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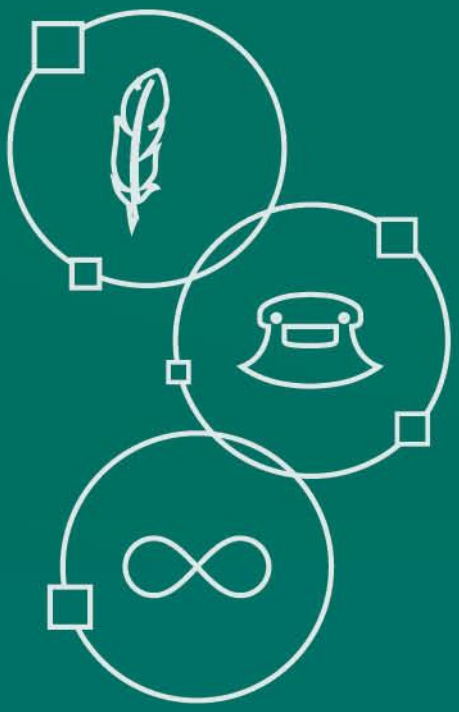
Ministère de la Justice Canada



PRIVACY ACT MODERNIZATION: Report on Engagement with Indigenous Partners

What We Have Learned (so far) and Next Steps

Spring 2020 to Spring 2021

Canada

Privacy Act Modernization: Engagement with Indigenous Partners What We Have Learned (so far) and Next Steps

Introduction

This report summarizes the input received from partners who participated in the Department of Justice Canada's initial engagement inviting First Nations, Inuit and Métis partners to discuss the modernization of the *Privacy Act*. These initial discussions took place from spring 2020 to spring 2021. This report also outlines next steps for further engagement with First Nations, Inuit and Métis partners on *Privacy Act* modernization. The purpose of sharing this report at this time is to let partners know what we have learned so far through this engagement process, to provide a common basis for continuing the conversation.

In light of the feedback received to date, we are proposing a multi-stage approach for moving forward. First, over the next few months, the engagement will focus on the *Privacy Act*'s foundational principles and rules that play a significant role in governing information sharing between federal public bodies and Indigenous peoples. After that, the engagement would focus on discussing more detailed rules and complex questions to support any initial changes that might be made to modernize the *Privacy Act*. This stage might occur after the possible enactment of a new *Privacy Act*.

This report is divided into three parts:

Part 1 provides a brief description of the context for *Privacy Act* modernization and Justice Canada's efforts to engage with Indigenous partners to date. It also includes a summary of what we have learned so far through initial bilateral engagement sessions and informal discussions with Indigenous partners on *Privacy Act* modernization.[1]

Part 2 suggests ideas for potential changes to the *Privacy Act*'s foundational principles and rules, based on input received so far from Indigenous partners. Our engagement efforts will focus on these potential changes over the next few months.

Part 3 briefly describes some of the questions to be addressed at a later stage, following the engagement on the ideas raised in Part 2. These questions include the more detailed rules that may be required to ensure the

[1] For simplicity, we refer to "bilateral engagement sessions" throughout this report, though we acknowledge that two partners asked that the initial meetings be viewed as informal discussions rather than formal engagement sessions. This report does not attribute the views, considerations, questions, and suggestions raised during these initial discussions to any particular Indigenous government, organization, or entity and is not intended to capture all comments raised during these discussions.

appropriate implementation of any initial changes made to modernize the *Privacy Act*, as well as other complex questions that go beyond the *Privacy Act* and relate to Indigenous data more broadly.[2]

Indigenous partners are invited to provide comments to the *Privacy Act* modernization team either through a virtual engagement session, in writing, or both, as preferred before **April 30, 2022**.

[2] The expression “Indigenous data” is used throughout this report to refer to (1) data about Indigenous individuals and communities; (2) data from Indigenous individuals and communities; and (3) data on resources, environment, wildlife, etc. See, for instance, the definition of “First Nations’ Data” provided by the First Nations Information Governance Centre at page 40 in A First Nations Data Governance Strategy.

Executive Summary

The Department of Justice Canada is leading efforts to modernize the federal *Privacy Act*, which is a key piece of Canada's legal framework for protecting privacy interests. The Act governs how federal public bodies may collect, use, disclose, retain, dispose of, and protect personal information. It also sets out the rights of individuals to access their own personal information from federal public bodies.

