

Possible changes to notification rules under the Privacy Act 2020

Introduction

Transparency regarding the collection, use, and disclosure of personal information is fundamental in protecting individuals' privacy rights and their dignity and autonomy. Transparency enables individuals to:

- make informed privacy choices;
- hold agencies to account for their privacy practices; and
- exercise their privacy rights under the Privacy Act 2020 (the Privacy Act).

Under the Privacy Act, agencies are generally required to notify individuals when the agency is collecting their personal information ("**direct collection of personal information**"). This helps promote transparency.

The Ministry of Justice administers the Privacy Act. It is considering how to broaden notification requirements so they would also apply when agencies collect personal information indirectly via a third party, rather than directly from the individual concerned ("**indirect collection of personal information**").

To promote and strengthen transparency, we have identified several potential changes to the current notification requirements under the Privacy Act to address the issue of indirect collection of personal information.

These changes would ensure New Zealand keeps up to date with privacy laws and best practices in overseas jurisdictions. They would also support international trade, and in particular the cross-border flow of personal information as a basis for digital trade.

We are seeking feedback on the form and scope any changes should take. For example, should changes apply only to agencies indirectly collecting personal information of individuals based overseas, or extend to the collection of personal information of individuals in New Zealand as well?

We are keen to hear from agencies involved in the indirect collection of personal information, whether domestically or overseas, as well as from individuals whose personal information may be indirectly collected.

We want your feedback

We are seeking your feedback on seven questions:

1. What factors do you think are most important when considering changes to indirect collection of personal information?
2. What are the advantages or benefits of broadening the notification requirements, for both individuals and agencies? What might the disadvantages be?
3. What form do you think the proposed changes to notification rules under the Privacy Act should take? Please elaborate on your preferred option and explain why you think the other options are not appropriate.
4. If you are a New Zealand business, are there any practical implementation issues you can identify in complying with the proposed changes?
5. Are there any other risks or mitigations to the proposed changes you can identify that are not mentioned in this document?
6. Should the proposed changes only apply to personal information collected indirectly from individuals *overseas*, or should they also apply to personal information collected indirectly from individuals in *New Zealand*?
7. Is there any other feedback you would like to provide on these proposed changes? If so, please provide this feedback.

Your views are important; please get in touch. Email your feedback to privacyfeedback@justice.govt.nz or post it to: Electoral and Constitutional, Ministry of Justice, PO Box 180, Wellington 6140.

For us to consider your feedback, we need to receive it by **5pm Friday 30 September 2022**.

Te Tāhū o te Ture – the Ministry of Justice is leading the project because it administers the Privacy Act 2020. This is the Act that sets the principles for handling of personal information in New Zealand.

Background information

What are the current requirements for notification under the Privacy Act 2020?

Information Privacy Principle (IPP) 2 provides that when an agency collects personal information it must generally do so *directly* from the individual to whom that information relates ('the individual concerned'), unless certain exceptions apply.

These exceptions include when the information is publicly available, for law enforcement purposes, or when it is not reasonably practicable in the circumstances to collect the personal information directly from the individual.

Information Privacy Principle 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:

- the fact that the information is being collected;
- the purposes for collection; and
- whether supplying personal information is voluntary or required by law.

This notification might take the form of a statement on a paper document provided to the individual or stated on a website the individual can view.

As with IPP 2, exceptions to IPP 3 mean that agencies do not need to notify individuals of the collection of their personal information in certain cases, for example where an agency reasonably believes that non-compliance would not prejudice the interests of the individual concerned.

Information Privacy Principle 11 allows an agency to *disclose* personal information it holds, under specific conditions. Some disclosures involve the individual concerned being *informed* of the disclosure (such as when the individual authorised it) but others do not. For example, if the agency believes on reasonable grounds the disclosure is directly related to the purposes for which the information was originally obtained, it may disclose the information without informing the individual concerned

You can find out more about these IPPs on the Privacy Commissioner's website: www.privacy.org.nz/privacy-act-2020/privacy-principles

What is the concern with indirect collection of information?

The interplay between IPP 2 and IPP 3 means that, in some circumstances, when certain exceptions to IPP 2 or IPP 3 apply, personal information will not be collected directly from the individual concerned under IPP2, and so there will be no notification requirement under IPP 3.

This could create a gap in the current notification regime, meaning the Privacy Act's protections are less effective where personal information is not collected directly from the individual concerned.

For example, when an individual provides personal information via the website of a New Zealand agency, the terms and conditions of the website might indicate that the individual authorises the collection and sharing of their information when agreeing to use the website under such terms and conditions

That website may then share the individual's personal information with an advertising agency for advertising purposes. The advertising agency may not be required to notify the individual under IPP 3 because it did not collect the personal information directly, but rather received it from the website.

In such a scenario, the individual may not be aware their personal information was indirectly collected by the advertising agency. This means they may be unable to exercise their full privacy rights (such as the right to request access to their personal information) under the Privacy Act from the advertising agency.

What are the notification requirements in other jurisdictions?

Many jurisdictions are considering or have already introduced broader notification requirements for indirect collection of personal information.

A significant example of this is the General Data Protection Regulation ('GDPR'), the key privacy law of the European Union ('EU'). The GDPR requires that an individual be informed of the processing of their personal information regardless of whether it is collected directly or indirectly, and in a clear and accessible form. This notification requirement is seen as a key protection for EU individuals when their personal information is shared.

Australia's Privacy Act 1988 Privacy Principle 5 provides generally for notification, regardless of the manner of collection.

The United Kingdom Data Protection Act 2018 sets out a general notification obligation applicable to agencies collecting personal information, including collecting it indirectly (see Section 44(3)).

Both Japan and South Korea have recently introduced additional safeguards surrounding the notification rules for organisations indirectly collecting personal information of EU individuals.

