

Submission in response to the Ministry of Justice consultation on the broadening of the Privacy Act's notification obligations

1. The Ministry of Justice ("Ministry") has released its consultation paper, *'Possible changes to notification rules under the Privacy Act 2020'* ("Consultation Paper"). The Consultation Paper identifies several potential changes to the Privacy Act 2020 ("the Privacy Act") to address the lack of a notification requirement for agencies that do not collect personal information directly from the individual concerned ("indirect collection").
2. The potential changes the Ministry proposes are relevant to the Act's operation and the objectives of the information privacy principles ("IPP"). If implemented, they would contribute to enhancing the privacy of individuals and assisting individuals to exercise their privacy rights (including rights of access to and to request correction of their personal information). As such, I am pleased to make a submission setting out my views in support of this amendment.

The basis for the proposed changes

3. Subject to various exceptions, IPP 3 provides that when an agency collects personal information directly from the individual, the agency must take reasonable steps to ensure the individual is aware of key matters immediately before the information is collected, or as soon as possible afterwards ('notification requirement'). This includes matters such as:
 - 3.1. the fact that the information is being collected;
 - 3.2. the purposes for collection; and
 - 3.3. whether supplying personal information is voluntary or required by law.
4. The notification requirements do not apply at all where an agency does not collect personal information directly from an individual concerned.
5. The Ministry is considering ways to broaden the Privacy Act's notification requirements so that they apply not only when agencies collect personal information directly from the individual but also when personal information is collected indirectly. The Ministry believes these changes can promote and strengthen transparency, ensure New Zealand keeps up to date with privacy laws and best practices in overseas jurisdictions, and support international trade (specifically, the cross-border flow of personal information as a basis for digital trade).

Possible amendments to the Information Privacy Principles

6. Requiring transparency about how agencies collect, retain, use, and share individuals' personal information is a core function of any privacy framework. Transparency and openness is a precondition to individuals being able to exercise informed choices. The importance of transparency and openness is internationally recognised, for example, in the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* ("OECD Guidelines"). In fact, one of the Privacy Act's explicit purposes is to give effect to internationally recognised privacy obligations and standards, including the OECD Guidelines. For our purposes the most relevant part of the OECD Guidelines is the 'openness principle' which says:

There should be a general policy of openness about developments, practices, and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

The 'collection limitation' also emphasises the importance of personal information being collected with the "[...] *knowledge or consent of the data subject*".

7. IPP 3 gives effect to the openness principle and serves a clear and important purpose as it currently stands. Nevertheless, we agree it should now be broadened to help increase transparency for individuals whose personal information is collected from other sources. Not only is transparency a precondition for individuals exercising informed choice but without it, individuals will have real practical issues exercising their rights of access (IPP 6) and to request correction (IPP 7) of their personal information. A broader IPP 3 notification obligation would also better align with the OECD openness principle objectives.
8. As for 'how', I support amending IPP 3 as the option that best meets the policy objectives. Theoretically, only minor adjustments to IPP 3's wording would be needed, making this amendment simpler for agencies to implement. This option also ensures that there is a seamless transparency obligation applying to agencies collecting personal information. The alternative options appear to be more complex to incorporate within the current structure of the IPPs and there may be a risk that some indirect collection would not be covered, therefore creating a gap. For instance, if the obligation is on the discloser under IPP 11, the discloser may be outside the jurisdiction of the New Zealand Privacy Act and

the notification obligation would not be triggered, despite collection by an entity within the ambit of the New Zealand Privacy Act.

9. I expect that some agencies may express reservations from a compliance costs standpoint. Agencies collecting personal information could well incur at least some extra costs from updating their systems. However, as the Ministry identifies in the discussion paper, there is scope to design IPP 3 in a way that ensures the obligation both effects the policy objectives but is also practical, and not unduly burdensome for agencies. My Office will be pleased to assist the Ministry in these matters.

Overseas best practice and international trade

10. I support the Ministry's efforts to achieve greater comity with our overseas partners including the United Kingdom, Australia, and the European Union Member States specifically on the matter of transparency best practice. As the Ministry identifies, a broadened notification obligation would also support international trade and in particular the cross-border flow of personal information as a basis for digital trade.
11. I am mindful that New Zealand is an outlier in not having notification requirements in situations of indirect collection. It is important that New Zealand's privacy law continues to provide a strong platform that will be recognised by our international trading partners. Otherwise, there is a risk that New Zealand businesses may incur other costs if our trading partners impose additional requirements. Having comparable privacy laws that meet internally recognised standards also helps in the negotiation of international trade agreements. The compliance costs therefore must be assessed against the broader national economic benefit of the proposed change.

Online & digital privacy

12. In 2010, the Law Commission considered the indirect collection issue as part of its Review of the Privacy Act 1993. But a lot has changed since 2010. Twelve years later, we live in a world in which personal information has greater economic value and business models relying on the collection, processing, and sale of personal information through websites and apps to diverse entities are now entrenched. Yet there is little transparency for individuals whose personal information may be indirectly collected.
13. A lack of transparency contributes to information and power asymmetries. It also negatively impacts individuals' ability to understand the privacy implications of taking certain actions online. The current lack of transparency may also be

contributing to the palpable sense of distrust around what personal information agencies in extensive data chains are collecting, and what they are doing with sometimes highly sensitive personal information. This distrust is particularly acute in the online environment where the use of tracking technology is both ubiquitous and opaque.

14. Ongoing technological change and the ever-increasing ability for agencies to share information widely and rapidly presents unique challenges, particularly in the online/digital environment. I do not expect that a broadened IPP 3 would be sufficient on its own to solve the many existing transparency and autonomy issues. Nonetheless, a broadened IPP 3 will be a critical platform for the work my Office is already undertaking to understand the extent to which further appropriate regulatory interventions may be necessary or desirable. It may be that these discussions lead to suggestions for further amendments to the Privacy Act in due course, to ensure this legislation remains fit-for-purpose for the digital age.

Conclusion

15. I support an amendment to broaden IPP 3 as the option that best meets the policy objectives of increased transparency and individual agency. This would also achieve greater comity with our overseas partners and support international trade. Furthermore, this amendment would provide a critical platform for the work my Office is already undertaking in the online/digital space.
16. Lastly, I welcome consultations with my Office who will be pleased to assist the Ministry as it considers these matters further.



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