While the *Privacy Act* focuses on protecting the personal information of all individuals held by federal public bodies, it also has specific impacts on Indigenous peoples in Canada. For instance, the Act currently sets out a list in the definition of "Indian band" and "aboriginal government". In addition, some of the provisions allowing the disclosure of personal information may not reflect the variety of reasons for which Indigenous governments and organizations may require disclosure of personal information.

The *Privacy Act* first came into force in 1983 and our world has changed dramatically since then. After decades of technological advances and societal change, Canadians' expectations of how federal public bodies collect, use, disclose, store and protect their personal information have evolved. There have also been significant developments that highlight the uniqueness of Indigenous interests in relation to personal information. For example, in 1998, the First Nations and Inuit Regional Health Survey National Steering Committee recognized the OCAP® principles[3] of data ownership, control, access, and possession. In 2018, the Government of Canada committed itself to the Principles respecting the Government of Canada's relationship with Indigenous Peoples, which include recognition of Indigenous rights and of Indigenous governments' right to self-determination. On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and immediately came into force.

In this context, Justice Canada sought to engage with governments and organizations representing the distinct perspectives of First Nations, Inuit and Métis in the context of modernizing the *Privacy Act*. Part 1 of this report summarizes what we have learned so far from the bilateral engagement sessions with participating Indigenous governments and organizations, which took place from spring 2020 to spring 2021.

During these initial engagement discussions, we learned that not all questions related to *Privacy Act* modernization raise the same concerns among Indigenous partners or have the same level of complexity. Because of this, Justice Canada is proposing a multi-stage approach for moving forward. **The goal of this approach is to ensure that all questions related to *Privacy Act* modernization and its impact on First Nations, Inuit and Métis are given appropriate consideration while ensuring momentum forward in modernizing the *Privacy Act*.**

[3] OCAP® is a registered trademark of the First Nations Information Governance Centre. See https://fnigc.ca/ocap-training/ for more information.

Building on the feedback received, Part 2 of the report sets out the next steps for engaging with Indigenous partners and invites them to provide input on ideas for modernizing the *Privacy Act*'s foundational principles and rules on information sharing between federal public bodies and Indigenous governments and organizations. These ideas reflect input received from Indigenous partners so far, and include:

- Adding a purpose clause recognizing "advancing reconciliation with Indigenous peoples" as a purpose of the Act, to better guide the interpretation of the Act;
- Broadening the disclosure of personal information to Indigenous governments, organizations and entities representing the interests of Indigenous peoples by:
    - introducing a principle relating to such disclosures;
    - delineating the purposes for which personal information might be disclosed, and to whom (Indigenous governments, organizations, and other entities and how to define them); and
    - identifying the mechanisms and baseline privacy protections pursuant to which Indigenous individuals' personal information may be shared.

Following discussions on these issues, Justice Canada is proposing to then focus discussions on the more detailed rules that may be required to ensure the appropriate implementation of any initial changes made to modernize the *Privacy Act*, as well as a number of other complex questions. This step is outlined in Part 3 of the report.

Justice Canada is sharing this report with all the Indigenous governments and organizations that were invited to participate in this engagement, whether they have participated yet or not. It is also being shared with additional Indigenous partners so that all modern treaty and self-government agreement holders are part of the discussion going forward.

To continue the discussion, Justice Canada has included the following questions throughout the report to support Indigenous partners in providing their views and reflections. References to the discussion on each issue within the report are included.

Indigenous partners are invited to share their input with the *Privacy Act* modernization team, through a virtual engagement session, in writing, or both, as preferred before **April 30, 2022**. To schedule a meeting or to provide written comments, please send an email to the *Privacy Act* modernization team at: privacyactmodernization-modernisationdelaLPRP@justice.gc.ca. You may also contact us by postal mail at:

Privacy Act Modernization Initiative
Department of Justice Canada
284 Wellington Street
Ottawa, ON
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QUESTIONS FOR INPUT

Q1. In what circumstances would you support the inclusion of a purpose clause which recognizes that one purpose of a modernized *Privacy Act* is advancing reconciliation with Indigenous peoples in Canada by promoting improved sharing of Indigenous individuals' personal information with First Nations, Inuit and Métis? [see discussion on pages 18-19]

Q2. In what circumstances would you support the addition of a principle recognizing that a federal public body may disclose Indigenous individuals' personal information under its control to an Indigenous government, organization or entity? [see discussion on pages 19-20]

Q3. For which purposes, in addition to those already included in the *Privacy Act*, should disclosure of Indigenous individuals' personal information to Indigenous governments, organizations or entities be authorized? [see discussion on pages 20-21]

Q4. Which approaches would you support to expand the purposes for which Indigenous individuals' personal information could be disclosed without consent?