Why are changes being considered to New Zealand's notification requirements?

The Government is considering **broadening the notification requirements** for agencies that collect personal information indirectly.¹

Technologies and business models relating to the collection of personal information have dramatically evolved in the last decade, resulting in a proliferation of indirect collection of personal information.

Broader notification requirements would support greater transparency, by helping individuals know what is happening with their personal information. This would give individuals more control of how their personal information is collected, used and shared by agencies, particularly online, which would also promote trust and safety.

Broadening the notification requirement to indirect collection of personal information would align the Privacy Act with international norms. This is important for ensuring New Zealand's rules are in step with major trading partners, and could help facilitate cross-border trade. Many New Zealand agencies operating overseas may already have to comply with notification requirements in those jurisdictions.

Question 1 – what factors do you think are most important when considering changes to indirect collection of personal information?

Question 2 – What are the advantages or benefits of broadening the notification requirements, for both individuals and agencies? What might the disadvantages be?

What changes are being considered?

The Ministry is exploring several ways in which a broader notification requirement could be introduced to the Privacy Act, including:

1. an **amendment to IPP 3** to introduce a notification requirement for all agencies covered by the Act. IPP 3 would be broadened so that it no longer applies only when an agency collects personal information directly from the individual concerned. It would apply when the agency collects the personal information indirectly from other sources.
2. an **amendment to one of the other IPPs**, for example, an amendment to IPP 2 to narrow exceptions that allow agencies not to collect information directly from the individual concerned (i.e. that allow agencies to collect the information indirectly); or an amendment to IPP 11 to require a disclosing agency to notify the individual concerned that their information has been disclosed to a third party (regardless of whether or not the disclosure itself is allowed).
3. **introducing a new separate privacy principle** dealing with notification of indirect collection.

We have explored enhancing notification requirements through voluntary guidance, or by providing for a code of practice to be made by the Privacy Commissioner under the Privacy Act. However, voluntary guidance would not support individuals to exercise their rights under the Privacy Act as robustly as a legally binding requirement. A code would be more limited in scope and might apply only to specific types of personal information, agencies or activities, or to a particular sector.

Question 3 - what form do you think the proposed changes to notification rules under the Privacy Act should take?

Please elaborate on your preferred option and explain why you think the other options are not appropriate.

¹ Proactive release – Privacy. Released by the Ministry of Justice on 28 June 2022, available at www.justice.govt.nz

What are some potential risks and mitigations associated with the proposed changes?

We have identified some potential areas of risk or challenge from broadening the notification requirements to include indirect collection.²

The first is **notification fatigue**. If individuals receive too many notifications about collection of their personal information, they may simply ignore it or 'tune out'. Instead of feeling that they better understand what is happening with their information, some individuals could feel overwhelmed and confused.

The second risk is the **compliance costs** associated with a new requirement to notify individuals of indirect collection. Businesses and other organisations may need to create new policies and processes to ensure they comply. There could also be practical difficulties in notifying an individual with whom an organisation does not have a direct relationship.

Larger businesses or agencies operating extensively in overseas markets are more likely to be collecting the personal information of New Zealand and overseas individuals already. They may be accustomed to complying with the broader notification requirements in those overseas jurisdictions. In comparison, smaller businesses operating exclusively within New Zealand may need extra resources to comply with a broader requirement.

We are interested in receiving feedback on these risks, and hearing about any other risks from the proposed changes.

We are particularly interested in hearing about possible compliance costs arising due to an indirect notification requirement on smaller New Zealand agencies and businesses operating exclusively domestically.

We are also interested in feedback on potential ways to mitigate risk, such as:

- limiting the circumstances in which notification must be provided, so, for example, an agency might only be required to take 'any steps that are, in the circumstances, reasonable' to notify individuals about the collection of information;
- providing an exception to an indirect notification requirement when the individual concerned already has the information that the organisation is required to provide under the Privacy Act;
- confining broader notification requirements to personal information collected indirectly from individuals *overseas*. This would mean businesses operating exclusively domestically should not face any further compliance costs.

Question 4 – if you are a New Zealand business or agency, are there any practical implementation issues you can identify in complying with the proposed changes?

Question 5 – are there any other risks or mitigations to the proposed changes you can identify that are not mentioned in this document?

Question 6 – should the proposed changes only apply to personal information collected indirectly from individuals *overseas*, or should they also apply to personal information collected indirectly from individuals in *New Zealand*?

Question 7 – is there any other feedback you would like to provide on these proposed changes? If so, please provide this feedback.

What happens to your feedback?

We'll use your feedback to help advise the Government on how notification requirements under the Privacy Act should be changed.

We intend to release a summary of the feedback received, along with a copy of it, once the Government has considered our advice and made decisions. Your responses will be anonymised, and no names of individuals will be identified. If you do not want us to release any information in your feedback, please state this clearly when you send it to us and explain why.

We may need to release your information under the Official Information Act 1982

We may also release your feedback after an Official Information Act 1982 (OIA) request. We can withhold personal details under the OIA, including your name and address.

If you do not want us to release any information in your feedback, please state this clearly when you send it to us and explain why. For example, some information may be commercially sensitive or personal. We'll take your views into account when we respond to OIA requests.

Any personal information you supply when making your feedback will be used by us only in relation to the matters covered in this document.

²The Law Commission also considered these risks in its 2011 review of the Privacy Act 1993.

Privacy - you can access and correct your personal information

The Privacy Act 2020 governs how we collect and use your personal information. You have the right to access and correct your personal information.

You can read the Ministry's privacy policy [here](#).

Your views are important; please get in touch. Email your feedback to privacyfeedback@justice.govt.nz or post it to: Electoral and Constitutional, Ministry of Justice, PO Box 180, Wellington 6140.

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