

Privacy Commissioner's Submission to the Governance and Administration Committee on the Data and Statistics Bill (81-1)

Introduction

1. The Data and Statistics Bill (the Bill) repeals the Statistics Act 1975 (the 1975 Act) and replaces it with a new Data and Statistics Act. The Bill is intended to modernise how data and official statistics are collected, held and published by government.
2. The Privacy Act 2020 is New Zealand's main privacy law. One of my functions as Privacy Commissioner under the Privacy Act is to examine legislation before Parliament and to consider any matters affecting individuals' privacy.
3. The collection and use of data and official statistics by public agencies, including Statistics New Zealand (Stats NZ), often involves the collection, use, disclosure, and retention of personal information, so it is appropriate that I consider the potential impacts on individual privacy posed by the Bill.
4. As set out below, the Office of the Privacy Commissioner (OPC) has engaged with the policy development process that has led to the introduction of the Bill. On the basis of this close engagement, an overall comfort with the Bill's design from a privacy perspective, and an expectation that Stats NZ would continue to engage with OPC as the Bill was given operational effect, it was determined that OPC did not need to submit on the Bill.
5. However, in light of privacy concerns that have been raised in some submissions and in the media about aspects of the Bill, this submission outlines my position on how the Bill deals with privacy. It sets out my broad comfort with the adequacy of safeguards in the Bill to protect individual privacy, while also proposing some additional safeguards for the Committee's consideration. I thank the Committee for considering this late submission.

Office of the Privacy Commissioner involvement in the development of the Bill

6. Under then Privacy Commissioner John Edwards, OPC engaged with Stats NZ throughout the development of the Bill. This engagement included:
 - submitting on the Stats NZ discussion document *Towards New Data and Statistics Legislation* in 2018
 - reviewing and commenting on Cabinet papers on policy decisions in 2020-21
 - reviewing and commenting on the draft Bill in 2021.
7. During this engagement, the Privacy Commissioner and OPC:
 - supported modernisation of data and statistics legislation
 - indicated broad comfort with proposed privacy protections and transparency requirements in the legislation
 - worked through specific feedback on the Bill with Stats NZ

- noted OPC's willingness to work with Stats NZ on policy and operational matters relating to the Bill.

8. Having contributed to this policy process, OPC has no significant concerns about the Bill as introduced, for reasons set out in this submission. However, in response to concerns raised by others, the submission does propose some additional safeguards that could be included in the Bill.

Relationship between statistics legislation and the Privacy Act

9. The production of official statistics necessarily involves the collection, storage and analysis of large quantities of personal information. Legislative authorisation of this collection and use of personal information establishes a statutory framework that is largely separate from the Privacy Act, and that overrides the Privacy Act to a significant extent. This relationship between the Privacy Act and statistics legislation already existed under the Statistics Act 1975 and the Privacy Act 1993. It has not been changed by the passing of the Privacy Act 2020, nor would it be changed by the enactment of the Bill.

10. There is nothing unusual about other legislation overriding provisions of the Privacy Act.¹ When reviewing proposals for such statutory overrides, the Privacy Commissioner must consider:

- whether the policy objective the proposal seeks to achieve justifies a departure from the protections in the Privacy Act
- what other safeguards will be put in place to mitigate the impacts on privacy.

11. A separate legislative framework for the use of personal information for official statistics, partially taking the place of protections for personal information in privacy legislation, is consistent with statistical legislation around the world. I consider that this approach is justified on the basis that:

- official statistics and research based on information held for statistical purposes have significant public benefit by helping us to understand our society and allowing government to plan for the implementation of effective policies and services
- statistical legislation, policies and practice involve strict protections for the confidentiality of information collected for statistical purposes, while also providing transparency about what is done with this information.

12. The important role of statistics and research is also recognised in the Privacy Act itself. Information privacy principles in the Privacy Act that place limits on the collection, use and disclosure of personal information provide exceptions where the information will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.

¹ Section 24 of the Privacy Act 2020 provides that the information privacy principles in the Privacy Act will not be breached if personal information is handled in ways that are authorised or required by other laws.