> **A)** Would you support (a) listing all the purposes for which disclosure is permitted, (b) allowing disclosure regardless of the purpose, or (c) an alternative approach? [see discussion on pages 20-21]

Q5. Which concepts and definitions would you support to ensure that the *Privacy Act* appropriately recognizes the diversity of First Nations, Inuit, and Métis Nation governments? [see discussion on page 22]

Q6. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information regardless of the purpose, should this broad disclosure authority be for Indigenous governments only or for all Indigenous governments, organizations and entities? [see discussion on pages 22-23]

Q7. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information for a new list of specific purposes, which types of Indigenous entities (governments, organizations and/or other entities) should be identified as authorized recipients for each of these purposes? [see discussion on pages 22-23]

Q8. What measures should be used to assist a federal public body in ensuring that an Indigenous government, organization, or entity is authorized to receive the personal information of its citizens or members? [see discussion on pages 22-23]

Q9. In what circumstances would you support expanding the *Privacy Act*'s disclosure provisions to authorize federal public bodies to transfer personal information?

> **A)** Should the transfer of personal information be authorized in general or limited to specific situations, such as where there is also a transfer of a program or activity?
>
> **B)** Should federal public bodies be authorized to transfer personal information to all or some Indigenous governments, organizations or entities? [see discussion on pages 23-24]

Q10. What mechanisms should the *Privacy Act* recognize to support expanded information sharing and to ensure the protection of personal information disclosed or transferred to First Nations, Inuit and Métis governments and organizations in line with federal public bodies' responsibilities and accountability obligations?

> **A)** Should a new Act explicitly recognize information sharing agreements (ISAs) and Indigenous peoples' own legislation and privacy codes as mechanisms to support personal information sharing and protection? [see discussion on page 24].

Q11. In what circumstances would you support the development of legislative or regulatory requirements to establish the baseline privacy protections that any chosen mechanism (whether ISAs, Indigenous privacy legislation or code) should include to mitigate the impacts of disclosure and transfer on Indigenous individuals' privacy interests? [see discussion on pages 24-25].

Q12. What baseline privacy requirements should be discussed after engagement on the potential changes identified in Part 2 has concluded? [see discussion on pages 24-25].

PART 1: Context and Summary

Why modernize the *Privacy Act*?

The *Privacy Act* is a key piece of Canada's legal framework for protecting privacy interests. It governs how federal public bodies may collect, use, disclose, retain, dispose of, and protect personal information. It also sets out the rights of individuals to access their own personal information from federal public bodies.

Our world has changed dramatically since the *Privacy Act* came into force in 1983. After close to 40 years of technological advances and societal change, Canadians' expectations of how federal public bodies collect, use, disclose, store and protect their personal information have evolved. There has been a profound shift towards the digitization of information over the last few decades, which has given federal public bodies enormous potential to gather, analyze, and store more information, including personal information. This raises important opportunities and challenges for consideration.

In 2016, the Minister of Justice announced that Justice Canada would be leading the modernization of the *Privacy Act*. A new, modernized *Privacy Act* would establish an updated framework to govern how federal public bodies manage personal information. It would reflect Canadians' modern expectations of privacy. It would also support responsible innovation by federal public bodies in using new technologies and business models to better serve Canadians, especially when these initiatives require cooperation among these bodies or the sharing of information with other levels of government.

Since the *Privacy Act* was enacted, there have also been a number of significant developments that highlight the uniqueness of Indigenous interests in relation to personal information. For example, in 1998, the First Nations and Inuit Regional Health Survey National Steering Committee recognized the OCAP® principles of data ownership, control, access, and possession.[4] In 2018, the Government of Canada committed itself to the *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, which include recognition of Indigenous rights and of Indigenous governments' right to self-determination. On June 21, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and immediately came into force.

