In Confidence
Office of the Minister of Justice

Chair
Cabinet Social Wellbeing Committee

PRIVACY BILL 2018 – APPROVAL FOR ADDITIONAL POLICY AMENDMENTS

Proposal

1. I propose six additional amendments to the Privacy Bill (the Bill), that is currently before the Justice Committee.

Executive summary

2. Submitters have suggested a range of reforms to the Bill to make it more effective and better aligned with comparator jurisdictions. I propose to progress six changes now:
    2.1. clarifying the Bill's application to agencies based overseas and information held overseas;
    2.2. allowing for future participation in binding cross-border privacy schemes such as that operated by APEC;
    2.3. amending the threshold for notifying privacy breaches to address concerns about over-notification, making the assessment of whether to notify more objective, and better aligning the threshold with comparable regimes overseas;
    2.4. applying the news media exemption in full to Radio New Zealand and Television New Zealand, to put them in the same position as other news media;
    2.5. broadening the definition of 'news activity' to include information gathered for, or disseminated in, books and online platforms, but only by media agencies subject to agreed standards of conduct and an independent complaints procedure; and
    2.6. repealing the public register privacy principles.

3. If Cabinet agrees, these changes can be addressed in the Departmental Report to the Justice Committee. If it is not possible to introduce them through the Committee's report back to the House, they can be introduced by supplementary order paper at a later date.

4. Submitters have put forward a range of other ideas for reform, many of which reflect emerging innovations in international privacy and consumer rights law, such as the European Union's (EU's) new General Data Protection Regulation (GDPR). While I think these ideas should be explored further, this will require significant policy development and consultation, particularly as international best practice is not yet agreed.

5. I do not wish to delay the Bill while this extra policy development is carried out. The Bill contains important and overdue reforms that are almost universally supported. Ministry of Justice officials will consider the other ideas for reform that submitters (including the Privacy Commissioner) have raised in a subsequent phase of work on privacy policy.

Background

6. The Privacy Bill had its first reading on 11 April 2018, and is currently before the Justice Committee. The Committee is due to report back to Parliament on 22 November 2018.

7. The Bill implements the Law Commission's recommendations from its 2011 *Review of the Privacy Act*. These changes include:

    7.1. *Mandatory reporting of privacy breaches*: breaches that pose a risk of harm to people must be notified to the Privacy Commissioner and to affected individuals;

    7.2. *Compliance notices*: the Privacy Commissioner will be able to issue compliance notices to require an agency to do something, or stop doing something;

    7.3. *Cross-border data flow protections*: New Zealand agencies will be required to take reasonable steps to ensure that personal information disclosed overseas is subject to comparable safeguards to those in the Privacy Act. The Bill also clarifies the position when a New Zealand agency engages an overseas service provider to store and/or process personal information;

    7.4. *New criminal offences*: it will be an offence to mislead an agency and to destroy documents containing personal information where a request has been made for it; and

    7.5. *Binding decisions on access requests*: the Privacy Commissioner will be able to make binding decisions on complaints relating to access to information.

Proposed amendments to the Bill

8. The Justice Committee has received over 160 submissions on the Bill from individuals, academics, community groups, local government, businesses, industry representatives, and privacy law experts. The majority support the Bill's reforms, but consider it does not go far enough. I instructed officials to work on those changes that would be appropriate to address at select committee stage. I propose to recommend them to the Justice Committee for inclusion in the revised version of the Bill reported back to Parliament. If these recommendations are not accepted by the Committee, I intend to progress them by supplementary order paper at the Committee of the Whole House stage.

Clarifying the Bill's application to agencies based, and information held, overseas

9. People routinely submit personal information directly to overseas agencies. The Bill contains some provisions detailing specific situations in which it will apply to information held overseas. However, the Bill does not address key issues such as whether the Bill will apply to agencies that are not "in" New Zealand, and if so, in what circumstances. If this is not explicitly addressed, there will be a lot of uncertainty about the extent to which the Bill applies in a range of situations involving overseas persons, agencies and information.