13. To the extent that the Bill clearly authorises personal information to be collected, held, used and disclosed, it will override restrictions in the information privacy principles in the Privacy Act. This is not to say, however, that the Bill completely displaces the Privacy Act. On the contrary, my assumption is that the Privacy Act will continue to apply to personal information collected for statistical purposes where the Bill does not provide otherwise. For example:
- the requirements under the Privacy Act to notify OPC and affected individuals of privacy breaches affecting statistical data that is personal information will apply
 - an agency could still breach information privacy principle 10 of the Privacy Act if it requested personal information on behalf of the Statistician and used that data for its own purposes without other statutory authority
 - individuals could still request their personal information held by Stats NZ, or any other agency covered by the Bill regulatory framework established by the Bill, under information privacy principle 6 of the Privacy Act.²
14. I comment further on the interaction with the Privacy Act in my proposals for additional privacy safeguards below.

Reasons for supporting the Bill

15. Former Privacy Commissioner John Edwards supported the development of the Bill and its objective of modernising the legislative framework governing the data and statistics system, while ensuring that information collected for statistical purposes continues to be subject to strict confidentiality. I also support this objective.
16. The collection and use of information for official statistics and research has changed significantly since the 1975 Act was passed, as a result of technological and other developments. As Stats NZ has adopted new approaches to collecting and analysing data, OPC has engaged with Stats NZ as necessary to ensure that privacy is protected. Successive Privacy Commissioners and OPC have been broadly comfortable with the protections in the 1975 Act and the strong culture of confidentiality at Stats NZ.
17. For example, early in his tenure as Privacy Commissioner, John Edwards wrote this about the Integrated Data Infrastructure (IDI), a research database managed by Stats NZ:

My office has cautiously supported the expansion of the IDI, although not in an unqualified way.

The IDI expansion represents something of a grand bargain – consolidate the collection of integrated data sets in one place under a strong governance regime, including a very clear statutory mandate and controls – or the alternative is the piecemeal integration of data by various government agencies under potentially inconsistent controls.

² On this point, I note that clause 39 allows the Statistician to disclose data in a form that may identify an individual if the disclosure is authorised in writing by the individual to whom the data relates.

Our confidence is based on our experience and knowledge of Statistics New Zealand's existing management of the IDI. This includes its long established culture of confidentiality and respect for data subjects which has led to its acceptance in the community as a trusted custodian of statistical data.³

18. It is now appropriate to modernise the data and statistics legislation to take account of changes that have occurred since 1975, such as the collection of statistical information by government agencies other than Stats NZ, the increasing use of administrative data for statistical purposes, and the use of information held by Stats NZ for beneficial research by other individuals and organisations. The Bill will bring greater transparency to developments such as these, which already take place under the 1975 Act.
19. I am satisfied that the Bill contains adequate protections against the inappropriate use of personal information. These protections include:
 - an overall purpose of providing for appropriate privacy, confidentiality, and security, and transparency about how data is used (cl 3(d))
 - a prohibition on the disclosure of identifiable information collected in joint collections between Stats NZ and another agency (cl 24(6))
 - a clear provision that, when a public sector agency is authorised to request data on behalf of the Statistician, that agency is not authorised to use that data (cl 26(4))
 - a requirement on the Statistician to take all reasonable steps to ensure that data is not disclosed in a form that could reasonably be expected to identify individuals (unless certain appropriate exceptions apply) (cl 39)
 - requirements for employees of Stats NZ and other relevant individuals (including those seeking to access data for research) to complete a certificate of confidentiality (cl 42)
 - a clear framework for access to data held by Stats NZ for research purposes (Part 5), including that the Statistician, before authorising access to data for research, must:
 - be satisfied the research is in the public interest (cl 49)
 - be satisfied the research is to be carried out by an appropriate researcher, who will protect the privacy, confidentiality and security of the data (cl 50, especially cl 50(a)(iii))
 - be satisfied access to data is subject to appropriate measures to protect privacy, confidentiality and security of data (cl 51)
 - consider whether, if the researcher is an overseas person, the data will be protected by comparable safeguards to those in the Bill (cl 52)

³ John Edwards, 'Privacy and Big Data', presentation to Ministry of Social Development, 2 September 2014.

and that the Statistician must publish information about access to data by researchers (cl 53)

- a requirement that researchers must comply with obligations in relation to data accessed for research, including to take all reasonable steps to ensure that data is only disclosed in a form that could not reasonably be expected to identify individuals (cl 54, especially cl 54(1)(c)).

Additional privacy protections that could be considered

20. While I support the Bill and believe it includes appropriate protections for personal information, there are additional protections the Committee could consider in response to concerns that have been raised about the Bill.

