

REGULATORY IMPACT STATEMENT

Information sharing amendments to the Privacy Act 1993

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice.

It provides an analysis of options to improve the sharing and use of personal information – that is information about an identifiable individual – under the Privacy Act 1993. Uncertainty around sharing personal information has led to inefficiencies and caused agencies to miss opportunities to deliver better services. The objectives in addressing these problems are to:

- facilitate information sharing where that would have high net benefits
- ensure that individual privacy receives appropriate levels of protection
- increase agencies' certainty around information sharing.

There are some constraints on the analysis in this RIS.

- Personal information is also shared and used under legislation other than the Privacy Act. The scope of potential reform is limited to the Privacy Act.
- The analysis undertaken is qualitative and considers the benefits and risks of the status quo and the options. Expected outcomes cannot be reliably predicted or quantified. Each option, if adopted, would widen agencies' opportunities to share personal information but outcomes depend on what agencies choose to do with these opportunities.
- The options considered align with options proposed or considered by the Law Commission as part of its review of the law of privacy and by an inter-departmental working group on information sharing (consisting of representatives from State Services Commission (convenor), the Ministry of Social Development, the Inland Revenue Department, the Department of Internal Affairs and the Office of the Privacy Commissioner).

None of the options considered are likely to impose additional costs on businesses, impair private property rights, market competition or the incentives on businesses to innovate or invest, or overrides fundamental common law principles.

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Information sharing amendments to the Privacy Act 1993

The status quo and problem definition

- 1 Information sharing is the disclosure of information about an identifiable individual by one agency to another. Information sharing contributes to a better, smarter public service but needs to be carried out with appropriate respect for personal privacy.
- 2 Currently, agencies are able to, and do, share personal information under the Privacy Act 1993. Information can be shared for the purpose for which it was collected, under a specific exception (for example for health and safety), for law enforcement purposes, under a Code of Practice (for example, the Health Information Privacy Code), or with an authorisation from the Privacy Commissioner. Some agencies also operate under Acts with their own information sharing provisions. Public sector service delivery is moving towards better interaction with citizens and better use of community, local government and private sector providers.
- 3 However, the Privacy Act is not as clear as it could be about when and how personal information can be shared. For instance, the information privacy principles and their exceptions are expressed in broad, open-ended terms and are therefore open to differing interpretations. This has sometimes led to disagreements between agencies about when information sharing is permissible. There are also views that the Privacy Act makes sharing information inefficient or does not permit enough information to be shared in justifiable cases.
- 4 Agencies need greater certainty.
- 5 Non-legislative factors also contribute to concerns about the status quo. For example, codes of ethics or professional standards may be developed with a focus on confidentiality and may provide disincentives for public service providers to share information. There also may be information technology barriers. Further, some agencies may lack the resources to respond to requests for information from other agencies. There is also the concern that sharing information with other agencies may undermine trusting relationships with clients or discourage clients from providing complete and accurate information in the future.
- 6 The perceived concerns about the current information sharing mechanisms in the Privacy Act are explained by a mixture of factors: a lack of understanding of the Act; fear of breaching the law; unwillingness to make judgements in a particular case; and agencies assigning different weights to privacy and competing interests.
- 7 Maintaining the status quo has the following associated costs:
 - the duplication of information collection and storage increases the information handling costs for government agencies, individuals, and community, local government and private sector providers
 - some personal information is not being shared that would speed up the detection of fraud and deter fraudulent behaviour

- data matching under the Act is quite prescriptive and as a result is more time consuming and resource intensive than is necessary
 - the ability of agencies to take a coordinated approach to support individuals and families with complex needs is not as effective as it could be if information were shared more easily
 - the violent abuse of a young child is sometimes blamed on inadequate coordination which draws attention to the lack of information sharing.¹ (The issues here are complex. However, better information sharing is likely to improve the Government's ability to respond to an abuse case.)
- 8 The status quo has also been criticised for lack of transparency. There is no one place which gives a full picture of information sharing across government.
- 9 There are, nevertheless, some benefits associated with maintaining the status quo. These include:
- Current privacy protections contribute to the high level of trust and confidence in government.
 - Transmitting and understanding personal information is itself a costly activity (for example it may require specialised information technology to transmit and receive, or training to understand information coming from outside the agency that produced it). Where information sharing does not take place, this cost is avoided.
 - New Zealand's privacy laws are in the process of being evaluated against the European Union privacy standards. A positive determination is expected and this will benefit New Zealand firms doing business in Europe.

