



24 May 2018

S18.21

## Submission to the Justice Committee on the Privacy Bill 34-1

### 0. Introduction

- 0.1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing 245 organisations affiliated at either national level or to one of our 19 branches. In addition, about 350 people are individual members. Collectively our reach is over 350,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
- 0.2. NCWNZ is making this submission to the Justice Committee regarding the Privacy Bill 34-1 introduced by the government to replace the Privacy Act 1993. It welcomes this opportunity to comment on a Bill that addresses issues identified in the Law Commission's review of the Privacy Act, in particular Stage 4 of this review (2011). NCWNZ recognises that the updating of this legislation is long overdue in the light of changes in digital storage and electronic transmission of information.
- 0.3. NCWNZ has for some time been concerned about the need to protect the privacy of individuals and resolved in 1972 (before the Privacy Act 1993 was passed) that legislation was necessary to protect computerised personal files.<sup>1</sup> A remit passed in 1989<sup>2</sup> was critical of proposals to allocate to each person a single reference number that would be used by and be accessible to government departments and agencies. Members have also been concerned about the sharing of digitalised information without consultation with the persons concerned and, like most New Zealand citizens, have been unsettled by breaches of privacy by major government agencies.
- 0.4. Previous NCWNZ submissions relating to privacy and protection of personal information have highlighted the need for effective and carefully administered informed consent processes if personal information is to be shared between agencies. NCWNZ has also argued strongly for the need for such information to be checked by the persons concerned and strategies used to ensure that the information shared is accurate.

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<sup>1</sup> NCWNZ. 2012. 115 years of resolution. 2.7.1 (1972). <http://www.ncwnz.org.nz/wp-content/uploads/2013/06/115-years-Register-everything-2.pdf>

<sup>2</sup> Ibid. 2.7.3 (1989).

- 0.5. Current NCWNZ policy supports the protection of privacy in relation to electronic information and the upholding of Article 12 of the United Declaration of Human Rights which states that no-one should be subjected to arbitrary interference with respect to their privacy and that everyone has a right to protection of the law against such interference.<sup>3</sup>
- 0.6. This submission was prepared by the NCWNZ Public Issues Standing Committee based on policy, and previous submissions relating to issues of privacy, confidentiality and protection of personal information. It is also based on a review of the recommendations to government by the Law Commission and the Privacy Commissioner's Report to the Minister of Justice under Section 26 of the Privacy Act – Six Recommendations for Privacy Act Reform. NCWNZ strongly supported the Law Commission's review of the Privacy Act in 2009 because of "advances in technology since 1993, which make invasion of privacy much easier to perpetrate and which threaten an individual's right to respect and freedom from fear".<sup>4</sup>
- 0.7. The submission has been reviewed by the NCWNZ the Parliamentary Watch Committee and the NCWNZ CEO. The short time frame for submissions meant that it was impossible to consult with all NCWNZ branches, individual members and member organisations.

**This submission focuses on particular components of this legislation.**

- 0.8. The focus is on changes to the Privacy Act 1993, rather than re-enactments of that legislation.

## **1. PART 3 – Information privacy principles, public register privacy principles, and codes of practice**

### **Subpart 1 – Information Privacy Principles**

- 1.1. NCWNZ supports the 12 Privacy Principles that were included in the Privacy Act 1993 and re-enacted in this Bill.

#### **Clause 19 Information privacy principles Information privacy principle 3**

- 1.2. NCWNZ welcomes the removal of the earlier exemption that permitted an agency to collect information from the individual concerned without ensuring that the individual is aware of specified matters if the collection is authorised by the individual. Those from whom information is collected should in most circumstances be aware of the matters associated with the collection of that information.

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<sup>3</sup> NCWNZ. 2012. Submission to the Justice and Electoral Committee on the Privacy (Information Sharing) Bill 318-1. S12.06. <https://www.ncwnz.org.nz/wp-content/uploads/2013/06/Privacy-info-sharing-Bill-S12-06.pdf>

<sup>4</sup> NCWNZ. 2009. Submission to the Law Commission on Review of Privacy Law. S09.24. <https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S09.24-Submission-to-the-Law-Commission-on-Review-of-Privacy-Law.pdf>

#### Information privacy principle 4

- 1.3. NCWNZ supports agencies having regard to the age of the person concerned when they are collecting information.

#### Information privacy principle 11 – Sub clauses 3 – 6

- 1.4. NCWNZ supports new provisions in the legislation that impose additional obligations on agencies when disclosing personal information to an overseas person to ensure the protection of that information. This is most important in a context in which personal information is more frequently transmitted between countries. It is vital that the person concerned should know about this transmission and consent to the sharing of information and also that the person or agency receiving the information is operating in a context where the regulation of privacy is compatible with New Zealand legislation.

#### Information privacy principle IPP12

- 1.5. NCWNZ has in the past indicated concerns about the application to individuals of identifiers that are used by multiple agencies.<sup>5</sup> It supports amendments to the earlier legislation that clarifies that agencies that record a unique identifier for a person that is used by another agency should not assign that unique identifier for use in its own operations. It is also appropriate that the agency disclosing its use of a unique identifier for its operation does all it can to avoid misuse of that identifier.

