

# Submission on discussion document: *Options for establishing a consumer data right in New Zealand*

## Your name and organisation

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## Responses to discussion document questions

### Does New Zealand need a consumer data right?

1 *Are there any additional problems that are preventing greater data portability in New Zealand that have not been identified in this discussion document?*

The discussion paper identifies the following problems hindering the development of data portability in New Zealand:

- reluctance of data holders to share information with third parties, even when the individual has authorised such sharing, due to privacy concerns
- data holders refusing to transfer information to protect a competitive advantage
- a lack of requirements to share data in a consistent format across a sector
- inefficiencies due to data-holders and third parties needing to enter multiple bilateral agreements for the sharing of data (i.e. a separate agreement is needed for each third party)
- lack of transparency around the fees data holders can charge third parties for accessing application programming interfaces
- use by some third parties of less secure methods of accessing consumer data (such as ‘screen scraping’) in the absence of a consumer data right.

OPC is not aware of any additional problems.

OPC recognises that agencies may hold privacy concerns about sharing consumers’ information with third parties. A legislative framework for data portability would help to address this concern and strengthen individuals’ existing privacy right to access their own information.

2 *Do you agree with the potential benefits, costs or risks associated with a consumer data right as outlined in this discussion document? Why/why not?*

OPC broadly agrees with the benefits and costs/risks set out in the discussion document, subject to the additional benefits discussed in our answer to question 3.

On the benefits side, the paper identifies that a consumer data right could:

- enable innovation
- facilitate competition

- increase productivity
- strengthen privacy and data protections
- improve consumer welfare.

The paper identifies the costs or risks as being:

- increased security and privacy concerns
- implementation costs for government and industry
- imposing barriers to entry
- possible delays to innovation in some sectors.

Under costs/risks, the discussion paper notes ‘there may be an increased risk of a data breach, and it may be difficult to determine where liability rests.’ We agree that there is a security risk in transferring personal data from one provider to another, or from a provider to the individual concerned.

However, security risks involving personal information are already regulated under the Privacy Act. Under the Privacy Act’s privacy principle 5, an agency that holds personal information is required to provide reasonable security safeguards for that information, including when the information is in transit to another agency. The Privacy Act also provides a framework for considering liability for information transferred from one agency to another.

Under the Privacy Act 2020, agencies are required to notify the Privacy Commissioner and affected individuals of significant privacy breaches. The new Privacy Act also gives the Privacy Commissioner the power to issue compliance notices, requiring agencies to take steps to comply with the Privacy Act. The Privacy Commissioner could use this power if there was evidence that an agency’s privacy and security protections for data transfers are inadequate.

Any new regulatory framework for a consumer data right could mandate such matters as security standards for transfer of consumer data and the role of the receiving organisation in verifying that the data has been received successfully.

3

*Are there additional benefits, costs or risks that have not been explored in the above discussion on a consumer data right?*

The discussion document recognises that a consumer data right could strengthen privacy protections and give consumers greater control of their data. However, it does not adequately make the case for a consumer data right as an extension of existing privacy rights.

OPC considers that a right of data portability will help ensure that existing rights of access to personal information remain meaningful in a pervasive digital environment. The right of individuals to access information about them is fundamental to legislative protection of privacy in New Zealand and other comparable jurisdictions. However, this right becomes less useful in today’s environment if the information is not provided in a reusable digital format. A consumer data right could help ensure that individuals receive, or authorise the transfer of, their personal information in a format that can be readily understood and reused.

Another benefit of a consumer data right that is given insufficient weight in the discussion document is that it would bring New Zealand law into line with laws in a growing number of our international trading partners. In particular, if the right is similar to that in the European Union’s General Data Protection Regulation (GDPR), it will help New Zealand to maintain its trading advantage as a country recognised by the EU as providing an adequate level of data protection.

4

*What would the costs and benefits be of applying the consumer data right to businesses and other entities, in addition to individuals?*

OPC's focus is on information about individuals. We therefore have no comment on applying a consumer data right to information about businesses or other entities.