10. The Supreme Court has said that legislation will only be treated as applying to persons and conduct outside New Zealand if the legislation provides for it expressly or by necessary implication. I think there is a risk that a court's interpretation of the existing provisions may not provide sufficient protections for New Zealanders. I therefore propose to clarify that the Bill applies to:

10.1. New Zealand public sector agencies, in relation to all their conduct in and outside of New Zealand;

10.2. New Zealand private sector agencies, in relation to all their conduct in and outside New Zealand. These private sector agencies would include people resident here and other agencies that are established under New Zealand law, or that have their central management and control here; and

10.3. overseas agencies that carry on business here, in relation to conduct engaged in the course of carrying on the agency's New Zealand business.

11. In particular, the new provision would make it clear that the Bill applies to agencies that carry on business in New Zealand. This involves systematically and deliberately taking opportunities to engage in trade in New Zealand, in a manner and to an extent that makes it reasonable to regulate its activities here. This aligns with the approach taken in Australia, and in other New Zealand legislation such as the Fair Trading Act 1986.

Allowing for future participation in a binding cross-border privacy schemes

12. The Bill introduces in Information Privacy Principle (IPP) 11 a requirement that New Zealand agencies only disclose personal information to overseas agencies if they believe, on reasonable grounds, that the overseas agency is required to protect the information in a way that provides comparable safeguards to New Zealand's. Some countries will be prescribed in Regulations as providing comparable safeguards, based on their domestic privacy protection regimes. New Zealand agencies will be able to transfer personal information to agencies in those prescribed countries, without having to individually assess their 'comparable safeguards'.

13. I propose to enhance this country-based approach by providing for New Zealand's future participation in a binding scheme. Binding schemes[1] attempt to overcome problems caused by differences in privacy law between countries. Agencies that choose to participate in the scheme apply a uniform set of privacy rules.

14. New Zealand does not currently participate in any binding schemes, but may choose to in the future. My proposal would allow binding schemes to be prescribed in Regulations in the same way as countries. This would allow New Zealand agencies to disclose personal information to agencies participating in a prescribed binding scheme without assessing the scheme's privacy safeguards, providing greater certainty for agencies and making participating in such a scheme more attractive.

15. The Bill should also make it clear that the Commissioner's functions include supporting the operation of the cross-border disclosure mechanisms, such as prescribed binding schemes, binding corporate rules, model contractual clauses, and other available mechanisms, and advising on whether an overseas country or State provides comparable safeguards to the NZ Privacy Act. This will give New Zealand flexibility to decide to join a binding scheme in the future without requiring further legislative amendment, and support the efficient operation of the new cross border disclosure framework.

[1] The Asia Pacific Economic Cooperation (APEC)'s Cross-Border Privacy Rules system is an example of a binding scheme that could be prescribed in Regulations. Six out of the 21 APEC economies (Singapore, South Korea, Canada, Japan, Mexico, and the United States) participate and Australia has recently applied to join. If an APEC economy joins the system, agencies within that economy may voluntarily opt in.

Amending the threshold for mandatory notification of a privacy breach

16. The Bill introduces a mandatory reporting regime, under which privacy breaches must be notified to the Privacy Commissioner and to affected individuals. In this context, a privacy breach is the loss of, or unauthorised access to, personal information. Failure to notify the Commissioner is an offence, and an agency may be liable to a fine of up to $10,000.

17. The aim of mandatory notification is to ensure individuals are informed, and aware of the need to take steps to avoid any further harm; and to incentivise agencies to take security of personal information seriously. Mandatory notification is also intended to assist the Privacy Commissioner to identify systemic issues, and focus regulatory effort on the sectors or agencies that regularly breach their privacy obligations.

