

Privacy Act Reform Regulatory Impact Statement #1

AGENCY DISCLOSURE STATEMENT

1. This Regulatory Impact Statement was prepared by the Ministry of Justice.
2. In 2006, in response to growing concerns that the Privacy Act 1993 (the Act) was no longer fit for purpose, the Government referred a review of privacy to the Law Commission. The Law Commission's report was completed and tabled in the House in August 2011.
3. That report, and operational reviews completed by the Privacy Commissioner confirm that changes to the Act are necessary in response to advances in technology, modern communications, and means of information exchange. In addition, amendments are necessary to reduce uncertainty, and make the Act easier to navigate. The Privacy (Information Sharing) Bill currently before the Justice and Electoral Select Committee addresses the most immediate area of need – improving Government efficiency, and effectiveness.
4. The Ministry has investigated the options for addressing the balance of the Law Commission's recommendations, which the Government must respond to by 27 March 2012. The Ministry's investigations confirm that the Law Commission's recommendations are generally sound, although some further work is underway to identify the risks and benefits in some areas. A separate RIS for these issues will be prepared in due course.
5. The analysis of the options considered in the current tranche of reforms has been constrained by a lack of empirical evidence on the direct and indirect economic costs on individuals, business and Government of current privacy law settings. However, those costs, and the estimated costs and benefits of the options analysed, take into account the detailed evidence presented to the Law Commission during its in-depth review of the Act.
6. The proposed reform involves a repeal and re-enactment of the Privacy Act, drawing on the Law Commission's recommendations, supplemented by additional proposals to improve the structure of the Act and to facilitate information sharing.
7. The preferred option will not impair private property rights, market competition, incentives on businesses to innovate and invest, or override any fundamental common law principles.
8. The preferred option is consistent with our commitments in the Government statement *Better Regulation, Less Regulation*.

Malcolm Luey, General Manager, Crime Prevention and Criminal Justice

STATUS QUO AND PROBLEM DEFINITION

9. The Privacy Act 1993 (the Act) regulates what can be done with information about individuals primarily by using 12 information privacy principles. The principles govern personal information throughout its lifecycle, from collection to destruction.
10. The Act is based on the OECD privacy principles and is similar to legislation in the European Union, Canada, Australia, and Hong Kong (the OECD principles approach). Overall, the OECD principles approach works well in New Zealand. The OECD principles approach gives agencies the flexibility to apply to the law in a wide variety of situations.

Problem

11. The flexibility of the OECD principles approach, coupled with the confusing structure of the Act can create uncertainty, and lead to risk-averse interpretations of the law. This means government and private sector agencies fail to use, disclose or share information in situations where this would be desirable.
12. The technical and structural issues that make the Act difficult to navigate and understand create a perception (and possibly a reality) that the Act is a barrier to information sharing and innovation.
13. There is a concern that the Act has gaps arising from technological advances over the last 20 years. For example, the de-facto safeguard on the transfer and sharing of information once stored on paper has been significantly eroded by computer technology, the Internet, and social media.
14. In addition, individuals, private sector and government agencies, and businesses that use the Act struggle to make it work in modern scenarios. This encourages “work arounds” or the development of conflicting sector- or agency-specific regulatory schemes.

Objectives

15. The preferred reform option will:
 - retain aspects of the Act that work well
 - make the Act easier to navigate and understand
 - decrease uncertainty for government, business, private sector agencies, and individuals
 - improve flexibility, and the ability to respond to ongoing technological advances
 - increase the efficiency and effectiveness of government and business privacy practices
 - maintain public confidence in the security of, and appropriate use of, personal information.

ALTERNATIVE OPTIONS

16. The options considered and their regulatory costs and benefits are summarised in the table in Appendix 1.

Option 1: Do not reform the Privacy Act 1993; consider only non-legislative options

17. Option 1 would defer a review of the Act for 5 to 10 years, and pursue non-legislative solutions in the interim. The focus would be on improving education and guidance materials that encourage pragmatic decision-making. Options to improve information sharing and enforcement will not be further explored. In essence, the status quo would be retained for the short to medium term.

Benefits

18. Maintaining the status quo would reduce the uncertainty associated with legislative change. Early, significant reform may not be enduring. Public attitudes toward privacy are changing with continuing rapid technological advances.
19. This option would avoid the direct costs new legislation may impose on taxpayers and agencies if changes operational practices and procedures are required, as is likely.
20. Further, a delay would enable New Zealand to align changes to the Act with reforms being considered by our major trading partners. Reviews of privacy law are currently underway in the European Union and Australia.