Objectives

- 10 In identifying options, the Ministry has identified three objectives for improving information sharing:
- Facilitate information sharing where that would have high net benefits.
 - Ensure that individual privacy receives appropriate levels of protection.
 - Increase agencies' certainty around information sharing.

Regulatory impact analysis

- 11 The Ministry of Justice has identified two practical options that meet these objectives. Both options would amend the Privacy Act. These options are:
- a mechanism allowing for the approval of Information Sharing Agreements
 - a broad information sharing enabling provision.

¹ See Marie Connolly and Mike Doolan, *Responding to the Deaths of Children Known to Child Protection Agencies*, Social Policy Journal of New Zealand, Issue 30, (March 2007).

Option One – Information Sharing Agreements

- 12 Under this option, the Privacy Act would be amended to make provision for the approval of agreements for the sharing of personal information between agencies. This mechanism will not replace the existing mechanisms in the Act but will provide another way for agencies to share information.
- 13 The amendment would set out the process of drawing up an agreement which would involve consultation with the Privacy Commissioner and other relevant persons and would culminate in approval by Order in Council. The amendment would also specify the criteria for approval, including the matters that need to be covered in the agreements and general rules for the operation of such agreements (including appropriate safeguards, transparency provisions and accountability mechanisms).
- 14 The proposed mechanism would allow an agency to share personal information amongst the various parts of the agency and with non-government organisations.
- 15 There will be safeguards to ensure that agreements do not undermine privacy expectations. These include the need to notify the person concerned before adverse action is taken, annual reporting for significant information sharing, the ability to complain to the Privacy Commissioner and the potential disallowance of agreements.
- 16 This option is closely aligned with the Law Commission's proposal on information sharing² and a proposal by an inter-departmental working group on information sharing (consisting of representatives from State Services Commission (convenor), the Ministry of Social Development, the Inland Revenue Department, the Department of Internal Affairs and the Office of the Privacy Commissioner).³

Analysis of option one

- 17 This option opens up an opportunity for agencies to share information in a way that increases efficiency and results in better service delivery.
- 18 The proposed mechanism will promote consideration about when sharing of information should occur and whether or not it is desirable. It will be flexible enough to provide a greater level of scrutiny required for instances of sharing information where there is a greater level of risk.
- 19 In this regard, the proposed safeguards that will be built into the new mechanism will ensure that individual privacy receives appropriate levels of protection. The risks and solutions associated with sharing programmes will be identified in each agreement. The parties to an agreement will also have increased certainty around what information can be shared and how that information can be used.

² Since 2006, the Law Commission has been undertaking a review of New Zealand's law of privacy. Included in this review is an examination of the current process for sharing personal information between government agencies. On 29 March 2011, the Law Commission published a briefing paper outlining its information sharing proposals.

³ Information Sharing between State Service Agencies in New Zealand: Service Transformation and Information Sharing Project (10 December 2010).

- 20 This option is likely to result in data matching costs that are lower than the status quo. This is because it will provide an alternative to the current mechanisms in the Privacy Act that is simpler and more flexible. Data matching generally involves comparing personal information from one set of records against personal information from another set of records. Since data matching is a significant cost even a proportionately small reduction would result in significant saving. The Ministry of Justice has no statistics on the overall cost of data matching. However, the \$8,783,520 that the Ministry of Social Development's National Data Matching Centre spent on data matching in 2007/08 is indicative of the scale of spending on data matching.⁴ Similar savings are likely to occur under option two.
- 21 Option one is the Ministry's preferred option.

Option Two — Broad enabling provision

- 22 Under this option, a broad provision would be added to the Privacy Act authorising any information sharing between government agencies, and where they are carrying out a public function, between agencies and non-government organisations. Effectively this would mean that agencies would have discretion to share information. The provision could include safeguards, which could for example be similar to those under the Canadian Federal Privacy Act.
- 23 The Canadian Federal Privacy Act provides for a broad enabling power which permits government institutions in Canada to disclose personal information, without the consent of the individual concerned, for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy, or disclosure would clearly benefit the individual. The Privacy Commissioner must be notified of any disclosure under this provision and can notify the individual concerned if appropriate.