18. On 19 March 2018, Cabinet agreed to modify the threshold for mandatory notification of a privacy breach, moving from a two-tier to a single-tier notification regime [CAB-18-MIN-0085 refers]. The notification threshold in the Bill currently requires agencies to notify the Commissioner and affected individuals if the breach has caused harm, or there is a risk it will do so. Harm is defined as a loss, detriment, damage, or injury to an individual; adversely affecting an individual's rights, benefits, privileges, obligations, or interests; or significant humiliation, loss of dignity, or injury to feelings.

19. This threshold attracted the largest number of submissions. Most were concerned that it is too low and will lead to all privacy breaches needing to be reported, because there is always a 'risk' of harm that could be conceived. The low threshold may lead to over-notification, meaning people become de-sensitised to notifications and less concerned to take protective action. This undermines one of the purposes of the notification regime.

20. High volumes of notifications risk reducing the Privacy Commissioner's effectiveness by diverting resources from the egregious or systemic breaches. A further concern for business submitters is that the threshold is considerably out of step with comparator jurisdictions, which, they suggest, could damage New Zealand's international reputation if we appear to have a proportionally higher number of notifications.

21. Another concern raised by many submitters is that 'harm' is subjectively assessed. This provides insufficient certainty for agencies needing to assess the risk of harm, where there may be a number of affected people with differing tolerances for risk and harm. To address these concerns, I propose to amend the current threshold for notification of a privacy breach (to individuals and the Privacy Commissioner) to:

    21.1. require notification only in cases where the breach is likely to cause serious harm;

    21.2. incorporate an objective approach to assessing the likelihood of harm occurring;

    21.3. allow an agency, in assessing the likelihood of harm occurring, to take into account any actions it has taken to mitigate the possibility of harm occurring.

22. Taken together, my proposed changes will increase the threshold for notification so that individuals are informed about breaches that might cause serious harm and are able to take protective steps where appropriate. Agencies will be able to assess the likelihood of harm from the perspective of a reasonable person, making this assessment more straightforward. Agencies will also be encouraged to take action to mitigate the likelihood of harm occurring following a breach.

23. The Bill will include criteria to guide agencies in determining whether a breach is likely to cause serious harm. This will align it with similar notification regimes in overseas jurisdictions, particularly Australia, which uses criteria such as the sensitivity of the information, the nature of any harm that may occur and the kind of person(s) who have, or may have, obtained the information and the likelihood that they will misuse it.

24. The Privacy Commissioner supports the proposed changes to clarify the breach notification threshold and reduce uncertainty. However, the Commissioner notes that the criminal offence for failure to notify is still likely to incentivise an overly cautious approach by agencies. The Commissioner would prefer that the potential penalty for failure to notify a privacy breach was a civil pecuniary penalty. I do not support introducing a power for the Commissioner to seek civil pecuniary penalties into the Bill at this time for the reasons discussed at paragraphs 49 to 54.

News media exemption be made agency and platform neutral

25. The Privacy Act (and Bill) excludes certain people or organisations from its scope, by excluding them from the definition of 'agency'. This exclusion is generally due to the nature of their role, and is intended to allow them to operate freely in that role (for example, members of Parliament in their official capacity, or the courts in relation to their judicial functions).

26. The news media are similarly excluded, but only in relation to their "news activities". News activities include gathering, compiling or disseminating news and current affairs materials, or making observations on the news. The news media exemption protects the free flow of information that underpins a free and democratic society, and is supported by the freedom of expression enshrined in the New Zealand Bill of Rights Act 1990.

Applying the media exemption in full to Radio New Zealand and Television New Zealand.

27. Radio New Zealand (RNZ) and Television New Zealand (TVNZ) currently do not enjoy the benefit of the news media exemption in respect of requests by people to access and correct personal information (although they may refuse an access request to protect confidential journalistic sources). The original rationale for this exception was that, as crown entities, they should be subject to greater transparency requirements. This is similar to the rationale for the Official Information Act 1982 (OIA) also applying to RNZ and TVNZ.

