Insurance Council of New Zealand
Te Kāhui Inihua o Aotearoa

Level 2 Asteron House
139 The Terrace
Wellington 6011

(04) 472 5230
icnz@icnz.org.nz
www.icnz.org.nz

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Justice Committee
Parliament Buildings
Wellington

Dear Committee Members

ICNZ SUBMISSION ON THE PRIVACY AMENDMENT BILL

Thank you for the opportunity to provide this submission to the Justice Committee on the Privacy Amendment Bill (**Bill**).

Background

Te Kāhui Inihua o Aotearoa / The Insurance Council of New Zealand (**ICNZ**) is the representative organisation for general insurance companies in New Zealand. Our members collectively write more than 95 percent of all general insurance in New Zealand and protect well over $1 trillion of New Zealanders' assets and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property insurance, and directors and officers insurance).

Insurers collect information from many sources. This includes collection from individuals, databases such as the NZTA's Motor Vehicle Register, repairers and suppliers, government agencies such as the New Zealand Police, and other insurers. The impact of the proposed Bill is therefore potentially significant for the general insurance sector.

Submissions

ICNZ understands that part of the original rationale for introducing a new notification obligation on an agency when it collects personal information indirectly was to ensure that New Zealand retained its EU adequacy status. We note that in January 2024, the European Commission determined that New Zealand has an adequate level of protection for personal data transferred from the European Union. This was irrespective of the proposed introduction of Information Privacy Principle 3A (**IPP 3A**).

That said, ICNZ supports privacy transparency and providing individuals with clear and concise information about how agencies use and handle individuals' personal information. We recognise that there is an apparent gap within the Privacy Act 2020 regarding indirect collection of personal information and so changes to address this and align with overseas law are appropriate.

However, any law change must be given careful consideration to ensure that the privacy benefits it provides are not outweighed by compliance costs and notification fatigue. Expectations for

implementation of the changes need to be pragmatic as there are aspects where the implications could be overly onerous for agencies or it may be inappropriate or impractical to inform people of their personal information having been collected from third parties. There is a risk that compliance costs may be passed on to consumers. Impacted individuals are also likely to experience notification fatigue, diminishing the value of notifications if they become so frequent and lengthy that individuals are less likely to read them. The insurance sector relies on its customers being engaged in the communications it sends to them. Any action that dilutes effective engagement would be to the detriment of the sector and consumers.

IPP 3A

The Bill sets out the new obligation, IPP 3A (Collection of personal information other than from the individual concerned) at a high level provides a level of flexibility and some broadly framed exceptions. This is necessary given the wide range of agencies and situations IPP 3A will apply to.

In the majority of situations where information is collected indirectly, the individual will have been 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. It is particularly onerous to require disclosure of the specific name and address of each agency from which information will be collected, when from a customer perspective, disclosure of the type of agency provides transparency about who their information may be collected from. The existing requirement to only collect for a lawful and necessary purpose already minimises the risk information will be collected inappropriately. We consider that a distinction should be made between indirect collection from a third party already authorised by the individual (such as collection via an insurance advisor, a motor vehicle repairer, or an insurance assessor), and indirect collection by other means.

We note that subclause (3) of IPP 3A goes someway to achieving this. However, given the specificity of the matters that must have been originally disclosed to the individual for subclause (3) to apply, we recommend the amendment outlined further below to subclause (1) of the new IPP3A, to ensure that the provision is more targeted at the primary issue – circumstances where the indirect collection was not contemplated when the information was originally obtained.

The IPP 3A requirement on the collecting agencies to make the individual aware of the name and address of the agency collecting and the agency holding the information is a challenge for insurers who collect information from many sources to assess applications for cover and manage claims. If the proposal proceeds in its current form, agencies may need to address this through more extensive privacy policies listing all the third parties information is shared with or collected from to that level of detail. This may require more frequent updates to keep this list accurate and current. Where an agency collects information from a wide variety of entities, it would be more practical to provide notice (such as through the insurer's privacy policy) of the kinds of entities an insurer may share and collect information from, rather than for each instance.

We suggest the following amendment to the wording in IPP3A.

Information privacy principle **3A**

Collection of personal information other than from individual concerned <u>or an authorised source</u>

(1) If an agency collects personal information about an individual other than from:

(a) the individual concerned <u>or</u>
(b) <u>a source the individual concerned has authorised the agency to collect personal information from or</u>
(c) <u>a source the individual concerned has authorised to share information with the agency</u>

the agency must take any steps that are, in the circumstances, reasonable to ensure that the individual concerned is aware of—

…

We would encourage sensible regulatory guidance on this matter, and look to the Australian Privacy Principles Guidelines on APP 5 'Notification of the collection of personal information' provided by the Office of the Australian Information Commissioner, by way of example.[1]

Assessing what steps are reasonable in the circumstances

We support the 'reasonableness' standard applied to the steps that must be taken to ensure an individual is made aware that an agency has indirectly collected their personal information.

However, we note that what is 'reasonable' in the circumstances is subject to interpretation, and many different factors may be taken into account when making this assessment. By way of example, an agency may be provided information about an individual as an emergency contact from an employee, or a referee through an employment process. The agency must determine what steps are reasonable where the individuals concerned are likely to have agreed to perform these roles and understand that their information will be shared. In some circumstances an agency may determine that it is reasonable to take no steps to notify such individuals, but before making such determinations, it would be useful to have guidance on what should be taken into account when assessing what is 'reasonable' in the circumstances and when not taking any steps might be reasonable.

We would encourage sensible regulatory guidance on this matter and refer to the Australian Privacy Principles Guidelines APP 5.

Compliance would not be reasonably practicable in the circumstances of the particular case

As stated above, we support the exceptions set out in the Bill.

