

Organised Crime and Anti-corruption Legislation Bill 219-1

**Submission by the Privacy Commissioner
to the Law and Order Committee**

5 February 2015



Privacy Commissioner
Te Mana Matapono Matatapu

1. Introduction and summary of recommendation

- 1.1. The Organised Crime and Anti-corruption Legislation Bill represents an important contribution to the Government's programme of work to combat calculated, profit motivated, serious offending. I welcome this opportunity to assist the Committee in its considerations.
- 1.2. The Police have advised that the proposed amendments to the Policing Act in Part 2, subpart 10 of the Bill do not provide the Police with any additional powers to share information internationally, but simply codifies existing information sharing practice.
- 1.3. We acknowledge that the stated objective is to codify, rather than extend existing practice. Nonetheless, while the information sharing foreseen by the new provisions may, in essence be the same as can currently occur, the potential quantity and frequency of such exchanges, and the number of jurisdictions potentially involved, could be considerably greater than is either currently the case, or than we would consider appropriate under the exceptions to information privacy principle 11 of the Privacy Act relied on currently.
- 1.4. Furthermore, while the Bill contains a requirement to make agency-to agency agreements publicly available as soon as is practicable after they enter into force, there is no certainty that any individual agreements between jurisdictions would contain the types of safeguards we would normally expect be included in any international information sharing agreement.
- 1.5. The Bill provides that the disclosure of personal information must be reasonably necessary to enable the corresponding agency to perform their relevant functions, as defined by criteria to be prescribed in the legislation.
- 1.6. However, I am concerned that the Bill lacks the oversight mechanisms and accountability safeguards needed to ensure transparency and to give the public confidence that any international sharing of personal information by the Police will be appropriate and proportionate to identified risks. This is a serious omission.
- 1.7. I therefore recommend a number of specific changes to the Bill to strengthen accountability for the use of the Police's new information sharing powers. My recommendations focus on clauses 60 and 61 in subpart 10 of the Bill, cross-headed *International policing: information sharing*, which propose new sections 95A through 95E of the Policing Act 2008.

2. The Bill needs to include robust accountability mechanisms for the use of the Police's information sharing powers.

- 2.1. In the Justice Minister's 2013 report back to Cabinet on the *All of government response to Organised Crime* (SOC (13) 61 refers), she proposed measures aimed at improving the ability to gather and share information for law enforcement purposes, including with international partner agencies.
- 2.2. The Minister recommended amending the Policing Act 2008 to expressly provide Police with a broad power to share information with its international counterparts, noting that this broad enabling power should be balanced with appropriate accountability and transparency mechanisms.

2.3. Cabinet agreed that:

- the Policing Act should be amended to expressly provide the Police with a power to share personal information with its international counterparts;
- the amendment to the Policing Act should include criteria for how the Police respond to requests for information from overseas agencies, and
- the provision should be made for the Police to continue to share personal information with their international counterparts under existing agreements, where applicable.

2.4. Cabinet also agreed that strong protections were needed around the use of the Police's new information sharing powers, including independent oversight.

2.5. Cabinet noted a number of non-legislative mechanisms had been agreed that would provide for regular review and reporting in respect of the Police's new powers, in particular, that the Police Commissioner would:

- consult the Privacy Commissioner before entering into agency-to-agency agreements for international sharing of personal information or when such agreements are varied or reviewed;
- consult the Privacy Commissioner when deciding to approve specific individuals or business units to respond to overseas requests for information directly;
- enter into a Memorandum of Understanding with the Privacy Commissioner as to the nature and scope of such consultation;
- identify areas of risk and develop an audit plan in consultation with the Office of the Privacy Commissioner and the Ministry of Justice; and
- report annually to the Privacy Commissioner on the operation of assurance processes.

2.6. I recommend that these safeguards should be codified in legislation.

3. This Legislation Advisory Committee Guidelines stress that legislation should include safeguards to adequately protect the rights of individuals affected by decisions

3.1. The Legislation Advisory Committee has emphasised in its Guidelines that legislation should clearly articulate the scope of a new statutory power, who will exercise it, and how it will be exercised, to assist those exercising the power and those people subject to it, and those who may be tasked with settling any dispute over the exercise of it.

3.2. The Committee has also stressed that that it is good practice to explicitly identify in statute the specific protections that apply, so as to avoid any uncertainty.

3.3. Prescribed limits as to the extent and exercise of the power are key safeguards; however, it may be necessary to include additional safeguards to ensure the rights and interests of individuals are protected. In particular, any procedural matters that go to the essence of the legislative scheme should ideally be addressed in primary legislation.

- 3.4. The appropriate process for exercising the power to share information internationally, and any pre-requisite circumstances or procedural steps (such as consultation) that must be taken before exercising the power, should therefore, be specified in the legislation.
- 3.5. Including explicit accountability mechanisms in primary legislation should not increase the complexity of the process, the time and cost required to implement the new provisions, as the same resource would be required for the Police to meet the reporting and review obligations Cabinet has agreed are necessary if in statute, or by agreement.