5

*Do you have any comments on the types of data that we propose be included or excluded from a consumer data right (i.e. 'consumer data' and 'product data')?*

From a privacy perspective, OPC does not have a view on the inclusion of 'product data' (information about products and services offered to consumers by a business) in a consumer data right. We can see that such data could be useful from a consumer perspective.

OPC agrees that a consumer data right should include data provided by the individual concerned (provided data) and data generated by the individual through their activities (observed data). We also propose that the data right should cover derived data (data about an individual created by a data-holder) and would welcome the opportunity to discuss this issue further. The inclusion of derived data would make the transferred information more meaningful and help ensure the consumer benefits are more fully realised. We are aware that the inclusion of derived data could create difficulties because such information is often derived using analytical methods that are commercially sensitive.

As the discussion paper notes, derived data can be personal information in terms of the Privacy Act and would therefore be subject to the right of access under the Privacy Act. If derived data is excluded from a consumer data right, the coverage of that right would therefore be narrower than the right of access under the Privacy Act. We note that the data portability right under the EU's GDPR is limited to provided data, and may also encompass observed data, but does not include derived data.

Other issues to consider regarding the types of data to be included in or excluded from a consumer data right include the following:

- Should the right cover digital data only or should it also include information in paper or other non-electronic formats? Since a key purpose of a consumer data right is to make information available in a reusable electronic form, there would be considerable compliance costs for businesses in digitising paper-based data if such data is included in the right.
- How would a consumer data right provide for exceptions to protect other interests, such as privacy of information about other individuals or intellectual property rights?

6

*What would the costs and benefits be of including both read access and write access in a consumer data right?*

The discussion paper defines 'read access' as the transfer of data to a third party, where the third party can read the consumer's data but cannot modify it. 'Write access' would enable the third party to change or add to a consumer's data at their direction and with their consent.

OPC agrees that including write access in a consumer data right would allow the consumer benefits to be more fully realised. As stated in the discussion paper, the ability of a third party to change or add data should be only at the consumer's direction or with the consumer's consent.

**What form could a consumer data right take in New Zealand?**

7

*Do you have any comments on the outcomes that we are seeking to achieve? Are there any additional outcomes that we should seek to achieve?*

OPC supports the proposed outcomes set out at para 26 of the discussion paper:

- Consumer welfare:
  - strengthening existing privacy rights and giving consumers greater choice and control of their data
  - enabling innovation that provides consumers with a wider range of products and services that better meet their needs
  - increasing access to more affordable products and services by facilitating competition, and reducing search and switching costs.
- Economic development:
  - increasing business productivity by accelerating the velocity with which data moves through the economy
  - contributing to the growth of the digital economy by enabling the development of new and innovative sectors of the economy that use consumer and product data.

We do not have any additional outcomes to suggest.

8

*Do you have any comments on our proposed criteria for assessing options? Are there any additional factors that should be considered?*

OPC supports the proposed criteria for assessing options set out at para 28 of the discussion paper:

- trust (including strengthening privacy rights and maintaining the security of consumer data)
- reach (in terms of the ability to extend data portability across multiple sectors)
- speed (how quickly data portability could become widespread throughout the economy)
- cost (minimising the costs of implementation so they do not outweigh the benefits)
- flexibility (capacity for solutions to be tailored to the needs of particular sectors).

We do not propose the inclusion of any additional factors.

9

*Do you have any comments on the discussion of Option one: Status quo?*

Under Option 1, the government would not introduce a consumer data right and it would be left to businesses to develop some form of data portability, if they saw value in doing so.

OPC does not support Option 1. We consider that the absence of a government-mandated framework for data portability would leave too much uncertainty. In the absence of legislation, companies would probably also lack incentives to work together on data portability.

In addition to the reasons against Option 1 given in the discussion paper, OPC considers that Option 1 would leave New Zealand increasingly out of step with legislative requirements in other comparable jurisdictions and trading partners.

10 *Do you have any comments on the discussion of Option two: A sectoral-designation process?*

Under Option 2, legislation would establish a high-level framework but the consumer data right would apply only to specific sectors or markets designated through secondary or tertiary legislation. As noted in the discussion paper, there is a precedent for a sector-specific approach in the right to transfer health information under section 22F of the Health Act 1956. This existing right has worked well in the health sector.