We support the exception that applies where the agency believes on reasonable grounds that compliance is not reasonably practicable in the circumstances of a particular case.

We envisage that insurers should be able to rely on this exception where, for example, they do not hold the individual's contact details. For example, where the insurer receives the name of a

[1] https://www.oaic.gov.au/__data/assets/pdf_file/0019/1198/app-guidelines-chapter-5-v1.2.pdf

nominated driver on a policy or the name of a third party in a motor vehicle accident. In addition, the names and, in some cases, dates of birth of trustees when the insurance is held by a trust.

We also consider that when determining what is reasonably practicable, regard should be had to the impact that IPP 3A has on agencies' wider systems and processes. For example, while it might be possible to track down, with some effort, the contact details of an individual (e.g. third party in a motor vehicle accident), it may not be reasonably practical to do so routinely in every case where this type of information is disclosed to an insurer.

We are concerned that as currently drafted subclause (4)(e) of IPP 3A does not take this into account. This is because subclause (4)(e) refers to the "circumstances of the particular case". We recommend that subclause (4)(e) should be amended to allow broader organisational concerns to be taken into account.

However, we note that 'reasonably practicable' is subject to interpretation. There is a risk in the absence of a reasonable approach that agencies will have to collect more information from third parties, such as contact details, just so the agencies can notify individuals that they hold a smaller set of information about them. We do not believe this is the intent of the proposals.

We would again encourage sensible regulatory guidance on this matter.

Compliance would prejudice the purposes of the collection

As above, we support the exception that applies where the agency believes on reasonable grounds that compliance would prejudice the purposes of the collection (subclause (4)(d) of IPP 3A). For insurers there are situations where it is not appropriate for persons to be informed that their personal information has been collected indirectly as it may jeopardise a specialist insurance claim, fraud investigation or the rights of an insurer to recover. For example, a medical professional discloses to their liability insurer circumstances related to their patients regarding a potential liability and as part of this provides the details of those patients. Another example might be where a fraud investigator collects information from a policyholder's neighbour.

We consider there are strong reasons for disclosure not to occur in their circumstances. Again, however, the matters an agency can take into account under the provisions in the Bill when assessing what will prejudice the purpose of the collection will be subject to interpretation. We urge that sensible guidance to provide certainty on how it should be applied in such circumstances. This will aid the experience of consumers and compliance of insurers.

If the Select Committee and its advisors from the Ministry of Justice consider there are doubts about whether the exception in subclause (4)(d) would cover the situations outlined above, an additional exemption under subclause (4) should be included in the Bill for situations where information is collected for a lawful purpose connected to the agency's functions or activities (not just public agencies under subclause (4)(c)) and the information is necessary for that purpose. The absence of such an exception could prevent insurers from providing insurance in some situations, noting insurers collect third party personal information for example in relation to fraud, investigation and liability claims purposes.

Non-compliance is necessary in the prevention, detection and investigation of fraud

Beyond the general issue of where compliance with IPP 3A would prejudice the purposes of the collection, we also believe a specific exception should be included under subclause (4), when non-compliance is necessary to avoid prejudice to the maintenance of the law and the prevention, detection and investigation of fraud. Insurance companies on occasion will receive information from informants, for example providing confidential information in relation to a claim. Making the customer aware of the collection of this information may interfere with the investigation of a potentially fraudulent claim. It may enable individuals to circumvent the law, or avoid detection. Minimising insurance fraud is critical to maintaining the affordability of insurance.

In the context of access requests, the Privacy Commissioner has recognised in some cases[2], that an insurer may rely on the likely prejudice to the maintenance of law, including the prevention, investigation and detection of offences, to withhold information. Although an insurance company does not have any law enforcement powers, it may be a natural first contact point for information with regards to potential insurance fraud. Should fraud be detected, the information would then be passed onto the police to take law enforcement action.

We recommend a specific exception to recognise that non-compliance with IPP 3A may be necessary to avoid prejudice to the maintenance of the law and prevention, detection and investigation of fraud and that this exception can be relied on by private sector agencies.

Commencement date and implementation

The Bill as introduced has a planned commencement date of 1 June 2025. This was potentially workable at the time the Bill was introduced in September 2023, however, given the delays in progressing the Bill resulting from the election process, we consider a later commencement date is required to enable agencies to undertake implementation activities in an appropriate and efficient way.

Given the breadth of application of the regime and the need to consider how it is reasonably and appropriately applied in a range of contexts, agencies will need adequate time to work through the range of situations relevant to their collection of personal information, update their privacy policies and put in place any other measures required. This needs to include ensuring the approach to IPP 3A does not undermine, for example, the overarching idea of data minimisation under IPP 1. We are also mindful of the need for time to be allowed for the development of guidance by the Privacy Commissioner and, if so, the time for agencies to consider this before implementing any new processes.

In cases where privacy policies are provided upon renewal, it will take 12 months to update all customers on the new terms.

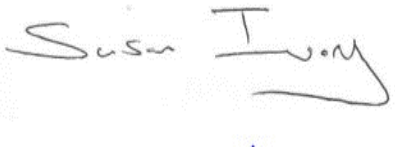
We would suggest either making commencement 18 months after enactment or setting a date that corresponds with this.

[2] Case Note 17375 [1997] NZPrivCmr 6: Couple complain insurance company refused to disclose informant's identity; Case Note 207459 [2009] NZPrivCmr 17: Woman's request for information from insurance company refused

Conclusion

ICNZ would like to appear before the Committee to speak to our submission. Please contact Susan Ivory (susan@icnz.org.nz) if you have any questions on our submission or require further information.

Yours sincerely



Hon. Kris Faafoi
Chief Executive

Susan Ivory
Regulatory Affairs Manager