4. This Bill provides an opportunity to clarify the interface between the Policing Act and Privacy Act and strengthen accountability for international information sharing

- 4.1. The Police has been sharing information with its international counterparts for many decades, through a combination of domestic legislation and international agreements. The Policing Act does not currently contain an express authority for such actions, and oversight of the Police's ability to share information is governed by the Privacy Act. The Privacy Act currently has limited scope for oversight of the Police's international information sharing.
- 4.2. The Bill seeks to clarify how the new information sharing provisions in the Policing Act will interface with the Privacy Act. It provides that a person will be taken to have breached an information privacy principle under section 66(1)(a)(i) of the Privacy Act if they contravene the personal information disclosure provisions of the legislation.
- 4.3. In practice, this means that an individual who considered that an action may have interfered with their privacy could complain to me about a potential breach under the provisions of the Privacy Act. However, the proposed amendments do not require the Police to notify individuals that their information will be, or has been shared with another jurisdiction, so in reality, it would be unlikely that relying on complaints would be an effective means of ensuring compliance. Furthermore, the Bill does not contain the accountability or external oversight mechanisms needed to minimise the potential for any such breaches to occur.
- 4.4. Cabinet has agreed that the process and framework for consultation on international information sharing arrangements will be agreed between the Police Commissioner and the Privacy Commissioner and set out in a Memorandum of Understanding before any amendment comes into force.
- 4.5. In response to the concerns my predecessor expressed regarding the policy proposals preceding this Bill, the Police acknowledged that any such Memorandum of Understanding could include a commitment to review audit processes after five years, to ensure that they remain fit for purpose. However, such a cooperative approach provides weaker assurance that would be offered by clear statutory obligations.
- 4.6. I am concerned that the proposed amendments to the Policing Act grant broad powers to the Police but do not contain sufficient accountability and external oversight mechanisms to give the public confidence in the Police's use of these powers.
- 4.7. I therefore consider this Bill should be amended to provide for appropriate governance should the broad information sharing provisions proposed be provided for in the legislation.

5. Recommendations

- 5.1. I recommend the Bill explicitly provide that the Commissioner of Police must:
- 5.1.1. consult the Privacy Commissioner before entry into any new information sharing agreement with an international counterpart under the proposed information sharing provisions, or varying such an agreement; and
 - 5.1.2. if the Privacy Commissioner so requires, undertake a review of any such agreement, and the arrangements for disclosure under it; and
 - 5.1.3. as soon as practicable after conducting such a review, report the result to the Privacy Commissioner.
- 5.2. I consider any formal reporting as to the Police's legislative compliance with the new provisions should, in general, be a matter for public record. Nonetheless, I recognise that circumstances may require confidentiality. I therefore propose that any reports should be able to be provided to me in confidence, with the scope and format able to be determined case-by-case, following discussion between myself and the Commissioner of Police.
- 5.3. To ensure the review and reporting requirements referred to above do not unduly burden Police resources, I recommend the Bill be further amended to provide that:
- 5.3.1. the Police Commissioner must report annually to the Privacy Commissioner on compliance with the new information sharing provisions, in a mutually agreed format;
 - 5.3.2. the terms of reporting for any international information sharing agreement may be agreed between the Commissioner of Police and the Privacy Commissioner on a case by case basis, including provision for reporting in confidence;
 - 5.3.3. the Privacy Commissioner must not require the Commissioner of Police to undertake a review of any agreement within 12 months of last doing so.
- 5.4. To provide assurance that compliance issues and implementation problems can be identified and addressed promptly, I recommend that the Bill also require that:
- 5.4.1. the international information sharing powers in the Policing Act should be reviewed after five years of operation, and that review should include review of relevant audit processes to ensure they remain fit for purpose.

6. The privacy impacts of other provisions in the Bill are either minor or manageable minor

- 6.1. The Bill contains a number of other provisions regarding the use of personal information that may implicate the privacy of individuals, including amendments that
- expand obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 for financial institutions to report inherently high-risk and suspicious transactions to the Police Financial Intelligence Unit;

- introduce new offences to the Customs and Excise Act 1996 for identity-related crimes involving identity documents or related information, and
- provide for amendments to the Financial Transactions Reporting Act 1996 to protect the identity of persons who make suspicious transaction reports.

However, I consider the Bill appropriately confines these provisions and I am comfortable the underlying legislative frameworks and administrative procedures can address any privacy concerns appropriately.

- 6.2. Particularly sensitive privacy issues arise in relation to the proposed amendments to allow the Police to share internationally DNA information and evidence required for the purpose of criminal investigations or proceedings, subject to the Attorney-General's authorisation. There are clear demands for the Police to be able to share such information, and I consider that allowing DNA information to be shared through the Mutual Assistance in Criminal Matters Act 1992 under the Criminal Investigations (Bodily Samples) Act 1995 as proposed is an appropriate response.
- 6.3. While we have some concerns about the inclusion and long-term retention of voluntarily provided DNA samples in the DNA profile bank, our concerns relate to a feature of the existing legislation, rather than a consequence of the changes proposed. We note, however, that the Police will need to ensure that individuals voluntarily providing DNA samples are informed that their information could potentially be shared internationally.

7. Conclusion

- 7.1. I consider that the Bill, as drafted, does not contain sufficient statutory mechanisms to ensure rigorous oversight and accountability for the Police's use of the proposed information sharing powers.
- 7.2. I consider the recommendations I have made for addressing this omission will both support the practical implementation of the new information sharing provisions and strengthen the public's confidence in the Police in this important area.
- 7.3. I do not request to appear to speak to this submission, but would be pleased to address the Committee on this submission if it would assist the Committee.



John Edwards
Privacy Commissioner