Engagement with Indigenous partners

A modernized *Privacy Act* could support reconciliation with First Nations, Inuit and Métis in Canada by engaging in renewed, nation-to-nation, government-to-government, and Inuit-Crown relationships. While the *Privacy Act* focuses on protecting the personal information of all individuals that is held by federal public

[4] OCAP® is a registered trademark of the First Nations Information Governance Centre. See https://fnigc.ca/ocap-training/ for more information.

bodies, it also has specific impacts on Indigenous peoples in Canada. For instance, the Act currently defines "Indian band" and "aboriginal government" in a restricted manner. In addition, some of the provisions allowing the disclosure of personal information may not reflect the variety of reasons for which Indigenous partners may require disclosure of personal information.

In this context, Justice Canada sought to engage with governments and organizations representing the distinct perspectives of First Nations, Inuit and Métis on *Privacy Act* modernization. In 2019, Justice Canada held a targeted technical engagement to begin an in-depth exploration of issues related to the *Privacy Act*, including issues affecting Indigenous peoples. During this technical engagement, privacy and data experts, including experts with knowledge of Indigenous data issues, provided submissions which helped Justice Canada to identify issues for discussion for the dedicated engagement with Indigenous governments and organizations.[5]

In 2020, Justice Canada wrote to 32 Indigenous governments and organizations to express interest in meeting to discuss *Privacy Act* modernization.[6] This initial contact was intended to gauge partners' interest and ability to have virtual bilateral engagement sessions, particularly in light of the COVID-19 pandemic. Officials from the Treasury Board of Canada Secretariat (TBS) were also invited to attend these meetings, given their role leading *Access to Information* (phase 2) review and that initiative's overlap with *Privacy Act* modernization.

Since August 2020, Justice Canada and TBS officials have held bilateral engagement sessions with representatives of 14 Indigenous governments and organizations to discuss *Privacy Act* modernization. These sessions took place in parallel with Justice Canada's online public consultation, and some Indigenous partners participated in both forums.[7] The purpose of the dedicated engagement was and continues to be understanding Indigenous partners' perspectives and experiences with the *Privacy Act* and learning how the Act could better reflect their respective needs and expectations.

To date, we have had discussions with four national Indigenous organizations (NIOs), five Modern Treaty governments, one Métis Nation government, and several organizations and an advisory circle that have particular expertise in privacy, claims research, or information management. Though we have met with partners who advance the interests of all Indigenous peoples, we have not yet had the opportunity to meet with

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[5] More information about this technical engagement and our work to modernize the *Privacy Act* may be found on the Modernizing Canada's Privacy Act webpage on the Justice Canada website. You may also find the *What We Heard Report*, which summarizes the submissions we received in the context of this engagement.

[6] This report does not name the Indigenous governments or organizations that we invited to participate or those who chose to participate in the engagement because we did not seek or obtain permission to proactively share that information.

[7] Justice Canada held an online public consultation on *Privacy Act* modernization from November 2020 to February 2021. More information about the online public consultation may be found on the Modernizing Canada's *Privacy Act* – Online public consultation website. The *What We Heard Report* summarizing the submissions received in the context of the online public consultation is available online.

any who exclusively represent Inuit interests. The summary of what we have learned so far should be read with this limitation in mind.

To help orient the conversation, we provided a Backgrounder document to support the bilateral engagement sessions.[8] Nevertheless, these conversations were an open forum for Indigenous partners to share their perspectives and experiences.

Throughout these meetings, all participating Indigenous partners were careful to clarify whose interests they were representing as well as the limitations of their authority to speak on behalf of other Indigenous peoples. Governments and organizations representing First Nations and Métis interests further emphasized the need to engage directly with First Nations and Métis rights-holders and with the governments authorized to represent them.

The majority of Indigenous partners emphasized the preliminary nature of their comments and expressed a desire for a continued dialogue. Many partners stressed the importance of having open and transparent communication with Justice Canada and TBS as they move forward with their respective modernization initiatives. This report was created as a direct result of this feedback.

One of the purposes of this report is to provide a transparent record of all the conversations that have occurred with Indigenous partners to date regarding *Privacy Act* modernization. Justice Canada officials prepared notes to document the important points raised during these conversations. After each session, these notes were shared with the representative(s) of participating partners and they were invited to provide feedback on the notes to ensure that they accurately captured the conversation. This report draws from these notes and consolidates the input received so far, so that all Indigenous partners, whether they have participated yet or not, can benefit from knowing what others have raised in the context of our initial discussions.

The following is a summary of what we have learned so far.

