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30 September 2022

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Electoral and Constitutional
Ministry of Justice – Te Tāhū o te Ture

Dear Madam/Sir,

Submission on Broadening the Privacy Act's notification rules

Thank you for the opportunity to submit on the Ministry of Justice's – Te Tāhū o te Ture (**MOJ's**) 'Possible changes to notification rules under the Privacy Act 2020' Engagement Document (**Engagement Document**).

By way of background, the Insurance Council of New Zealand - Te Kāhui Inihua o Aotearoa (**ICNZ's**) members are general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand assets and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as Product and Public Liability, Business Interruption, Professional Indemnity, Commercial Property and Directors' and Officers' insurance).

Please contact Jane Brown (jane@icnz.org.nz) if you have any questions about our submission or require further information.

This submission has two parts:

- overarching comments, and
- responses to the questions in the Engagement Document.

Overarching comments

ICNZ understands from speaking with MOJ that this consultation has arisen in response to the EU Commission's review of Aotearoa New Zealand's adequacy status. We are supportive of Aotearoa retaining its adequacy status and recognise that this is a valuable tool for those entities doing business in the European Union. We also appreciate that while there is an apparent gap in the legislation at present where personal information is collected indirectly, in the majority of these situations the individual will have provided a general waiver for the agency to collect their information from third parties, which will include how their information will be used and shared.

In considering changes to the Privacy Act, which we understand is Parliament's intention, it is imperative that any future notification obligations do not become unduly onerous for the notifying agency, or so overwhelming for an individual as to lose their effectiveness, with the result that the individual is no better informed of their privacy rights or suffers from notification fatigue. This may require finding an appropriate balance, for example by only implementing this expectation for instances in which the customer does not already have the information.

The MOJ must also appreciate the potential administrative burden in complying with any proposed change to the law, and that implementing the necessary changes will likely be costly, a cost that would inevitably end up being passed onto consumers. Insurers collect information from many sources when taking out cover, deciding whether or not to accept a risk and on what terms, as well as at claim time where many parties can be involved. This includes collection from other individuals, third party databases such as the NZTA's Motor Vehicle Register and the Insurance Claims Register, from repairers and suppliers, government agencies such as the New Zealand Police, and from other insurers. The impact of the proposed changes is therefore potentially significant for the general insurance sector.

Given this and recognising the high level at which the options have been framed in the consultation, ICNZ seeks further engagement from MOJ during its development of a preferred option (in advance of any legislation being introduced to Parliament), so as to ensure that whichever option is progressed is workable for the general insurance sector and its many customers.

Responses to the questions in the Engagement Document

The following section sets out ICNZ's responses to the questions set out in the Engagement Document.

Question 1.

What factors do you think are most important when considering changes to indirect collection of personal information?

Broadly, we believe that any changes need to specifically address circumstances where harm to individuals from the gap in the current notification regime could occur, and not introduce wide sweeping changes. Introducing wide sweeping changes has a high risk of creating unintended consequences or significantly increased compliance costs for businesses where there is nil to low levels of harm to the individual arising from a lack of notification of indirect collection.

Other important factors that must be considered include:

- Considering whether "blanket/general" notification to customers via existing privacy statements (and in the case of insurers, policy wordings) will suffice, or whether there will need to be specific notification each time a third party provides an individual's personal information, and if so, how that notification would need to be made.
- To ensure only instances of high risk or potential harm are captured, consideration should be given to ensuring the existing manner in which IPPs 2, 3 and 11 operate remains unaffected (aside from the amendment to address indirect collection notification) and New Zealand agencies are able to continue collecting personal information in largely the same manner as they do currently, without creating excessively onerous and costly compliance obligations.