#### Clause 28 Enforceability of IPPs

- 1.6. NCWNZ strongly supports the re-enactment of Clause 28 that states that, if a public sector agency holds personal information, the individual concerned has a legal right to access that information under Information Privacy Principle 6, and that right may be enforced by a court order. It is important that this right should be legally enforceable. Individuals must be able to know what personal information relating to them is held by particular agencies. In an earlier submission NCWNZ stated: “Access to the courts is a basic right and should remain as an alternative for people who for whatever reason do not obtain redress from the government system”.<sup>6</sup>

#### Subpart 3 – Codes of practice

##### Clauses 35 – 43

- 1.7. NCWNZ supports the requirement that:
- Sector specific codes of practice with respect to privacy must apply to information about deceased persons.

<sup>5</sup> NCWNZ. 2012. 115 years of resolution. 2.7.3 (1989). <http://www.ncwnz.org.nz/wp-content/uploads/2013/06/115-years-Register-everything-2.pdf>.

<sup>6</sup> NCWNZ. 2002. Submission to the Law Commission on Discussion Paper No 49 Protecting Personal Information. S02.21, p. 2. <https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S02.21-Discussion-Paper-No-49-Protection-Personal-Information.pdf>

- The Privacy Commissioner must ensure that codes of practice are available on an Internet site.

## **2. PART 4 – Access to, and correction of personal information**

### **Subpart 1 – Access to personal information**

- 2.1. NCWNZ supports this section of the Bill which largely re-enacts provisions in the Privacy Act 1993 Parts 4 and 5. It considers the rights of individuals to access information about them held by agencies is a very important human right.

### **Subpart 2 – Correction of personal information.**

- 2.2. NCWNZ considers that it is very important that individuals can check and correct personal information held about them. It supports the re-enactment of Sections 34, 37, 38, 39 of the Privacy Act 1993.

### **Clause 69 – Decision on request under IPP 7(1)(a)**

- 2.3. NCWNZ values the details of the procedure in Clause 69 that sets out how an agency is to respond to a request under IPP 7(1)(a), including the requirement that the requestor is informed of the reason and their right to complain to the Privacy Commissioner.

### **Subpart 3 – Charges**

#### **Clause 72 – Charges**

- 2.4. NCWNZ supports the retention of charges that may be imposed by a public sector agency with the authorisation of the Privacy Commissioner. It considers that the removal of the need to have the Commissioner's authorisation for charges by private sector organisations is appropriate.

## **3. PART 5 – Complaints, investigations and proceedings**

- 3.1. NCWNZ broadly supports the increased powers of the Privacy Commissioner that are included in this Part of the Bill. These increased powers are consistent with the need for streamlining of procedures identified as important in the Law Commission's review of the Privacy Act in 2011. It notes that the Law Commission was critical of the previous legislation with respect to the Privacy Commissioner being required to investigate complaints, but having no enforcement powers. These powers resided solely in the Human Rights Review Tribunal. The Law Commission identified these processes as potentially "complex and confusing", especially with respect to the necessary intervention of the Director of Human Rights Proceeding who was empowered to decide whether a case could proceed to the Human Rights Review Tribunal.<sup>7</sup>

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<sup>7</sup> Law Commission Te Aka Matua o Te Ture, 2011. *Review of the Privacy Act 1993: Review of the Law of Privacy, Stage 4.* pp. 14-16. <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R123.pdf>

- 3.2. NCWNZ considers it appropriate that the Commissioner should be able to uphold complaints and direct an agency to make information available. NCWNZ also supports the inclusion in this Bill of the power of the Commissioner to take cases to the Tribunal.

### **Subpart 1 – Complaints**

#### **Clause 77 – Who may make complaint**

- 3.3. NCWNZ supports the provision in this clause for complaints to not only be brought by individuals but also by a representative of one or more individuals. In cases where there are systemic issues relating to access to information held by agencies on sets of individuals, it is important that this type of complaint can be made.

### **Subpart 2 – Investigations by Commissioner**

#### **Clause 96 – Procedure after completion of investigation relating to breach of IPP 6**

- 3.4. For the reasons indicated above, NCWNZ supports the extension of the powers of the Commissioner to direct an agency to confirm whether it holds any specified information, or to permit the complainant access to specified information, or to make specified information available to the complainant in a particular way.

### **Subpart 3 – Proceedings before Human Rights Review Tribunal**

#### **Access orders**

#### **Clause 109 – Enforcement of direction made by Commissioner under section 96(5)(a) after investigation of IPP 6 breach**

- 3.5. NCWNZ supports the new provision in this Bill that enables an aggrieved individual to apply to the Tribunal for an access order requiring an agency to comply with a direction made by the Commissioner under Clause 96(5)(a).

#### **Appeals against direction made after investigation of IPP 6 breach**

- 3.6. Clauses 110 – 114 are appropriate provisions for appeals to the Tribunal against a direction by the Privacy Commissioner. These provisions are important if the powers of the Commissioner to make directions are extended.