Interaction with the Privacy Act

21. As discussed above, I assume that the Privacy Act will continue to apply except to the extent that the Bill clearly authorises personal information to be collected, held, used or disclosed. However, to avoid doubt, it could be helpful for the Bill to expressly set out the relationship between the Bill and the Privacy Act.
22. In addition, I note that the Bill does not deal with situations in which individuals may suffer harm, of the kinds set out in section 69(2)(b) of the Privacy Act, as a result of breaches of the requirements of the Bill. The Bill provides for offences relating to the obligation to protect data. However, it does not provide for redress to individuals affected by a failure to meet obligations to protect data.
23. The Committee could consider whether the Bill should provide for a right for individuals to make a complaint to the Privacy Commissioner in relation to a breach of obligations to protect data under the Bill, where the breach relates to personal information as defined in the Privacy Act.

Delegation of the Statistician's functions or powers

24. Clause 17 of the Bill provides that the Statistician may delegate any of the Statistician's functions or powers, in accordance with the provisions of the Public Service Act 2020 relating to the delegation of functions and powers of public service chief executives. It is not clear why such broad provision has been made for delegation of the Statistician's functions and powers, and the Committee may wish to ask officials for further information about the purpose of this provision.
25. In addition, clauses 25 and 26 provide for the Statistician to authorise a public sector agency to request data on the Statistician's behalf. This is also a type of delegation of the Statistician's powers.
26. I recognise that anyone acting under delegation or authorisation from the Statistician would be subject to the same legal obligations that apply to the Statistician. However, such a person would not necessarily come from the same strong culture of confidentiality as is found within Stats NZ. There is a risk, however small, that a person acting under

delegation would perform the Statistician's functions in ways that do not sufficiently protect the privacy and confidentiality of data.

27. I therefore propose as a safeguard that the Bill should require the Statistician, before delegating functions, powers or authorities to any agency outside Stats NZ, to be satisfied that the agency has the capability to perform the functions or powers safely and responsibly. Further, I propose that the Bill provide for the Statistician to develop an assurance framework for assessing an agency's capability in relation to delegation of functions or powers, and that the Statistician must consult the Privacy Commissioner about the assurance framework.

Limitation on the purposes for which information may be used

28. It is my strong expectation and understanding that any information collected under authority provided by the Bill will be used only for statistical and research purposes. It would be entirely inappropriate to use such information, where it relates to identifiable individuals, for operational, compliance or enforcement purposes (even if these purposes were considered beneficial to the individuals concerned).
29. In my view, the Bill's provisions, taken as a whole, do protect against use of information collected under the Bill for purposes other than the production of statistics and the undertaking of research. However, there is no single provision that clearly states this purpose limitation, in contrast to the 1975 Act, which states that 'Information furnished to the Statistician under this Act shall only be used for statistical purposes'.⁴
30. I would support the inclusion in the Bill of a stand-alone provision restricting the purposes for which data collected under the Bill may be used to statistical and research purposes. I do not propose defining the terms 'statistical' or 'research', which are also undefined in the statistical and research exception in the Privacy Act. I believe the terms 'statistical' and 'statistics' are well understood in New Zealand and internationally. The term 'research' is admittedly broader, but could be clarified in part by research standards issued by the Statistician under clause 90(1)(d).
31. I also note that the 'Five Safes' framework that governs research access to the IDI specifically states that such data 'cannot be used for individual case management, such as making a decision about a specific person or family'. The Committee could consider whether a similar restriction (suitably broadened beyond case management to any decision-making about identifiable individuals) should be included in the Bill.
32. As a more general comment, the Bill's explanatory note comments that the Bill incorporates aspects of best practice frameworks, including the 'Five Safes' and Ngā Tikanga Paihere (Stats NZ's framework for ethical and culturally appropriate data use). However, there may still be elements of those frameworks that could be incorporated into the Bill to strengthen its privacy and ethical protections. For example, Stats NZ has developed the practice, applauded by overseas privacy regulators as best practice, of

⁴ Statistics Act 1975, s 37(1).

undertaking and publishing a privacy impact assessment when new data is added to the IDI.