Risks

21. Education and guidance will not address the structural deficiencies and gaps in the Act. Increasing resources for education and guidance is unlikely to reduce uncertainty about the Act's application (particularly in relation to inter-agency information sharing), and about who can access personal information. The direct and indirect costs arising from the current uncertainty may increase over time.
22. Retaining the existing Act will leave in place confusing, frustrating or redundant provisions that are relatively simple to change.
23. The Law Commission's comprehensive review of the Act, and statements from the Privacy Commissioner, has generated a climate of support for legislative change. This broad-based support may dissipate if reform is delayed. A delay may also undermine business confidence, and stifle new investment.
24. There is also a risk that the Law Commission's work may go stale if reforms are delayed. Repeating the review at some time in the future would involve substantial costs.

Conclusion

25. On balance, we do not recommend this option. The benefits are outweighed by the risks of not proceeding with urgent reforms. A delay will increase costs and uncertainty.
26. Maintaining the status quo is difficult to justify in light of the Law Commission's recommendations, and the widespread acceptance that the Act is not "fit for purpose" in the modern operating environment.
27. Reform now would not preclude a future review involving the same or different aspects of privacy law.

Option 2: Make discrete amendments to the Privacy Act 1993

28. Option 2 is to retain the Act and to amend it. An amendment Bill or amendment Bills will be used to implement discrete changes.

Benefits

29. This option will facilitate incremental reform of the Act, which could help maintain broad-based support. Incremental reform will reduce implementation costs for government agencies and businesses.
30. Identifying discrete issues for reform may make it easier to secure House time to pass legislation at an early date.

Risks

31. Agencies may have different priorities, which may make it difficult to achieve consensus on which reforms to advance.
32. Enacting discrete reforms limits the opportunity to take a wider view of the scheme of the Act, and make it “fit for purpose”.
33. This option also limits the scope to address the technical and structural problems, which are arguably the major source of misinterpretation and dissatisfaction with the Act. Large numbers of ad-hoc amendments are likely to increase problems with navigating, and understanding the Act. They are also much more likely to lead to internal inconsistencies, which may require corrective legislation.

Conclusion

34. We do not support this option. If the Act is to be amended, it is preferable to do it once, and try to do it right. Cost savings associated with incremental reform are likely to be outweighed by a failure to address at a fundamental level the problems identified in the Law Commission’s report.

Option 3: A new model for privacy regulation in New Zealand

35. The option is to change the Act’s OECD principles approach, and use or design a new model. Possible alternative models for privacy regulation, each with their own risks and benefits, include:
 - Rules-based model, with detailed rules,
 - Market-based-model, with limited (or no) government oversight
 - Judicial model, along the lines of the New Zealand Bill of Rights Act 1990.

Benefits

36. A new approach will signal a break with an Act perceived to be a barrier to information sharing and innovation. It will force agencies to think about privacy law and how they apply it. Agencies would not be constrained by existing requirements, so could develop more effective and flexible practices, while maintaining public confidence in those systems.
37. A rules-based approach would provide clarity on what is and is not permitted. A “bright line” could be drawn, which would remove uncertainty.
38. A market-based model would enable agencies to tailor solutions to meet their customers’ needs and expectations. Agencies operating in similar environments would be incentivised to take privacy seriously in order to retain customers.
39. A judicial model would provide a basic framework, which would be more flexible than a rules-based model. Judges would be able to apply the framework to circumstances as they arise.

Risks

40. A shift from the OECD principles approach would make New Zealand's privacy law inconsistent with that of our major trading partners. A change of approach would therefore need to deliver clear benefits, and be implemented in a way that will not undermine our trading relationships. A particular risk of a shift from the OECD principles approach is that it could undermine New Zealand's attempts to have its privacy law certified as "adequate" for trading with businesses in the European Union.
41. A new approach will take longer to implement than the other options considered. It would increase implementation costs for agencies. The size of the increase is difficult to predict, but is likely to be substantial.
42. There are specific risks associated with the alternative approaches identified, for example:
 - Rules-based model: This would reduce flexibility, and may require frequent amendment. This would increase uncertainty, and costs. It may also lead to attempts to circumvent the rules, especially if gaps are identified.
 - Market-based model: The government would not have the tools to intervene in the event of a (private) market failure. The government would still require a regulatory regime for the public sector. Different rules in the public and private sector could potentially constrain government policies, such as the mixed-ownership model.
 - Judicial model: Increasing flexibility can lead to greater uncertainty. The risks of this are likely to be greater than the current OECD principles approach, simply because agencies have 20 years experience with the existing regime. The judicial-based model carries a greater risk because different courts, and different factual situations may lead to different interpretations.

Conclusion

43. The Ministry does not support this option. It is unlikely to deliver any improvements on the current regime. There are no quantifiable benefits, and clear downsides. In particular, the potential loss of access for New Zealand business seeking to trade with European Union countries cannot be overlooked.

PREFERRED OPTION: REPEAL AND REPLACE THE PRIVACY ACT 1993, BUT RETAIN A PRINCIPLES-BASED APPROACH

44. The preferred option is to repeal the Act and to replace it with a new Act, but retain a principles-based approach to the regulation of privacy. This is the option recommended by the Law Commission. It is supported by the Privacy Commissioner.