28. RNZ and TVNZ face an additional compliance burden by being subject to three regimes (the Broadcasting Standards Act 1989, the Privacy Act and the OIA). They cited recent examples where this has led to the same complaint having to be dealt with three times, once under each regime. Another issue for both broadcasters is that the exception risks creating a 'chilling' effect in respect of investigative journalism, because the subject of an investigation is able to use the Act to request information about themselves while the investigation is ongoing, thereby frustrating its progress.

29. In my view, this situation is outdated and inconsistent (for example, it does not apply to Māori Television[2]). I propose to apply the news media exemption in full to RNZ and TVNZ because, as a matter of principle, RNZ and TVNZ should be able to operate on the same

[2] The OIA, by contrast, does apply to Māori Television.

footing as other news media when undertaking news activities. They will still be required to adhere to broadcasting standards including balance, accuracy, privacy and fairness.

30. My proposal to remove the current exception is consistent with the Law Commission's recommendation in its 2011 review. As the Law Commission noted, it will create an anomaly with the OIA. This is because under the OIA, information could still be requested from TVNZ and RNZ about companies, or by a third party about an individual (although requests of the latter type are usually denied under the withholding grounds at section 9(2)(a) of the OIA, which protects the privacy of natural persons).

31. The Privacy Commissioner and the Ombudsman oppose the removal of the exception for RNZ and TVNZ. The Privacy Commissioner is concerned about reducing the right for individuals to access and correct their personal information. Both the Commissioner and the Ombudsman are also concerned about divergence from the OIA. They suggest that any review of this aspect of the Privacy Act should be deferred until the Privacy Act, OIA and, to the extent it is relevant, the Ombudsman Act 1975 can be reviewed together.

32. I acknowledge that making this change to privacy law ahead of complementary changes to the OIA will create a discrepancy between the two regimes. But a concurrent review of the OIA and privacy law is impractical, as the Privacy Bill is already well advanced. The Government has signalled its intent to carry out targeted consultation, commencing later this year, to inform a decision on whether to progress a formal review of the OIA. Such a review could consider the position of RNZ and TVNZ under the OIA, and thus provide an opportunity to realign the two regimes.

Extending the scope of 'news activity' to all media platforms that are subject to an oversight body

33. The present definition of news activity refers to the preparation, compiling or dissemination of 'articles or programmes' of, or concerning, news, observations on news, or current affairs. It is unclear how this relates to journalistic work that is neither an article, nor a programme. For example, a recent court case held that a book was not a 'news activity', meaning that the journalist author did not have the benefit of the exemption because a story was published in book form rather than serialised in a magazine.

34. I propose to make the definition of "news activity" platform neutral, so it can include books and online platforms such as blogs. I also propose that the new definition apply only to news media that are subject to independent standards of conduct (including privacy standards) and a complaints procedure.

35. News media using 'traditional' media platforms will also need to be subject to an independent regulator to get the benefit of the exemption, whereas the exemption currently applies to these news media without that requirement. This will create a better balance between freedom of expression and individuals' privacy protections, by ensuring there is effective oversight of media claiming the exemption, and that individuals have access to remedies if their privacy is breached.

36. These changes may not alone address the issue with journalistic books being able to claim the news media exemption. It is not clear whether a book, even written by a member, would be considered 'news' by the New Zealand Media Council (NZMC), the current industry regulator. The NZMC is not prohibited from looking at complaints about books, but the issue

has not arisen so far; its main work is with newspapers, magazines and online media. This is something the NZMC could consider in the future.