- Avoiding notification fatigue for individuals which would dilute, if not erase, any benefit associated with the notification.
- Noting that for some agencies, such as insurers, who regularly collect from and share information with third parties, there is a risk that increased compliance costs will be passed onto consumers.
- Ensuring there is clarity in the definition of “indirect collection” so that agencies can appropriately scope the extent of their notification obligations. If necessary, distinguishing between indirect collection from a third party explicitly authorised by the individual (such as collection via an insurance adviser), and indirect collection through other means (such as an advertiser collecting information, as in the example used in the consultation document). It may also be appropriate for the indirect collection notification requirement to be targeted to circumstances where the indirect collection was not contemplated when the information was originally obtained.
- Considering where the onus for notification should lie (i.e., with the collecting agency or the disclosing agency), MOJ should consider:
 - Whether it is more appropriate for the collecting agency to provide notification to the individual given that they will be in a better position to explain how the information is intended to be used and how long it will be stored, how to access or correct the information, etc., however, noting this will occur after the disclosure has been made.
 - Whether the disclosing agency should have the obligation to notify the individual as they are likely to have an existing relationship with the individual and the notification could occur before the disclosure is made.
 - In either case, practicalities, avoiding duplicate notification in relation to the same use and notification fatigue, and compliance costs should be carefully considered.
- Whether, in broadening the notification requirement, there should also be notification exceptions introduced for agencies around indirect information that is collected for a lawful purpose connected with the agency’s functions or activities, and the information is necessary for that purpose. In many cases collection of personal information is clearly envisaged and expected by the individual in the context of the transaction they are conducting and therefore any changes to the legislation which affect these scenarios are unlikely to benefit either individuals or agencies. For example, in the case of a consumer purchasing an insurance policy, it is made clear during that process that information will be collected by an insurer as necessary to issue and manage the policy, and to process claims.
- Consideration of what should happen if the personal information is sourced indirectly from a commercial or government source which is not a publicly available source. For example, use of credit agency or ownership verification information. It will be important to consider in advance how this can be practically managed by agencies and in a manner that does not jeopardise the other IPP in the Privacy Act.
- Ensuring that any changes allow for a complex and diverse range of business models.
- Allowing an appropriate timeframe for entities to implement changes, and avoiding legislative changes having any retrospective impacts.

Question 2.

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

ICNZ sees the following potential advantages for individuals and agencies in broadening the notifications:

- Broadening the notification requirements in the way identified by MOJ, could be beneficial for individuals in circumstances where their information has been collected when they would not have expected or previously consented to this occurring.
- Consumers would also be better empowered to be proactive custodians of their own data and have greater transparency around use of personal information.
- There would be an obvious benefit for New Zealand businesses if changing the law means retaining our adequacy status in the EU.

There are also serious disadvantages to be considered before any law change. These include:

- Notification fatigue: depending on how the changes are worded, they could result in individuals becoming overloaded with notifications about the disclosure of their personal information.
- Further notification fatigue would occur if both parties had to notify an individual and on every occasion of indirect collection (as opposed to one general notification about collection, as is used by insurers at present). We would not be supportive of a law change which requires notification by both the collecting and disclosing agencies.
- Notification fatigue would be exacerbated given the number of entities insurers interact with on a daily basis to process insurance policies and claims.
- Significantly updating the existing principles could cause confusion, when at present, we believe they work well. We also note, there are existing mandatory breach notification requirements where individuals must be informed of certain issues relating to breaches of the Privacy Act irrespective of whether they had been informed of collection or disclosure at the time it is occurring.
- Compliance with the law change could potentially slow down agencies' processes – if agencies need to dedicate a larger portion of time to notifying individuals about indirect information collection, they may not then be able to service their needs in other ways. There would also be an education component to the change – consumers would need to be educated about the change and what it means before they would understand why agencies were requiring additional consents or other actions from them. For example, failure to inform consumers of any changes could lead to frustrations about additional time delays when processing customer requests.
- In an insurance setting, changing the law could lead to increased compliance costs with little benefit to insureds (i.e. they will be told what they already know, that the broker has disclosed their personal information to insurers for the purposes of placing their insurance or processing a claim or an insurer has provided their information to a supplier),¹ costly change to business practices, subsequent increased costs for consumers, and difficulties of notifying individuals with whom an agency does not have direct contact.
- Broadening the notification requirement may give individuals greater awareness of their privacy rights without any real way to exercise those rights (i.e., correction, deletion, or supply of information) or to fully understand what information is being collected/disclosed via indirect means.
- Compliance with this law may risk infringing on that under the Unsolicited Electronic Messages Act 2007 if it is the collecting agency that is responsible for notification. It is

¹ There are a number of commonly used distribution channels used by insurers in Aotearoa New Zealand, including direct channels (where a consumer purchases a policy directly from an insurer) and intermediated channels (where a consumer uses a broker or other intermediary to place their insurance). When a broker is used, they act as the agent for the insured and will pass information onto the insurer for underwriting purposes.

possible that, depending on the type of information, they do not have an existing relationship with the individual and the individual has therefore not consented to receiving communication from the collecting agency.

- Agencies would likely have to work through the detail of numerous different “indirectly sourced” scenarios to determine whether notification is required, and how and when it should take place. This process, along with the necessary system changes already noted above, will likely be time consuming and resource intensive. A long lead time for implementation will be required.

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.

It is not possible to provide detailed comments on proposed changes, or identify a preferred option, without further detail of how any proposed changes would be designed. However, we set out some initial comments on each of the proposals in the table below.