OPC can see value in combining a general right of data portability with more detailed sector-specific arrangements. We discuss this approach further in response to question 13.

11 *Do you have any comments on the discussion of Option three: An economy-wide consumer data right?*

Under Option 3, there would be an economy-wide general right of data portability. This is the approach taken in the EU's GDPR. Although not specifically identified in the discussion paper, one approach for Option 3 would be to include a right of data portability in the Privacy Act (although this would mean limiting it to personal information).

OPC considers an economy-wide right of data portability to be the best way of giving effect to rights of access to personal information in a digital environment. However, as discussed further in response to question 13, we think this economy-wide right could be usefully combined with sector-specific arrangements.

12 *Do you have any comments on the discussion of Option four: Sector-specific approach?*

Under Option 4, consumer data rights would be developed through specific legislation for particular sectors, without any overarching legislative framework.

This option would probably be the easiest to implement. There could therefore be a case for using it to trial a consumer data right in particular sectors where consumer demand is greatest, before moving to an economy-wide right.

13 *This discussion document outlines four possible options to establish a consumer data right in New Zealand. Are there any other viable options?*

OPC favours the introduction in the Privacy Act 2020 of an economy-wide right of data portability for personal information. This would have the advantage of building on and strengthening existing rights relating to personal information and making use of the Privacy Act's regulatory framework (with any necessary additions or modifications).

However, a general economy-wide right established under the Privacy Act could be combined with arrangements giving effect to that right in particular sectors. Such arrangements could take account of the specific features of a sector and existing regulatory frameworks in that sector. The sector-specific arrangements could also be more prescriptive about requirements for that sector. OPC would be happy to discuss options for combining general and sector-specific data portability rights.

A right of data portability in the Privacy Act would not cover product information or information about businesses, neither of which are personal information. However, a consumer data right involving product information or information about businesses could be provided for in specific sectors.

14 *Do you have any comments on our initial analysis of the four options against our assessment criteria?*

OPC broadly agrees with the initial analysis of the four options. However, we think that Option 3 should score two ticks for trust, as it would strengthen existing privacy rights. Option 3 should also probably score two ticks for reach, although we recognise that it might involve excluding information about businesses and product data. We also question the discussion paper's view that Option 3 would not provide flexibility. If the right were introduced as part of the Privacy Act, it would benefit from the Privacy Act's flexible, principles-based structure.

15

*Do you agree or disagree with our assessment that Option two is most likely to achieve the best outcome using the assessment criteria?*

As discussed in response to question 13, OPC's preferred option involves a general data portability right combined with sector-specific arrangements. This option is somewhere in between the discussion paper's Options 2 and 3. We believe it will best support comprehensive privacy and consumer outcomes, and scores particularly strongly on trust, reach and flexibility.

### How could a consumer data right be designed?

16

*Do you agree with the key elements of a data portability regime as outlined in this section? Are there any elements that should be changed, added or removed?*

The key elements of a data portability regime identified in the discussion paper are focused on the paper's Option 2 (sectoral-designation approach). The elements are:

- the process for designating particular sectors to be covered by a consumer data right
- the scope of coverage within designated sectors, in terms of the types of data and data holders to be included
- detailed rules for accessing and transferring data
- the accreditation regime for third parties
- privacy safeguards
- a liability and enforcement regime and methods for consumer redress.

OPC agrees that, at a high level, most of these key elements would need to be covered in a data portability regime. We do not have any high-level elements to add.

We do question whether an accreditation regime for third parties is an essential feature of a consumer data right, although it could be desirable. We recognise that it would be an unreasonable burden on individual consumers to expect them to make their own security assessments of third parties. However, a combination of regulatory oversight and market mechanisms could be sufficient to ensure third parties provide adequate security, without the need for formal accreditation.