37. While the Privacy Commissioner supports broadening the definition of news activity to clarify its application to books, he expresses caution about the risk of unintended consequences from broadening the definition. He also recommends that, for clarity and workability of the new provision, the proposed qualifier must be expressed in specific terms so it is clear on the face of the statute that membership of the established media regulators (i.e. the BSA and NZMC) qualify to exempt news media from the Privacy Act. Alternatively, he suggests that the Bill should include a clear process for deciding whether standards of media regulation are adequate for this purpose (such as setting out criteria in regulations) to ensure a minimum standard of alternative redress.

38. I do not think it necessary to name the BSA and NZMC in the Bill itself, as this would make it more difficult to keep privacy law current. Neither do I consider it necessary to prescribe in Regulations the standards of conduct or complaints procedures that independent media regulators must adopt. In my view, this would risk being overly prescriptive, and in any case, the Privacy Act is not the appropriate home for any such regulation. The Ministry for Culture and Heritage is working on the broader regulatory settings for the media, and this work can address issues relating to media self-regulation to the extent required.

Repealing the Public Register Privacy Principles

39. I propose to repeal the Public Register Privacy Principles (PRPPs), as they are inconsistent with the objective of modernising the Privacy Act. The statutes establishing public registers often include safeguards relevant to that register. A public register is any register, roll, list, or other document that is required by law to be publicly available or open to public inspection. The Bill contains four PRPPs, carried over from the existing Act. The PRPPs apply to public registers established by legislation listed in Schedule 2 of the Act.

40. PRPPs were introduced to meet a perceived need (when the internet was in its infancy) to provide a minimum set of safeguards for public registers that were largely paper based. Over time the PRPPs have become increasingly outdated. They are often overridden by the legislation establishing the register, and cannot generally be effectively enforced.

41. The Law Commission's 2011 recommendations included repealing the PRPPs and a comprehensive review of existing public registers. In 2016, the Privacy Commissioner recommended repealing the PRPPs, and three other submitters on the Bill concurred.

Further work will consider a proposal for a centralised suppression mechanism

42. Various statutes provide a discretionary power for suppression of personal information from a public register, in circumstances where disclosure would put a person at risk. There is no central point of contact for an individual to request suppression where their information is recorded in multiple public registers. Submitters supported a separate, but related Law Commission recommendation for a centralised suppression mechanism to address this issue. The Privacy Commissioner also supports this recommendation, which could involve applications for suppression being channelled via his Office.

43. The concept of a centralised suppression mechanism has merit. It represents a specific and practical privacy enhancement. However, further policy work is needed on the design of

this mechanism, including whether legislation is the appropriate vehicle. I have directed Justice officials to undertake targeted consultation with key stakeholders, including those who submitted on this issue, the Privacy Commissioner, and key government departments. They will provide me with advice in due course.

Future privacy-related work

44. A range of other ideas for reform have been put forward by submitters, including the Privacy Commissioner. Many of these ideas reflect emerging innovations in international privacy and consumer rights law, and aim to respond to new challenges to privacy and related human rights in the data driven age. These ideas include new rules on the de-identification and reidentification of personal information, a 'right to erasure', data portability, and algorithmic transparency.

New Zealand 'adequacy' status and the EU's General Data Protection Regulation (GDPR)

45. Most submitters were strongly concerned to maintain New Zealand's 'adequacy' status with the EU. Our adequacy status enables businesses and organisations in the EU to send personal information here without having to apply extra safeguards. The ideas put forward by submitters for other reforms to be added to the Bill often had this aim in mind, as their proposals reflected some of the newer features of the GDPR. However, there is no clear international consensus on the overall merits of many of the GDPR's newer features, and most EU countries are still working through how to incorporate them in their own legislation.

46. While I recognise that these issues are increasingly important in a mass data era, developing a regulatory framework appropriate to the New Zealand context will require extensive policy development and consultation. Attempting to include such proposals in the Bill at this stage would significantly delay the important reforms already in the Bill.

47. The GDPR does not immediately impact on our adequacy status but does require all countries' status to be reviewed by 25 May 2020. New Zealand officials are liaising with the EU about this review. The Bill already contains reforms that, once implemented, will assist our case to maintain EU adequacy. It is the only vehicle for legislative change before the adequacy review so it is important that it is progressed promptly.

