

Privacy Impact Assessment in a Pandemic: The Privacy Commissioner has a role

Blair Stewart, 25 May 2020

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On 20 May 2020 the Ministry of Health launched its NZ COVID Tracer app and, at the same time, released a [Privacy Impact Assessment](#) (PIA) report. Commentators have generally acknowledged that the privacy impacts associated with the model of app that the Ministry has adopted are minor (although it should be noted that planned enhancements in the future may carry additional impacts). The Privacy Commissioner explicitly [endorsed](#) the app.

Consultation

The Ministry of Health PIA states at p 2:

This document has been prepared by the Data & Digital Directorate, Ministry of Health.

Consultations with the following have occurred during the development of this document:

- Sector Portfolio Manager, Digital Portfolio Team, Ministry of Health
- Manager, Data Governance, Data & Digital, Ministry of Health
- Project Manager, COVID-19 Contact Tracing App, Data & Digital, Ministry of Health
- General Manager, Emerging Health Technology and Innovation, Ministry of Health
- The Chief Privacy Officer of the Ministry of Health
- The Office of the Privacy Commissioner

The sole consultee outside the Ministry of Health was the Privacy Commissioner.

Role of the Privacy Commissioner

PIA is a non-statutory process. There is no statutory obligation to involve the Privacy Commissioner. If the Commissioner is to be involved there is a question of how and to what extent. In its [Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection \(2020/C 124 I/01\)](#) the European Commission stated:

The Data Protection Authorities should be fully involved and consulted in the context of the development of the app and they should keep its deployment under review.

The Ministry of Health PIA states that the Privacy Commissioner has been consulted (p 2) and adds (p 4):

The Office of the Privacy Commissioner has overseen and supports this release.

‘Release’ presumably refers to the release of the app version: i.e. that OPC reserves its position for further add-ons to the app. As mentioned, the Privacy Commissioner publicly endorsed the app.

One [commentator](#), known particularly for his considerable expertise on freedom of information, queried whether the Privacy Commissioner’s involvement might affect “people’s perceptions of the independence of the OPC, willingness to criticise where necessary, and therefore trust in the regulator they have to rely on”. He indicated that he’d “prefer a model where the Government Chief Privacy

Officer provides the advice to those building it, and the regulator steers clear, to maintain public trust when dealing with any complaints.”

The comments reflect an eternal dilemma of independent oversight bodies. Should they remain out of the fray and keep their powder dry in case they need dispassionately to inquire at a later date. Or do they roll up their sleeves to assist with problem-solving. The Ombudsmen, as a generalist complaints body, tend to stay on the sidelines, quietly waiting to be called upon. However, it makes less sense for a body possessing specialist expertise to sit on its hands. Especially in the case of a multi-faceted public body like the Privacy Commissioner which, in addition to investigating complaints, has a statutory mandate to engage in many other ways to seek outcomes that accord with the objects of the Privacy Act.

Additionally, the Privacy Commissioner is accorded an explicit role under Cabinet Committee processes to express an opinion and so it is never going to be entirely possible for the “regulator to steer clear”.

However, the question of how and how far for the Commissioner to engage in a departmental PIA remains an issue. In presentational terms, there may be a fear that the independent public watchdog will become unduly associated in the public’s mind with the government position. In terms of perceptions of bias, there may be a concern that a complainant will not get a fair go if lodging a complaint in relation to the endorsed app. The Privacy Commissioner will be expected to carefully manage these issues, it is a regular part of the job.

There has been surprising little study of the appropriate, or most effective, role of privacy authorities in PIA processes. It was a topic on which I led a half day workshop at an international privacy conference in Ottawa in 2007. Unfortunately, the workbook developed for the workshop seems no longer to be online. I updated my workshop paper as chapter 21 “Privacy Impact assessment: Optimising the Regulator’s Role” in Wright and De Hert, *Privacy Impact Assessment*, Springer, 2012.

In normal times there are many departmental PIAs that will not or need not involve the statutory privacy authority. However, it is hard to imagine that there is a clearer case of a PIA where the New Zealand public would expect the national privacy authority to take a close interest. (I doubt they would sympathise with any suggestion that the Privacy Commissioner sit back in case a complaint emerges.) Not only is the topic one of immense public interest and importance but also it has a cross-cutting quality that has implications beyond simply the department that is building the app and system.

Sometimes it will be necessary for the Privacy Commissioner to be closely involved in a process because of the expertise the office brings. I don’t think this is the principal consideration here – the privacy issues are, it appears from the outside, comparatively straightforward and within the competence of government privacy staff and easily available consultants. (Albeit that a single department or group of developers would benefit from engaging with a wider group of stakeholders – see companion commentary on consultation.) Instead, the justification for Privacy Commissioner involvement might perhaps be characterised as:

- *Representative role*: The Ministry chose not to widen consultation and so the Privacy Commissioner might attempt, in addition to being a privacy expert, seek to stand in for classes of affected individuals. (A companion commentary suggests that stakeholder engagement would have been useful – in which case this burden wouldn’t implicitly fall on the Commissioner.)

- *PIA quality control*: The obvious way to ensure the Commissioner's concerns have been considered in the PIA process is to consult OPC during the process.
- *Speed the subsequent processes*: Time is of the essence in a health emergency. The Privacy Commissioner will be required to express a view to Cabinet and so will see the PIA report in the lead up to Cabinet decision-making. The last thing anyone wants is for gaps in analysis being identified at a late stage possibly leading to delays in finalising collective advice.

It should be understood that satisfying the Privacy Commissioner as to the thoroughness of a PIA process does not normally imply that the Commissioner need agree with the conclusions or support decisions based, in part, upon the PIA. However, in a case like this where a negative reaction from the Privacy Commissioner would be viewed as problematic by Cabinet, as it could undermine public confidence which might be fatal to uptake of the app and thus the app's usefulness, unanimity between officials and Commissioner would be expected to be obtained if feasible.

Long term trust at cost of short-term delay?

From the outside, the app seems to have taken longer to have been delivered than was expected. The first iteration seems quite simple. Indeed, there have been a number of public comments questioning the value of such a rudimentary app and wondering why there was so much secrecy and delay. In an ideal scenario, one might have expected the QR code system to have been up and running before the start of Alert Level 2.

Might this delay have been down to the PIA process? We don't know. (PIA is an informal and flexible process whereas Cabinet decision making is of necessity formal and predicated on Cabinet meetings. This is possibly the source of delay rather than the PIA.) However, if PIA development led to a delay in the roll out would it have been worthwhile? The downside would be a less seamless roll out of the app (e.g. competing app products now in place) and potentially a reduction in achieving the gold standard in tracing and thereby delaying an eventual move to Level 1.

The same debate might equally apply with further PIAs for the planned future use cases and so it is not just a historical issue but may be compounded as we move forward. There is an ongoing need for efficient and not unduly protracted PIA in a public health emergency.

The downside of any delay must be set against the benefits of greater understandings as a result of the assessment process (assuming that anything was learned in the assessment and it was not just a process of writing up what was already known) and greater consensus on the best way forward. Decision-makers need to value the insights and reassurance the process brings. It may be worth taking longer (hopefully measured in days not weeks) to do a good job that will endure and lead to better case tracking capability and social cohesion rather than rush to a poor option or a flawed compromise.

It will be interesting to see whether the intended future enhancements also go through Cabinet or are delegated to Ministers and officials and at what level future PIA operates at.