Benefits

45. This option provides the opportunity to deal with the technical and structural issues that could not realistically be expected of an amendment Act, or Acts. Difficulties with interpretation, and agencies' associated administrative and operational costs can be minimised by:
 - grouping disparate provisions
 - focusing attention on crucial provisions
 - clarifying the legal status and content of the information privacy principles
 - making better use of purpose and overview provisions.

46. This option will enable the Government to take full advantage of the significant groundwork done by the Law Commission in its review of privacy. The Government will be able to introduce significant reforms, while retaining an approach that is broadly aligned with that of our trading partners.
47. Innovation can be pursued aggressively without threatening New Zealand's status as a country with quality privacy laws. Finally, and significantly, a new Act will be a circuit breaker. It will encourage individuals, agencies and businesses to engage with privacy law, and apply it in a way that is both efficient and effective.
48. This option also has benefits for private sector agencies, which will not need to "reinvent the wheel" in terms of business systems and practices. Further, business efficiencies resulting from a modern Privacy Act that is fit for purpose should deliver savings over time.

Risks

49. This option carries with it a small risk that existing provisions that work well will be changed unintentionally resulting in unforeseen consequences.

Costs

50. Replacement of the Privacy Act may create initial "bedding in" costs for Government, business, and private sector agencies. A new Act will trigger the need for agencies to update their privacy policies, procedures and some contracts. However, we anticipate that any additional up-front costs will be offset by operational efficiencies, and greater certainty over privacy law rules.

IMPLEMENTATION AND REVIEW

51. The Ministry is currently identifying the Law Commission recommendations it believes should be implemented in a replacement Privacy Act. Some are straight forward, but some require further work to identify the full range of costs and benefits. Policy approval will be sought, and a further RIS completed before drafting instructions are issued.
52. "Bedding in" costs of a replacement Privacy Act can be mitigated by the provision of guidance and education materials.
53. The risk of making unintended changes or creating a perception that unintended changes have been made can be mitigated by allowing adequate time for public consultation through the select committee process.
54. A review of the new Act will be completed after five years.

CONSULTATION

55. The following agencies have been consulted: The Treasury, Ministry of Health, Department of Internal Affairs, Department of Corrections, Ministry of Foreign Affairs and Trade, New Zealand Police, Ministry of Agriculture and Forestry, New Zealand Customs Service, Serious Fraud Office, Department of Building and Housing, Ministry of Consumer Affairs, Department of Labour, Ministry of Education, Te Puni Kōkiri, Inland Revenue Department, New Zealand Transport Agency, Ministry of Transport, Ministry of Culture and Heritage, New Zealand Security Intelligence Service, New Zealand Defence Force, Ministry of Pacific Island Affairs, Statistics New Zealand, Ministry of Economic Development, Office of the Ombudsmen, Office of the Privacy Commissioner, Human Rights Commission, Law Commission. The Department of Prime Minister and Cabinet and the Parliamentary Counsel Office have been informed.

APPENDIX 1 – SUMMARY OF OPTIONS

Options Considered	Advantages	Disadvantages
Do not reform the Privacy Act 1993, consider only non-legislative options (not preferred)	<ul style="list-style-type: none"> • Avoids creating new problems • Reduces uncertainty associated with legislative change • Avoids legislative costs • Delay will enable alignment with potential reforms in trading partner countries 	<ul style="list-style-type: none"> • Current support for legislative change may wane • Confusing, frustrating or redundant provisions will remain • Uncertainty and conservative interpretations of the Act will remain, increasing costs over time • Delay may undermine business confidence, and stifle new investment • Law Commission's report may go stale
Amend the Privacy Act 1993 (not preferred)	<ul style="list-style-type: none"> • Incremental reform will reduce implementation costs • Identifying discrete issues may simplify legislative process 	<ul style="list-style-type: none"> • Does not address, and may increase, structural problems with the Act • Ad hoc amendments may lead to internal inconsistencies, requiring further legislation
A new model for privacy regulation in New Zealand (not preferred)	<ul style="list-style-type: none"> • Could act as a “circuit breaker” altering current uncertainty over privacy law • Agencies could develop more effective and flexible practices to meet public expectations concerning information privacy • Offers the opportunity to choose between a variety of options balancing certainty with flexibility 	<ul style="list-style-type: none"> • New Zealand's privacy law will not align with that of our major trading partners • Greatest potential for uncertainty for agencies, and the public • Long lead in time to pass legislation • Highest implementation costs
Repeal and replace the Privacy Act 1993 (preferred option)	<ul style="list-style-type: none"> • Will deal with the Acts structural issues • Interpretative difficulty can be minimised • Will result in a less confusing Act • Has broad support following the Law Commission's review • Agencies will be able to utilise / adapt existing business systems and practices 	<ul style="list-style-type: none"> • Initial “bedding in” costs • Existing provisions that work well may be unintentionally changed