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|---|---|
| Option 1 (amendment to IPP 3) | <ul style="list-style-type: none"> • IPP 3 feels like a natural fit around notification of collection of personal information from individuals. • Agencies should easily be able to incorporate any notification requirements within existing privacy statements/notices/processes, if a blanket approach is deemed acceptable and the indirect collection notification requirement applies only where the indirect collection was not contemplated when the information was originally obtained (although related to the purposes of the initial collection). • Broadening the existing IPP 3 would considerably reduce the cost associated with updating artefacts for businesses and thus make compliance more viable. |
| Option 2 (amendment to IPP 2 or IPP 11) | <ul style="list-style-type: none"> • Amending IPP 11 to require notification of disclosure would be a plausible option for change. However, the cost and effort of practically applying this for agencies would be larger and more disruptive than the other options, unless a blanket notification approach is permitted to cover the fact disclosures occur (indirectly to third parties) and customers consent to this as a whole. • It seems practical for the central obligation to notify if data is collected indirectly to sit with the disclosing agency. The disclosing agency should already have mechanisms in place to notify an individual if required, such as for a breach, and they have the immediate control and accountability regarding whether the indirect provision of the information should even take place. • It is otherwise not possible to comment on proposed amendments to IPP 2 without more detail as to how the exception will be narrowed. |
| Option 3 (new IPP) | <ul style="list-style-type: none"> • While all options would necessitate change, option 3 in particular would necessitate the most internal change and resource to reflect an entirely new principle (i.e., communications, training, updating documentation and privacy compliance processes, etc.). • However, this option could also be specifically written to cater for requirements on collecting information from external sources, by increasing requirements to declare upfront to a customer on what the details will be used for or by enhancing the current privacy statements on companies’ websites. |

In our view, whichever proposal is advanced, it must ensure that the existing collection and disclosure principles remain intact so far as possible. Specifically, the exceptions (such as those listed in IPP 2(2)(a)-(g) and IPP 3(2)-(4) which enable collection or disclosure to occur must continue to be available for agencies to rely on. There is no clear benefit for individuals that would be achieved by removing many of these exceptions which are regularly relied on by agencies to operate. For example, under IPP 3(4)(a), if there is no prejudice to the interests of an individual, then arguably, there would be no benefit in notifying them of collection of the information.

Question 4.

If you are a New Zealand business, are there any practical implementation issues you can identify in complying with the proposed changes?

ICNZ has identified a number of issues that would arise in having to comply with the proposed changes. Firstly, a change to ensure all individuals are aware of exactly who their information is shared with comes with significant downsides for both the individual and insurer. Insurers regularly collect information from other parties (such as where a policy is in joint names) and regularly collect information at claim time from other parties (such as from other drivers in motor vehicle claims, and from suppliers, repairs, etc). We believe that the compliance and time involved to comply with the requirements would outweigh any benefits and negatively impact the overall customer experience if the proposed changes are poorly designed.

With regards to intermediated and brokered insurance business, in most cases the insurer will not have direct contact with many of their customers, and in fact can be contractually restricted from making contact with their customers, with all contact instead going through the broker, distributor, or other intermediaries. Based on this, it is unclear how any of the proposed changes would operate other than a provision for the intermediated or broker party to notify the individual that their personal information will be provided to the insurer and why.

Implementing changes to the legislation will require changes to computer systems, websites and claim forms, and training material, etc. This would come at a cost, and note that this has already been done recently, following the passage of the Privacy Act 2020. Additionally, due to some processes and operations being automated/system generated, implementation would likely require significant time and effort. Insurers would also have to install processes to identify, manage and track third party sources of indirect collection to ensure a clear picture is provided and then use that information to determine how and when notification would be carried out (if that level of detail is not prescribed by legislation). We would therefore urge MOJ to carefully consider each option as well as the inclusion of a reasonable grace period to minimise impacts on business operations whilst implementing any new requirements, when finalising the proposals.

ICNZ has identified a number of implementation issues specifically arising in the insurance context, but which may also affect other agencies. Firstly, should it be necessary for insurers to contact non-customers/third parties individually to provide them notice (for example, in relation to information collected following a motor vehicle collision), then a range of practical challenges could arise. These include:

- An inability to issue notice to the person as their current contact details are not known. This then raises the question of how long the notice must be put on hold and what happens to the information that has been collected.
- What happens in those instances where a non-delivery notice is received.

- The content of the notices. For example, whether the notification itself should contain the information required under the law, or whether it is simply intended as an explanation of what it is.
- Whether it is intended that there will be a standard format or minimum standards for the notice.
- For tip-offs (for example, relating to fraud), whether notification risks identifying the informant, and if so, how notification should be provided to prevent identification of an informant, which might dissuade further tip-offs being made in future.

Secondly, in terms of how notification is made, if notification were to be made via email, as an example, we foresee a number of issues, including:

- Notifications potentially being caught by spam email filters, particularly if notices are sent out in bulk lots.
- The potential that notification could create a privacy breach in some situations. For example, if notification is sent to a work email address that the individual's employer is entitled to access.
- Notifications with large file sizes, although rare, could be too large to send via the email system.
- Not everyone has access to email and some digitally vulnerable people or people with lower technological competency may seek assistance from other people, who may then receive the notification, rather than the individual it should be sent to, creating a breach.