What we have learned so far from the Indigenous engagement

The modernization of the Privacy Act *impacts First Nations, Inuit and Métis in unique ways*

Several Indigenous partners noted that, in many cases, the federal government tends to hold more personal information about Indigenous individuals compared to most Canadians. Some partners suggested that the Government of Canada should explore ways to reduce what they view as the over-collection of Indigenous individuals' personal information. They noted that this information also tends to be more sensitive than that

[8] The Backgrounder is included as Annex A to this report.

pertaining to Canadians in general, as it may include demographic and social data such as information related to an individual's genealogy, health, education, employment, housing, *Indian Act* status, and treaty annuity payments. As a result, *Privacy Act* modernization may have a unique impact on Indigenous individuals compared to other Canadians.

Indigenous partners also insisted that distinguishing between the experiences and perspectives of First Nations, Inuit and Métis is crucial to understanding the unique impacts and potential of *Privacy Act* modernization for each.

The Privacy Act *is one part of the broader Indigenous data framework*

Multiple Indigenous partners, including organizations with expertise in privacy, claims research or information management, noted that the *Privacy Act* does not regulate the handling of all Indigenous data, but only an individual's personal information. The *Privacy Act* also intersects with other federal statutes,[9] many Modern Treaties, self-government agreements, and in some cases, Indigenous peoples' own legislative, regulatory, and policy frameworks. Because the *Privacy Act* is only one piece of the framework regulating the access, protection, preservation, control, and sharing of Indigenous data, changes to modernize the *Privacy Act* should consider how the Act intersects with other important pieces governing First Nations, Inuit and Métis individuals' personal information and other Indigenous data.

Recognizing the diversity of Indigenous governments

Subsection 8(2) of the *Privacy Act* specifies how federal public bodies can disclose personal information without the consent of the person to whom the information relates. Certain subsections (see ss. 8(2)(k), 8(2)(f), 8(6), 8(7) and 8(8)) authorize federal public bodies to disclose personal information for specific purposes to certain Indigenous governments, notably those defined as an "aboriginal government" or an "Indian Band" under the Act.

Most Indigenous partners considered these concepts and definitions too restrictive. Multiple partners asserted that a modernized *Privacy Act* should acknowledge the diversity of Indigenous governments in Canada and the various legal regimes under which they operate (Modern Treaties, self-government agreements, the *Indian Act*, the *First Nations Land Management Act*, Inuit Land Claims, etc.). Any modernized concepts and definitions should be expanded to recognize that Indigenous governments and organizations are formed at the community, grass-roots level. It should allow for a bottom-up determination of who qualifies as "Indigenous" and take into account traditional and hereditary governance structures. In addition, such a definition should not

[9] The following federal legislation was identified in particular: the *Access to Information Act*, *Indian Act*, *Crown-Indigenous and Northern Affairs Department Act*, *Indigenous Services Canada Act*, *Library and Archives Canada Act*, and *Statistics Act*. Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous peoples*, since enacted and in force, was also raised.

perpetuate the exclusion of historically underrepresented groups (for example, First Nations women, non-status individuals identifying as Indigenous, Métis Nation citizens, and individuals who identify as Indigenous but who are living off-reserve or outside land claim settlement areas).

Some partners expressed a preference to be explicitly named as governments under a modernized *Privacy Act*. However, some Modern Treaty partners indicated that this particular issue is less relevant to them, since they are already listed under the *Privacy Act*'s definition of "aboriginal government".

One NIO partner suggested that the *Privacy Act* should adopt the inclusive definition of an "Indigenous governing body" as incorporated in other federal statutes, such as the *Indigenous Languages Act*.[10] Another NIO partner, however, raised concerns with this suggestion, indicating that not all partners are recognized under this definition or were consulted when it was introduced in other federal legislation. Other partners either did not comment on this suggestion or indicated that they would need to seek the perspectives of their citizens or members before providing input on this topic.

Expanding the purposes for which information may be shared

The current *Privacy Act* lists two specific purposes for which personal information may be shared with certain Indigenous partners without the consent of the individual to whom the information relates: first, for the purpose of administering or enforcing any law or carrying out a lawful investigation (paragraph 8(2)(f)); and second, for the purpose of researching and validating claims, disputes and grievances (paragraph 8(2)(k)).