48. After the Bill is enacted and subject to other work programme priorities, Justice officials will commence separate work on these issues, in partnership with other agencies as appropriate. This work could, in due course, lead to specific enhancements to the Privacy Act. An incremental approach to privacy reform is, in my view, sensible in light of the continued evolution of international privacy standards.

Civil Pecuniary penalties

49. Submitters also commented on the Bill's enforcement mechanisms and criminal penalties, with the more substantive submissions proposing the development of a civil pecuniary penalties regime.

50. The Bill gives the Privacy Commissioner new tools to identify and respond to privacy breaches. It also contains some offence provisions, such as for failure to notify a privacy breach, failure to comply with a compliance notice or access order, or for giving a false

statement. Offences are punishable by a fine of up to $10,000. There is no penalty for breaches of the Information Privacy Principles themselves, even if they are serious.

51. Forty-four submitters commented on the compliance and penalties regime. Almost all considered the penalties were too low or insufficient, particularly in comparison to international regimes which tend to utilise civil penalties rather than criminal sanctions.

52. The Privacy Commissioner thinks that the lack of a civil penalty regime is a significant omission, and creates a gap in the compliance framework in the Bill. He proposes that the Privacy Commissioner have the power to seek a civil pecuniary penalty of up to $100,000 for an individual or $1 million for a body corporate for serious or repeated breaches of the IPPs, failure to notify a privacy breach, or failure to comply with a compliance notice. Fourteen submitters expressly agreed with the Commissioner that the Bill should introduce civil pecuniary penalties for serious non-compliance.

53. I accept that there may be a case for additional changes to the regulatory framework, including the introduction of civil pecuniary penalties. However, this would be a significant change to the existing privacy regime, and the wider regulatory system within which it sits, and should not be done in an ad hoc manner.

54. The Ministry of Justice is currently working on guidelines for when pecuniary penalties may be appropriate and what safeguards should apply. I would want to ensure that any new pecuniary penalty regime sits well within these guidelines. As such, the case for pecuniary penalties will be considered as part of the next phase of work on privacy policy.

Consultation

55. The matters discussed in this paper were raised by, and discussed with, various submitters on the Bill. In particular, Justice officials have sought the advice of the Privacy Commissioner, the Privacy Foundation, and several individual privacy law experts.

56. The following departments, agencies and crown entities have been consulted on the proposals in this paper, and support the additional amendments being included in the Bill: Treasury, State Services Commission, Business, Innovation and Employment, Defence, Education, Foreign Affairs and Trade, Health, Social Development, Transport, Culture and Heritage, Environment, Pacific Peoples, Primary Industries, Conservation, Corrections, Prime Minister and Cabinet, Internal Affairs, Customs, Inland Revenue, Land Information, Inspector-General of Intelligence and Security, Oranga Tamariki, Police, Parliamentary Counsel, Te Puni Kōkiri, Security Intelligence Service, Social Investment Agency, Statistics, Government Communications Security Bureau, Crown Law, Transport Agency, Accident Compensation Corporation, Government Chief Privacy Officer, TVNZ, RNZ and the Broadcasting Standards Authority.

57. The Privacy Commissioner provided the following comment.

    The Privacy Commissioner welcomes the proposals to clarify aspects of the Bill, in particular those relating to extraterritorial scope, the breach notification threshold, repealing the public register privacy principles and clarifying the definition of “news activity” for the purposes of the new media exemption in the Bill.

Extra-territorial application of the Privacy Act

The Commissioner strongly supports clarifying that the Bill applies to agencies based overseas which carry on business in New Zealand, similar to the approach taken to consumer protection regimes here and in Australian privacy legislation. However, he notes that the effectiveness of those regimes is underpinned by civil penalty sanctions. The Commissioner considers that clarifying who the Bill applies to globally will be less effective due to the absence of civil penalty sanctions in the Bill.