The extent of implementation issues will also depend on the position the MOJ reaches on the use of general, as opposed to specific, notification to consumers. Insurers already include privacy statements that an insured must agree to, informing them that the insurer will collect information from other parties as part of their processes. If the use of statements such as these will satisfy changes to the legislation, then implementation would not be so onerous. However, if, despite the existence of these statements, insurers must also notify an insured each time they collect information from a different third party, this would significantly complicate implementation. From discussion with MOJ, we understand that there has not yet been a view reached on this point about use of general privacy statements. It will be important for MOJ to state their position on general privacy statements in order for submitters to provide the most informed feedback on the proposed changes to the law going forward. We note that for the purposes of GDPR privacy notices and privacy statements are essentially interchangeable and therefore, we would hope that MOJ would consider that transparency within a privacy statement would satisfy any notification requirements.

Finally, we question what MOJ's expectations would be in relation to personal information that has already been collected via a third party prior to any legislation change. We presume that there would not be any requirement to retrospectively communicate that that information had been collected (should Option 2 be the one that is advanced).

Question 5.

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

ICNZ has identified two further risks specific to the insurance industry that we raise for the MOJ's consideration. Firstly, introducing a new privacy principle to deal with indirect collection of personal information would create complexities for the insurance industry (and likely many others) where

information may be collected either directly or indirectly depending on how the individual chooses to interact with an agency. In practice this will create practical difficulties leading to excessive compliance/administrative obligations to manage two different sets of requirements.

Secondly, any change to the legislation would require significant changes to the dominant business model in the insurance industry, which will be costly. These costs would inevitably be pushed down to consumers by way of increased premiums at a time when there is already significant regulatory review underway that will mean the insurance industry must review policies and processes² (and, as noted in response to question four, very soon after the review that was required in response to the 2020 Privacy Act changes). Inflation and global economic pressures also mean that costs are rising across all areas of an insurer's business which is then reflected in the premiums being charged to consumers. We do not believe that the options in the Engagement Document propose positive changes for individuals or insurers.

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?

ICNZ believes that any proposed changes should apply to personal information from both individuals overseas and in Aotearoa New Zealand as this would minimise additional complexities and the potential creation of differing compliance approaches across a customer base. In practice it would be difficult for many agencies to identify which individuals it interacts with may be based overseas at a particular time, depending on how often they interact and how regularly they update their details (such as their residential address) with the agency. This is likely to create situations where agencies inadvertently become non-compliant, a situation that would be difficult for agencies to rectify until after a compliance breach has already occurred.

In relation to the potential cost of implementing any change, it should be noted that many insurers will already indirectly collect personal information relating to individuals both here and overseas, (for example, because an overseas resident insures a house they own in Aotearoa New Zealand with an insurer domiciled locally). Therefore, limiting the application of the proposed changes to personal information collected from individuals in Aotearoa New Zealand would not address the significant increase in compliance costs and impact on standard business practices and models in the insurance industry.

Question 7.

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

We believe that if these proposals are advanced, in whichever form, the legislation should also be amended to provide an exception to an indirect notification requirement when the individual concerned already has the information that the agency is required to provide under the Privacy Act (i.e. the information required under IPP 3).

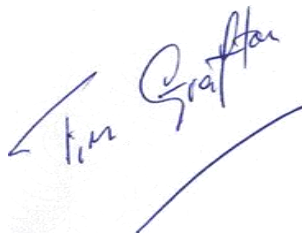
² For example, the Financial Markets (Conduct of Institutions) Amendment Act 2022, Natural Hazards Insurance Bill 2022 and yet-to-be-introduced Insurance Contracts Bill will require time consuming and costly reviews of products, systems and processes for insurers. ICNZ has previously advocated for the commencement periods of these pieces of legislation to either align, or be separated significantly in time so that the implementation periods do not overlap.

Finally, while ICNZ supports privacy transparency and providing individuals with clear and concise information about what agencies do with individuals' personal information, we again stress that any law change in this area must be afforded careful consideration to ensure that the privacy benefits it provides are not outweighed by the creation of costly and onerous compliance obligations.

Conclusion

Thank you again for the opportunity to submit on this matter. If you have any questions about our feedback, please contact our General Counsel by emailing jane@icnz.org.nz.

Yours sincerely,

A handwritten signature in blue ink that reads "Tim Grafton". The signature is written in a cursive style and is positioned above a horizontal line.

Tim Grafton
Chief Executive

A handwritten signature in blue ink that reads "Jane Brown". The signature is written in a cursive style and is positioned above a horizontal line.

Jane Brown
General Counsel