17

*Do you have any feedback on our discussion of any of these key elements?*

OPC notes that the discussion of the key elements currently assumes that data would be transferred, with the consumer's consent, from the data holder to a third party. However, the data right could also give individuals the right to require a data holder to provide their personal information to the individual in a reusable digital form, instead of or in addition to the direct transfer of that information to a third party. While individuals already have the right to access their personal information under the Privacy Act, data portability could go further in providing for the information to be transferred in a specified format.

For example, an individual might not yet know which new provider they want their information transferred to. The individual might instead want to receive their information in a reusable format in order to compare providers. A right of data portability could create opportunities for the development of online platforms to which consumers could upload key data from their existing providers, allowing rival providers to 'bid' for the consumer's business based on this key data.

As work on a consumer data right progresses, OPC would welcome the opportunity to discuss the key elements of the regime further.

18

*Are there any areas where you think that more detail should be included in primary legislation?*

OPC does not have a fixed view at this stage on which details should be included in primary legislation. Our preliminary view is that primary legislation should at least provide for:

- the broad parameters of the format in which the data should be provided (e.g. in a structured, machine-readable and interoperable electronic format)
- the type of data covered (provided, observed and inferred data)
- privacy and security safeguards for the transferred information
- liability, enforcement and redress mechanisms.

We note that the Privacy Act has an existing regime for liability, enforcement and redress that could readily be used.

19

*How could a consumer data right be designed to protect the interests of vulnerable consumers?*

Paragraph 54 of the discussion paper refers to consumers requiring a degree of financial or digital literacy to ensure they understand the potential risks of consenting to their data being shared and used by a third party. The paper notes that this could pose a particular risk for vulnerable customers.

OPC does not have specific suggestions for protecting the interests of vulnerable customers, but notes that the design of the regime should ensure that the risks to individuals are minimised. As mentioned above, under the Privacy Act 2020, the Privacy Commissioner has increased powers of enforcement if agencies fail to adequately protect personal information.

20

*Do you have any suggestions for considering how Te Tiriti o Waitangi should shape the introduction of a consumer data right in New Zealand?*

OPC supports the proposal to engage with Māori to ensure the principles of Te Tiriti o Waitangi are considered in the design of a consumer data right. We do not have any suggestions for how Te Tiriti should shape the introduction of a consumer data right.

21

*How could a consumer data right be designed to ensure that the needs of disabled people or those with accessibility issues are met?*

OPC does not have any specific suggestions about how a consumer data right can be designed to meet the needs of people with disabilities or those with accessibility issues, although we note that detailed requirements could require that web content accessibility standards are met.

22	<i>To what extent should we be considering compatibility with overseas jurisdictions at this stage in the development of a consumer data right in New Zealand?</i>
	OPC considers that compatibility with overseas jurisdictions should be a significant consideration in the design of a consumer data right. As discussed above, New Zealand should aim for a data portability right that is compatible with that under the EU's GDPR. Compatibility with Australian legislation is also very important, given the close trading and financial relationships between New Zealand and Australia.
23	<i>Do you have any comments on where a consumer data right would best sit in legislation?</i>
	OPC proposes that a consumer data right focused on personal information would sit most naturally in the Privacy Act 2020.
24	<i>Do you have any comments on the arrangements for establishing any new bodies to oversee parts of a consumer data right?</i>
	OPC proposes that the Privacy Commissioner should be the oversight body for a data portability right under the Privacy Act. However, depending on the design of the right, other regulators could also play a role, particularly in regulation of specific sectors.
25	<i>What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?</i>
	The pros and cons of having multiple regulators or a single regulator will depend on the overall design of the consumer data right.
26	<i>If government decides to establish a consumer data right, do you have any suggestions of how its effectiveness could be measured?</i>
	OPC does not have any suggestions at this stage about how the effectiveness of a consumer data right can be measured.

## Other comments

OPC welcomes the current consideration of a consumer data right and strongly supports the introduction of a right of data portability in New Zealand. The Privacy Commissioner recommended in 2017 and 2018 that such a right be included in the Privacy Act. Internationally, data portability is most commonly treated as an extension of existing privacy rights, particularly the right of individuals to access their own information.

OPC looks forward to contributing to further work on the case for, and design of, a consumer data right.