Indigenous partners emphasized the need to expand these purposes. They provided a number of reasons that First Nations, Inuit and Métis need increased access to personal or communal information, including:

- to locate children in government care;
- to locate and re-establish contact with those taken in the 60s scoop;
- to facilitate registration under the *Indian Act* (especially in cases where a family member is deceased or estranged);
- to assist an Indigenous government with its governance, service delivery and community programs;
- to assist with natural resource management;
- to facilitate the advancement of collective claims;
- to facilitate the co-development and coordination of future initiatives between Indigenous peoples and the Government of Canada; and
- to recognize Métis-specific needs for information, including the creation of Métis Nation government policy and program delivery.

[10] The *Indigenous Languages Act* defines "Indigenous governing body" as "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act*, *1982*".

Some NIOs, Modern Treaty governments, and organizations with expertise in privacy, claims research, or information management also emphasized the importance of receiving information in a timely, accurate, and efficient manner to effectively deliver programs and for strategic planning. One Métis Nation partner suggested that the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the inherent rights to self-government and self-determination as recognized under section 35 of the *Constitution Act, 1982*, should be the starting point for information sharing. They saw no reason for the *Privacy Act* to list specific and limited purposes for which information can be disclosed to Indigenous peoples.

Finally, many partners underlined the importance of Indigenous data sovereignty, meaning that First Nations, Inuit and Métis should have control over their personal information and information relating to their respective communities. Some NIO partners and organizations with expertise in privacy, claims research, or information management added that federal public bodies should go beyond increased disclosure authorities and explore ways to transfer information about First Nations, Inuit and Métis to their respective governments and representative organizations.

Information-sharing agreements and interaction with federal government and Indigenous laws

Paragraph 8(2)(f) of the *Privacy Act* authorizes the disclosure to certain recipients of personal information without the consent of the individual to whom the information relates "for the purpose of administering or enforcing any law or carrying out a lawful investigation" where there is an information-sharing agreement (ISA) in place. However, regarding Indigenous partners specifically, such disclosures can only be made to First Nations listed in the Act. We asked whether there was a need for new and more flexible information-sharing partnerships to ensure that First Nations, Inuit and Métis Nation governments have the same opportunities to access personal information held by federal public bodies.

Most partners identified ISAs as one tool to address their need for more information. ISAs are useful because they can be tailored to the parties' specific needs and can set different levels of protection depending on the sensitivity and use of the information. These partners suggested that the *Privacy Act* should provide clear legislative authority for the creation of ISAs between federal public bodies and First Nations, Inuit and Métis Nation governments and organizations. In their view, such an authority should be distinct from that used for foreign, provincial and territorial governments. It should be broad and adaptable so that it will work for different Indigenous peoples (for example, taking into account that some First Nations operate under the *Indian Act* and others have modern treaties, self-government agreements, or their own effective access to information and privacy legislation).

Certain Modern Treaty partners noted that it can be very resource intensive to create comprehensive ISAs. They suggested that the federal government should create template ISAs to assist First Nations who have less capacity to create one. Some partners suggested that template ISAs could establish baseline privacy

protections to ensure adequate protection for the personal information disclosed or transferred to them, as long as First Nations governments were consulted on what the templates would cover.

Many partners noted that laws, regulations, or policies could be used to establish baseline privacy protections, which could supplement or be used in lieu of ISAs. Similarly, the federal government could consider supporting Indigenous governments with less capacity by clearly establishing baseline privacy protections in federal legislation, regulations, or policy. Including these standards in legislation might be more transparent and helpful to First Nations individuals than nation-to-nation ISAs, which may be confidential or harder to access. On the other hand, where federal laws interact with modern treaties, self-government agreements, or Indigenous partners' own legislation on access to information and privacy, federal laws should recognize and respect these existing legal frameworks.

One NIO partner suggested that, similar to the *Carbon Pollution Pricing Act*, the *Privacy Act* could establish a minimum floor for Indigenous governments' privacy protection requirements, but allow for an Indigenous government's own legislation or an agreement between the Government of Canada and an Indigenous government to override the *Privacy Act* where the legislation or agreement provides equivalent or higher protection.

Finally, some Modern Treaty partners suggested that, regardless of whether ISAs or other legal tools are used, the federal government should ensure that First Nations have the capacity to meet increased privacy protection standards. Where necessary, the federal government should provide resources to assist First Nations in building capacity to meet these requirements prior to the disclosure or transfer of personal information.

Some organizations, particularly those representing First Nations' interests, indicated that further engagement would be required to ascertain their members' perspectives on ISAs or whether minimal privacy protections should be governed by legislation, regulation, or policy.