Civil penalty sanctions

The Commissioner is disappointed at the failure to progress key reforms to protect New Zealander's rights and align our law with key trading partners. One such reform is establishing civil penalty sanctions, the absence of which leaves New Zealand out of step with the majority of countries with EU adequacy. Civil penalties are routinely used in New Zealand to promote compliance with other consumer protection regimes, including the Commerce Act and Unsolicited Electronic Messages Act. Tougher sanctions were the issue of second highest concern to Bill submitters, and the inclusion civil penalty sanctions in the Bill is largely technical and could be achieved within the timeframe of this Bill.

Breach notification threshold

The Commissioner also supports the proposed breach notification threshold. However, there is a risk of over-notification to the Commissioner and unnecessary compliance cost if a criminal sanction for private sector failures to notify remains in the Bill. The Commissioner recommends this criminal sanction be removed and replaced with a civil sanction.

Television New Zealand and Radio New Zealand

The Commissioner does not support further exempting TVNZ and RNZ from the Bill. Parliament has on several occasions made it clear that SOEs have additional obligations of transparency above those of private sector companies. The Commissioner considers that the proposal is illogical and will be ineffective as the Official Information Act will readily fill the gap. An OIA request where an individual has given a privacy waiver will achieve the same practical effect as an access request under the Privacy Act. The Commissioner strongly recommends that this reform should only be considered in conjunction with any review of the Official Information Act and consultation with the Ombudsman.

News media

The Privacy Commissioner supports the proposal to clarify the definition of "news activity" in principle, however considers the Bill should explicitly state that membership of established media regulators (i.e. BSA and NZMC) qualifies for purposes of the Privacy Act exemption. If membership is not clearly stated, the Bill should include criteria about qualifying news media regulators in order to support decision-making about the scope of the exemption.

Further modernisation requirements

The Commissioner recommends that Cabinet sets a firm timetable for future privacy reforms to address emerging challenges to privacy rights and take New Zealand beyond the Law Commission reforms of 2011. These reforms would include protections for

individuals subject to automated decision making and re-identification, and appropriate rights to erasure and data portability. This timetable should coincide with the 2020 review of New Zealand's EU Adequacy.

58. The Ombudsman was consulted on the proposal to apply the media exemption in full to RNZ and TVNZ. As noted above, he was concerned that the proposal would create anomalies with the OIA in terms of access to information from TVNZ and RNZ relating to their news activities. He said it would be concerning if the change were to incentivise would-be Privacy Act requesters asking acquaintances to make information requests to RNZ or TVNZ without identifying that they are doing so on the would-be requester's behalf. The Ombudsman preferred that any review of this aspect of the Privacy Act should be deferred until the Privacy Act, OIA (and, to the extent it is relevant, the Ombudsman Act) regimes can be reviewed together.

Financial implications

59. There are no further costs or funding requirements related to the additional policy proposals in this paper. Contingency funding has been set aside to support the Office of the Privacy Commissioner in its new functions under the Bill, and these additional proposals do not alter any of those functions. The tagged contingency must be drawn down by 1 February 2020. I intend to seek Cabinet's approval to the draw down following the Bill's report back from Select Committee. [CAB Min (14) 13/8 (18), CBC-17-MIN-0076 and CAB Min (18) 0001 refer].

Legislative implications

60. Legislation is required to implement these proposals. They can be added to the Privacy Bill when it is reported back from the Justice Committee, or, if that is not possible, during its later Parliamentary stages by supplementary order paper.

Impact Analysis

61. A Regulatory Impact Statement (RIS) for the Privacy Bill was prepared in accordance with Cabinet requirements and was submitted to Cabinet along with the paper seeking policy approvals in March 2014 [CAB Min (14) 10/5A].