## **4. Part 6: Notifiable privacy breaches and compliance notices**

### **Subpart 1 – Notifiable privacy breaches**

#### **Clause 118 Agency to notify Commissioner of notifiable privacy breach**

- 4.1. This clause requires an agency to notify the Commissioner if the agency suffers a notifiable privacy breach as soon as practicable after becoming aware of it. NCWNZ considers that this provision is a core component of New Zealand's privacy legislation.

### **Clause 119 Agency to notify affected individual or give public notice of notifiable privacy breach**

- 4.2. Clause 119 requires an agency to notify any affected individual if the agency suffers a notifiable privacy breach as soon as practicable after becoming aware of it. If it is not reasonably practicable to notify an affected individual or each member of a group of affected individuals, the agency must instead give public notice of the privacy breach.
- 4.3. These provisions are vital if the public is to have confidence in the commitment of agencies to be transparent about breaches in the security of personal information for which they are responsible. This applies whether or not the breach is an operational error or the result of computer hacking.

### **Subpart 2 – Compliance notices**

#### **Clause 124 – Compliance notices**

- 4.4. This clause allows the Privacy Commissioner to issue a compliance notice to an agency if they consider it is in breach of the Privacy Act, or an action has occurred that is a breach of an Individual Privacy Principle or an interference with the privacy of an individual under another Act of Parliament. NCWNZ supports this power of the Commissioner to issue compliance notices against the background of the advice of the Law Commission, following its consideration of submissions by members of the public and assessment by legal experts.

#### **Clause 125 Issuing compliance notice**

- 4.5. Clause 125 sets out what the Commissioner should consider before issuing a compliance notice. It provides for agencies to have opportunities to comment on a compliance notice. This is a necessary component of the powers of the Commissioner identified in Clause 124.

#### **Clause 126 Form and service of compliance notice**

- 4.6. Clause 126 is a necessary provision of this legislation which requires the agency issued with a compliance notice to act on the notice by a particular date. It is necessary if the notices issued by the Commissioner are to have any significant effect.

### **Proceedings**

#### **Clause 130 – Enforcement of compliance notice**

- 4.7. NCWNZ supports the provision in the Bill that enables the Commissioner to take enforcement proceedings to the Human Rights Review Tribunal if an agency in breach of privacy law does not take action to remedy the breach after a compliance order has been issued.

#### **Clause 131 Appeal against compliance notice or Commissioner’s decision under section 128**

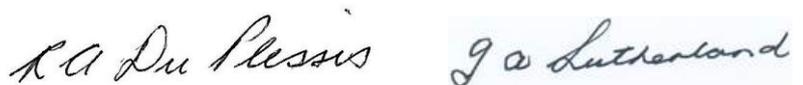
- 4.8. The right for an agency to appeal a compliance notice under Clause 131 is a necessary component of the right in Clause 124 for the Commissioner to issue compliance notices.

## 5. Summary

- 5.1. NCWNZ supports the Privacy Bill as necessary and long overdue updating of legislation to protect the rights of individuals with respect to the storage, accuracy, safety and sharing of personal information. It welcomes new provisions in the legislation that impose additional obligations on agencies when disclosing personal information to an overseas person or agency to ensure the protection of that information. The people concerned should know about such transmission of information and have a right to be confident that the person or agency receiving the information is operating in a context where the regulation of privacy is compatible with New Zealand legislation.
- 5.2. NCWNZ has in the past had concerns about the application to individuals of identifiers that are used by multiple agencies. It therefore supports the clarification in this Bill that agencies that record a unique identifier for a person that is used by another agency should not assign that unique identifier for use in its own operations.
- 5.3. NCWNZ welcomes the extension of the powers of the Privacy Commissioner, including their power to gather information and also issue compliance notices to agencies with respect to their processes for storing, protecting and transmitting personal information. Members in the past have been concerned about the use of personal information for political purposes.<sup>8</sup> An increase in the powers of the Privacy Commissioner, their auditing of codes of practice with respect to privacy of information in agencies, and their accountability to report to Parliament has the potential to increase citizens' confidence in the use of appropriate processes relating to management of personal information.
- 5.4. NCWNZ has had concerns about issues relating to the media and issues of privacy that are not addressed by this Bill. It notes that the Law Commission indicated in 2011 that "the media should respect privacy" and that the media regulators (the Broadcasting Standards Authority and the Press Council) should frame and enforce privacy principles for media outlets. It notes that for the purposes of Privacy Act exemption, the term 'news media' should be continued for media agencies that operate under a code of ethics and are subject to a complaints body. NCWNZ is concerned that many media outlets, including those that are available solely in digital formats, do not operate subject to the code of ethics and complaints processes referred to above. In this respect, the current Bill does not address concerns of NCWNZ members that were set out in its 2009 submission to the Law Commission both with respect to publication of photographs by various media outlets and acts of surveillance, including the use of covert tracking devices and electronic workplace surveillance.<sup>9</sup>



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<sup>8</sup> Ibid. p.2.

<sup>9</sup> NCWNZ. 2009. Submission to the Law Commission on Review of Privacy Law. S09.24. <https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S09.24-Submission-to-the-Law-Commission-on-Review-of-Privacy-Law.pdf>