Mitigating impacts on Indigenous individuals' privacy interests

The disclosure of personal information to Indigenous governments and organizations raises a number of questions that impact the privacy interests of First Nations, Inuit and Métis individuals. We asked whether there is a need to mitigate impacts to individual privacy interests through new legal, policy, or governance measures. We also asked to what extent federal public bodies should disclose personal information to an Indigenous entity where the personal information relates to an individual who is not associated with the entity seeking the information.

Many partners pointed out that this was a complex issue that requires the consideration and balancing of multiple interests, such as: (i) the federal government's interest in ensuring adequate privacy protection and accountability; (ii) Indigenous peoples' communal interest in data sovereignty and the protection of communal information; and (iii) Indigenous individuals' privacy interests in having their personal information protected,

regardless of who holds it. Some NIO partners indicated that particular care should be taken to protect the privacy interests of vulnerable Indigenous individuals, such as Indigenous women, First Nations individuals living off reserve, or individuals with no ties to their ancestral communities. They suggested that a case-by-case analysis should determine whether personal information should be disclosed.

Many partners agreed that there is a need to ensure that there are adequate privacy protections in place before a federal public body discloses or transfers personal information. Some NIO and Modern Treaty partners suggested that the Métis Nation and some First Nations already have governance frameworks or legislation that would provide or support adequate privacy protections for information under their control.

Many partners also commented that the level of protection for personal information may differ depending on the sensitivity of the information and how it is to be used. For example, some partners suggested that privacy protections should be as strong as possible where family history or health information is involved.

Some partners suggested that there should be a mechanism to allow Indigenous individuals to opt out when a federal public body is about to disclose their personal information to an Indigenous government, organization or entity. Others thought that Indigenous individuals should have the right to formally complain about their community's use of their personal information. One NIO partner suggested that the *Privacy Act* could be amended to make the unauthorized disclosure of personal information an offence in order to deter improper use and disclosure of Indigenous individuals' personal information.

Many Indigenous governments and organizations mentioned that they were not aware of their citizens' and members' perspectives regarding the impact of information sharing on Indigenous individuals. They indicated that further discussions would be needed to ascertain their particular perspectives.

Researching and validating claims, disputes and grievances

Paragraph 8(2)(k) of the *Privacy Act* authorizes federal public bodies to disclose personal information to certain Indigenous governments, associations and Indian bands, or to any person acting on their behalf, "for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada".

Most NIO partners and organizations with expertise in privacy, claims research, or information management noted the importance of paragraph 8(2)(k). They identified its limits and discussed the need for more access to Indigenous data, but did not question the need to maintain such a disclosure provision in the *Privacy Act*.

Indigenous partners identified a number of practical impediments to meaningful access to information (described in the next section below). Many of their comments apply to both the *Privacy Act* and the *Access to*

Information Act, given how the acts interact with each other with respect to accessing relevant information to support Indigenous peoples' claims and address other needs.

Organizations with expertise in privacy, claims research, or information management were of the view that it is a conflict of interest to have federal public bodies making decisions about Indigenous peoples' access to records and information that are needed to advance claims, disputes and grievances against the Government of Canada. They expressed concerns that Indigenous peoples often do not have access to the information they need to advance their collective claims, but that the Government of Canada has access to these same records in order to defend claims against it.

Practical impediments to meaningful access to information and privacy protection

Some Indigenous partners discussed the administrative barriers and limitations of the current access to information and *Privacy Act* regimes. Organizations with expertise in privacy, claims research, or information management noted that a number of issues arise in practice. These include the criteria that must be met to obtain access, the amount of information needed to prove successful claims, and the time it takes to access or challenge denials of information (up to five years). These partners noted there is also an issue with government departments taking different approaches to policies that require transferring records to Library and Archives Canada.

NIO and First Nations government representatives discussed the unique barriers their members and citizens experience that impact their access and privacy rights. They mentioned a lack of basic Internet access, IT systems, and infrastructure, the remote nature of some Indigenous communities, and technological and other literacy challenges (especially in English or French). While they acknowledged that increasing electronic access to government services is generally beneficial, they asserted that paper options must remain available given the current realities of many Indigenous communities and individuals. One barrier in particular was noted: that many Indigenous individuals may be hesitant to interact with the federal government because of past negative experiences.

