

# Privacy Amendment Bill

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Submission of the New Zealand Law Society Te Kāhui  
Ture o Aotearoa

13 June 2024

## 1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Privacy Amendment Bill (**Bill**).
- 1.2 The Law Society supports the continued passage of this Bill. This submission highlights some drafting improvements, practical workability concerns, and considerations the Law Society considers should be addressed before the Bill is passed.
- 1.3 This submission has been prepared with assistance from the Law Society's Human Rights and Privacy Committee.<sup>1</sup>
- 1.4 The Law Society **wishes to be heard** in relation to this submission.

## 2 General Comment

- 2.1 The Bill aims to amend the Privacy Act 2020 (**Act**) to improve transparency around the collection of personal information by third parties. It relates to the indirect collection of personal information by an agency for which there is currently no notification requirement. The amendments will support and enhance the purpose of the Act by introducing new information privacy principle (IPP) 3A.
- 2.2 New IPP3A would import a notification obligation on an agency when it collects personal information indirectly.
- 2.3 Whilst the Law Society supports the intent of the Bill, we note that practically the proposed amendment may be a challenging obligation for agencies to fulfil.

### Connection between knowledge and control

- 2.4 The notification requirement will assist individuals in exercising their existing privacy rights, but we note that it does not extend to provide a right to request erasure/restriction of processing as included in the General Data Protection Regulations. The Law Society recommends further policy work to consider whether this should form a part of the privacy regime in Aotearoa New Zealand.
- 2.5 Further, we note that with the proposed amendment comes a risk of notification fatigue that may make it difficult for agencies to ensure that individuals engage meaningfully with the notifications they receive.

## 3 Part 1 - New Information Privacy Principle 3A

- 3.1 Clause 4 amends section 22 of the Act to include new IPP3A. This will require an agency collecting personal information from a source other than from the individual the information is about directly (indirect collection) to take reasonable steps to notify the individual concerned.
- 3.2 The requirement includes ensuring the individual is aware not only of the fact of collection but also the purpose of collection, the intended recipients of the information, the name and address of the agency that collected and is holding the information, the law that authorises or requires the collection, and the rights of access to and correction of the information.

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<sup>1</sup> More information on the Law Society's Human Rights and Privacy Committee can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/human-rights-and-privacy-committee/>

## Exceptions

- 3.3 The proposed exceptions are unclear and do not cover relevant scenarios where an agency legitimately collects information indirectly and a notification requirement would interfere with the intended purpose of the collection. The Law Society suggests further consideration of the clarity and suitability of exceptions is needed, as discussed below.

### Compliance not reasonably practicable

- 3.4 In this exception, an agency is not required to comply with the notification requirements where it believes, on reasonable grounds, that compliance is not reasonably practicable.
- 3.5 Given the practicality issues outlined above, the broad scope of this exclusion, without further guidance, creates a real risk the exception will be used improperly as a loophole or default, to avoid compliance.

### Individual has previously been made aware

- 3.6 It is unclear in what circumstances the criteria for this exception would be met. It could be problematic if an individual was informed about the agency's collection of the information a long time ago, or where the collection was in relation to a different purpose.
- 3.7 The Law Society suggests amendment of the wording of clause 4(3) to align with the wording used in IPP3(3) narrowing the relevant timeframe for this exception to a "recent previous occasion".

### Health and Safety

- 3.8 Clause 4 provides at IPP3A(4)(h)(i) an example where disclosure of personal information about an individual who has a contagious disease would not need to be made if the agency reasonably believed compliance would cause a serious threat to public health or safety.
- 3.9 This example is confusing. The obligation under IPP3A(2) is to comply 'as soon as is reasonably practicable'. The agency would not be required to prioritise notification if that was to the detriment of containing the spread of disease. It could do so once it was "reasonably practicable", after taking the required immediate action to contain spread. In any case, this appears to be the type of information that an agency may want to disclose if there was a significant health risk to help to reduce spread. If it were not practicable to notify the individual about the collection of their personal information, IPP3A(4)(e) would apply.
- 3.10 Further, where agency C is a health sector agency, the example would be covered by the Health Information Privacy Code.
- 3.11 The Law Society considers the example lacks clarity and is potentially not what is intended to be covered by IPP3A(4)(h)(i). We recommend that it be removed.

### Other scenarios where an exception should be considered

#### *Confidential relationships/detriment to the discloser*

- 3.12 In some situations, an agency may indirectly collect personal information, and the requirement to notify the person whose information is collected could interfere with confidentiality obligations in relation to the information or could harm the person providing the information or an individual to whom the information relates. In these cases, it is not always clear whether an exception applies.

3.13 For example, professional advisors regularly collect information from clients about third parties. While some of these groups (such as lawyers) have an obligation of confidence set out in regulation which would mean the lawyer does not need to make an IPP3A disclosure due to the application of s24(2) of the Privacy Act, this will not always be true of all such advisors. In some cases, the 'prejudice the purpose of collection' exception or the 'serious threat' exception may apply, but these would need to be assessed on a case-by-case basis and presumably would apply based on the nature of the *information* not the nature of the relationship between advisor and client. We query whether this was intended. If a professional advisor is not able to provide confidentiality assurances to their client, this may deter the client from speaking candidly, or the advisor from being willing to probe for further information. There are many situations where the interests of the discloser could be undermined by third party disclosure without meeting the serious threat threshold.

3.14 We suggest a further exception or exceptions are needed to (a) capture information that is subject to an obligation of confidence and/or privilege and (b) capture information where disclosure to the third party would be to the detriment of the discloser.

#### 4 Requests for personal information after IPP3A disclosure is made

4.1 IPP3A requires the agency to disclose the fact and purpose of collection to the third party, not the information itself. There is a realistic prospect that many individuals notified under IPP3A will then request access to that personal information as they are entitled to do under IPP6. As currently drafted, not all of the grounds for refusing access to personal information under sections 49 to 53 of the Act are reflected in exceptions to IPP3A.

4.2 This may have the consequence of an individual being made aware of the existence of information about them, pursuant to IPP3A, but then being refused access to that information under a specified ground in Part 4. We query whether this is intended, and note it is likely to cause frustration or stress for notified individuals.

4.3 The Law Society recommends that consideration is given to aligning the exceptions provided in IPP3A with the grounds for withholding information in Part 4 of the Act. We note, however, that some of the grounds provided in section 53 would not be relevant.



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