Applying the ‘public interest’ test to research requests

33. Clause 48 of the Bill gives the Statistician sole discretion to authorise or decline access for research to data held by Stats NZ, and to impose conditions on such access. A key consideration in deciding whether to grant access is the public interest test in clause 49. The public interest test ensures consideration of matters that are important from a privacy perspective, including whether the proposed access to information (which could include access to information about identifiable individuals) is justified, the nature and extent of any risk posed by access, and the purpose for which the data was originally collected.
34. In exercising this discretion, I would expect the Statistician to take advice from experts in data ethics, tikanga Māori, privacy and other relevant areas of expertise. It could be helpful for the Bill to provide for the creation of a research ethics committee to advise the Statistician on decision-making under clause 48, particularly (but not exclusively) in relation to the application of the public interest test. The Bill could also provide in general terms for the composition of such a committee. Such a committee should also provide advice to chief executives of other departments that the Statistician has determined may authorise access for research purposes under clause 55.

Strengthening some wording in the Bill’s requirements

35. It may be possible to tighten up some of the wording in the Bill to be more protective, particularly where the current wording might be seen as weakening requirements in the 1975 Act. I make two specific suggestions, on which the Committee may wish to seek advice from officials.
36. First, the Bill refers in a number of places to the Statistician obtaining information that is ‘*necessary or desirable*’ for the production of official statistics, or ‘*desirable*’ for research purposes.⁵ I propose that the test should be stronger than simple desirability of collecting information, and that the words ‘*necessary or desirable*’ and ‘*desirable*’ be replaced by ‘*necessary*’. A necessity test would be particularly appropriate where a data request is not voluntary, and especially in relation to the power of entry and inspection under clauses 57 and 58.
37. Second, clause 39 provides that the Statistician ‘*must take all reasonable steps to ensure that the Statistician does not publish or otherwise disclose data in a form that could reasonably be expected to identify any individual or organisation.*’ Equivalent wording also appears elsewhere in the Bill. By contrast, section 37(4) of the 1975 Act requires the Statistician to ensure that statistical information is published ‘*in such a manner as to prevent any particulars published from being identifiable by any person (other than the person by whom those particulars were supplied)*’.

⁵ See clauses 22(c), 23(1)(b), 25(1), 57(1) and 58(1).

38. The wording in the 1975 Act with regard to non-identifiability is arguably stronger than that in the Bill, and the Committee could consider whether the wording in the Bill could be strengthened. However, the Committee should be aware that the wording in the Bill closely mirrors that in the statistical and research exceptions in the Privacy Act.⁶ The Committee could also consider whether it may be more appropriate to provide greater specificity about how statistical information should be made non-identifiable through Standards issued by the Statistician under clause 90 of the Bill.

Conclusion

39. I support the Bill's objectives of modernising data and statistics legislation while continuing to provide safeguards for information collected for statistical purposes and to ensure transparency about the use of such information. I believe the Bill already contains important safeguards that have the effect of protecting privacy of personal information. I also expect Stats NZ to continue to engage with OPC about implementation of the Bill, if it is enacted.
40. However, to respond to concerns that have been raised about the Bill and help to ensure continued public trust in the collection and use of data for official statistics and research, I propose the following additional safeguards for the Committee's consideration as possible amendments to the Bill:
- Clarify the Bill's relationship with the Privacy Act and provide for individuals to complain to the Privacy Commissioner about failure to meet obligations to protect data under the Bill, where such data is personal information.
 - Require the Statistician, before delegating functions, powers or authorities to any agency outside Stats NZ, to be satisfied that the agency has the capability to perform the functions or powers safely and responsibly. Further require the Statistician, in consultation with the Privacy Commissioner, to develop an assurance framework for assessing such capability.
 - Restrict the purposes for which data collected under the Bill may be used to statistical and research purposes, and provide that information collected under the Bill cannot be used to make decisions about specific identifiable individuals.
 - Provide for the creation of a research ethics committee to advise the Statistician on the exercise of the Statistician's discretion to authorise access to data for research (especially in relation to the public interest test for such access).
 - Replace references in the Bill to a 'necessary or desirable' or 'desirable' test for obtaining information with 'necessary', particularly where it is mandatory to provide information and in relation to powers of entry and inspection. Also consider

⁶ The Privacy Commissioner has previously recommended that the Privacy Act should include stronger protections against re-identification of personal information that has been de-identified for statistical and research purposes: Privacy Commissioner's submission on the Privacy Bill to the Justice and Electoral Committee, 31 May 2018, pp 22-25 and rec A.4.

whether the Bill's wording on non-identifiability of information should be strengthened.

41. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

A handwritten signature in blue ink, appearing to read 'Liz MacPherson', is written over a faint, light blue circular stamp or watermark.

Liz MacPherson
Acting Privacy Commissioner
5 April 2022