse

Several submitters raised general concerns about government misuse of the ELIS, and the possibility that the system could be accessed outside of the boundaries set by Schedule 4.

The Commissioner has always been cognisant of this risk and has taken steps to limit use, bolster transparency and accountability measures and make his expectations about access to the system very clear. The Commissioner is satisfied that the boundaries and safeguards now in place are sufficient to ensure that this important system can deliver both public safety and privacy outcomes.

Impact of the extensions on certain vulnerable groups

Some submitters expressed concern that the system extensions may have an unintended negative impact on vulnerable groups, including victims of domestic violence and people with mental health issues.

These are valid concerns, but the Commissioner is satisfied that the Code as amended adequately addresses these. Emergency service providers do not have to notify an individual that their location information has been collected if they believe that doing so might prejudice their mental health. MBIE and the emergency service providers are working together to develop standard operating procedures that ensure access to ELIS is warranted and controlled.

Finally, the Commissioner will expressly consider any unintended consequences of the system extensions when he reviews Schedule 4 in due course. The Commissioner can, at any time, make further amendments required to address issues that arise.