62. Additional policy decisions were made in February 2016. A RIS for these additional decisions was prepared in accordance with Cabinet requirements and was submitted to Cabinet in February 2016 [CAB Min (16) 0047].

63. The Regulatory Quality Team at Treasury has advised that regulatory impact analysis is not required for the proposals to clarify the cross-border provisions, to allow for future participation in a cross-border binding scheme, and to repeal the public register privacy principles, as they have no or only minor impacts on businesses, individuals or not for profit entities.

64. Regulatory Impact Analysis requirements apply to the remaining proposals in this paper and a Regulatory Impact Assessment (RIA) is attached. The Ministry of Justice's RIA Panel have reviewed the RIA and considers that the information and analysis summarised in the RIA meets the Quality Assurance criteria. In reaching this conclusion, the QA panel notes the constraints posed by the limited availability of data to support the analysis. That

constraint is always a factor with framework legislation such as the Privacy Act, which applies across all sectors, and to agencies ranging from the smallest sole trader to the largest corporation. The RIA's extensive use of submitters' evidence ensures a range of perspectives are available, which helps to make the qualitative analysis robust and reliable.

Human Rights

65. The policies in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 (BORA). Amendments to the media exemption support section 14 of BORA, which protects freedom of expression; however, this is balanced against legitimate privacy interests.

Gender Implications

66. I do not expect that the proposals in this paper will have any differential impact on the basis of people's gender.

Disability Perspective

67. The proposals in this paper are not expected to have any differential impact on the basis of people's disability.

Proactive Release

68. I propose to release this Cabinet paper proactively, after the Justice Committee reports the Bill back to Parliament.

Recommendations

69. I recommend that the Committee:

    1. **Note** that the Privacy Bill is currently being considered by the Justice Committee, with report back to the House by 22 November 2018.

    2. **Note** that Cabinet agreed that the Minister of Justice be authorised to make additional minor policy decisions within the overall framework approved by Cabinet, but any major policy issues will be subject to further Cabinet consideration [CAB Min (14) 10/5A].

    Cross-border issues

    3. **Agree** to clarify when the Bill applies to information and agencies based overseas, including that it applies to entities carrying on business in New Zealand.

    4. **Agree** that the Bill allow for New Zealand's future participation in a prescribed binding scheme.

    5. **Agree** that the Bill clarify that the Commissioner's functions include supporting the operation of cross-border disclosure mechanisms.

    Breach notification threshold

    6. **Agree** to change the threshold for notification of a privacy breach (to individuals and the Privacy Commissioner) to:

6.1. require notification of breaches that are likely to cause serious harm;

6.2. incorporate an objective approach to assessing the likelihood of harm occurring; and

6.3. allow an agency to take into account any actions it has taken to mitigate the likelihood of harm occurring from a privacy breach, in assessing the likelihood of harm occurring.

News media exemption

7. **Agree** that the news media exemption apply in full to Radio New Zealand and Television New Zealand.

8. **Agree** that the definition of news activity used in the media exemption be broadened to include all news media platforms, as long as the news medium is subject to an oversight body.

Public register privacy principles

9. **Agree** to repeal the public register privacy principles.

10. **Note** that further policy work is being undertaken on whether there should be a centralised mechanism for suppressing information from public registers.

Financial implications

11. **Note** that while the recommendations 3 to 8 above will not have any financial implications; the costs to the Office of the Privacy Commissioner in relation to carrying out its new functions under the Bill have already been provided for through tagged contingency funding previously set aside by Cabinet [CAB-18-MIN-0001 refers].

Future work

12. **Note** that I propose an incremental approach to the future stewardship of privacy law, with a further phase of policy work commencing in due course after the enactment of the Privacy Bill. This will include considering new rules on the de-identification and reidentification of personal information, a 'right to erasure', data portability, algorithmic transparency and civil pecuniary penalties.

Authorised for lodgement

Hon Andrew Little
Minister of Justice