Analysis of option two

- 24 This option would be highly enabling and flexible, and would remove confusion about what is allowed. It would therefore be accompanied by modest lower compliance costs.
- 25 However, agencies would be provided with little guidance about how to take into account privacy considerations before sharing information. It is unlikely to increase certainty. The experience in Alberta, Canada, appears to be that even though a broad enabling provision exists, in practice agencies develop agreements and seek guidance on how to use the power.
- 26 Without a clear approval mechanism set out in primary legislation, information sharing under this option would be under-regulated and the sharing of bulk personal information by multiple agencies would present opportunities for misuse. It is also likely to generate fear that personal information provided to one agency would automatically be available across the board to other agencies. This in turn would not enhance and may actually erode public confidence. This is a concern as the loss of trust in Government would result in the supply of less and lower quality information in the future.
- 27 A broad enabling provision, because it lowers privacy protections, could also jeopardise the position of firms doing business in Europe. New Zealand's

⁴ Annual Report of the Privacy Commissioner 2008, at 52.

privacy laws are in the process of being assessed by the European Union to determine whether they meet its privacy standards. If they do – as is expected – then firms doing business in Europe will be able to avoid compliance costs associated with showing that they have adequate privacy protections in place to protect the information they are dealing with. A final determination in New Zealand’s favour may be put at risk if changes to New Zealand privacy law could be said to fall below the recognised European Union standard against which we are being judged.

28 This is not the Ministry’s preferred option.

Consultation

29 The following agencies have been consulted on this paper: Departments of Building and Housing, Conservation, Corrections, Inland Revenue, Internal Affairs, and Labour, Ministries of Agriculture and Forestry, Culture and Heritage, Education, Economic Development, Fisheries, Foreign Affairs and Trade, Health, Pacific Island Affairs, Social Development, and Transport, Accident Compensation Corporation, Child, Youth and Family, Civil Aviation Authority, Housing New Zealand, New Zealand Customs, New Zealand Police, New Zealand Security Intelligence Service, New Zealand Transport Agency, Serious Fraud Office, State Services Commission, Statistics New Zealand, Te Puni Kokiri, and Treasury, as well as the Law Commission, Office of the Privacy Commissioner, and Office of the Children’s Commissioner. The Parliamentary Counsel Office, Crown Law Office, and the Department of the Prime Minister and Cabinet have been informed.

30 The Law Commission, as part of its privacy review, consulted with the public including non-government agencies and government agencies on the Privacy Act, including information sharing. The Law Commission provided the Ministry of Justice with copies of the written submissions it received.

31 No agency opposed option one, and many supported it. No agency supported option two.

Conclusions and recommendations

32 We recommend adopting option one: amending the Privacy Act to include a new mechanism allowing for the approval of Information Sharing Agreements.

33 Both options have advantages over the status quo. They would allow more information sharing and provide agencies with opportunities to achieve efficiencies and deliver better services. By providing a simpler more flexible alternative to the Privacy Act, both options are likely to lead to significant savings around data matching, although savings are hard to quantify.

34 Option one better satisfies the policy objectives. Option two may not ensure that individual privacy receives appropriate levels of protection and is unlikely to increase agencies’ certainty around information sharing. In addition, the broad enabling provision is unlikely to meet European Union privacy standards. This could put in jeopardy the benefits for New Zealand firms doing business in Europe that come from the European Union finding New Zealand’s privacy laws meet its privacy standards.

Implementation

- 35 The new mechanism will place pressure on the Office of the Privacy Commissioner's resources especially in the first few years of operation. These pressures cannot be met from within the Privacy Commissioner's existing baseline funding. No new funding is sought. The Ministry of Justice will consult the agencies that are likely to be major users of the new mechanism and will consider options for supporting the Office of the Privacy Commissioner, including seconding a Ministry of Justice staff member.
- 36 Some of the pressure on the Commissioner will be relieved by the development of guidance and templates as this will improve the quality of draft information sharing agreements that the Commissioner will review.
- 37 There will be costs for agencies to set up information sharing agreements. It is not anticipated that agencies will seek additional funding for this purpose.

Monitoring, evaluation and review

- 38 The Ministry of Justice will review and evaluate the mechanism to share information after five years of operation.