Multiple Indigenous partners suggested that a mechanism to allow third parties to assist with information requests would alleviate some of these barriers. Some recommended a legislative modification to allow First Nations governments to request personal information on behalf of their citizens. However, another partner noted there are risks in allowing third-party representation where a vulnerable person is involved and stated that a strict consent framework would be required to maintain confidence in the system. One organization suggested these practical barriers could be reduced by providing free translation services or allowing information requests to be made in an Indigenous language.

Indigenous partners offered different perspectives on whether the publication of genealogical information would facilitate claims and other research. Two NIOs indicated that such a publication would be welcomed if it

reduced the cost and the difficulty of obtaining that information. One organization with expertise in privacy, claims research, and information management suggested using a general database instead of a publication and providing equal access to researchers acting on behalf of Indigenous governments and organizations and Government of Canada researchers.

All Indigenous partners who provided input on this issue noted that the bigger challenge is how to appropriately balance access to information with the privacy rights involved. Questions such as whether publication would be open access (publicly available online) or limited access (such as only allowing authorized researchers to access databases or only allowing individuals to access their own ancestors' and descendants' information) require further discussion and consideration. Early comments suggested that there is no one-size-fits-all solution and government should adopt a risk-management approach to these questions.

New governance mechanisms

Decisions touching on the access to and protection of First Nations, Inuit and Métis individuals' personal information can be particularly complex, and Indigenous governments and organizations want to exercise a measure of control over such decisions. We asked whether Indigenous partners thought that new governance tools were needed to support a participatory approach in assisting federal public bodies to discharge their stewardship obligations.

NIOs and organizations with expertise in privacy, claims research, or information management who provided feedback on this topic emphasized the need for Indigenous sovereignty over their data. This would require Indigenous peoples to be directly involved in the decision-making process related to how their information is used and disclosed. This may require legislative, policy, and process changes, such as the establishment of appropriate enforcement and appeal mechanisms.

These partners suggested that a new access to information and privacy regime could be established, one which would allow Indigenous peoples to provide direct guidance, oversight, or exercise formal decision-making powers with respect to how their information is used. For example, some of these partners suggested that Indigenous governments should be notified where there is a privacy breach involving their citizens' data, or be consulted where federal public bodies intend to disclose Indigenous peoples' data, particularly to third parties who intend to share or sell this information to others.

These partners suggested that a new oversight body could also be established. The oversight body would need to be arm's length from the government, have Indigenous and non-governmental representation, and be adequately resourced. One NIO partner suggested that the Office of the Privacy Commissioner and Office of the Information Commissioner could continue their oversight functions, but be given the additional power to conduct a confidential investigation where an Indigenous individual's request for information is denied. This

would help protect the most vulnerable Indigenous individuals who require information, including Indigenous women and their families.

All partners who provided input on this topic emphasized that the creation of any new governance mechanisms would require consultation and co-development with Indigenous governments.

Recognizing collective-based privacy interests

Another issue that we raised for discussion was whether the *Privacy Act* should provide protection for both individual and collective privacy interests, and if so, how this could be best achieved.

Some NIOs and Indigenous expert organizations, as well as one Modern Treaty partner, noted that Indigenous peoples have unique, collective privacy interests. Collective privacy interests may arise in relation to a variety of traditions – for example, with respect to a First Nation's ancestral naming traditions or traditions relating to sun dance ceremonies. Collective privacy interests may also arise in relation to other forms of knowledge and information (including Indigenous peoples' oral histories, songs, stories, knowledge of medicines, and any other information about their community and in relation to their traditional lands). One organization with expertise in privacy, claims research, or information management noted that privacy protections for these types of interests must transcend jurisdictional boundaries and be open-ended enough to recognize new forms of privacy interests into the future.

There was divided opinion on whether the *Privacy Act* or other federal or Indigenous laws were the appropriate legal framework to protect collective privacy interests. Some partners noted that due to the *Privacy Act*'s emphasis and structuring around individual-based interests, it might not be the best framework for recognizing and protecting collective privacy interests. Others felt that the *Privacy Act* should protect collective privacy interests and could set out specific rules for this form of knowledge (for example, a requirement to notify the Indigenous community that Indigenous knowledge will be collected, how it will be used, if it will be disclosed, and if so, to whom). One organization with expertise in privacy, claims research, or information management stated that First Nations should have decision-making powers with respect to all their data; in their view, it would be better for First Nations' own legislative frameworks to address this question. Another organization said that it would have to consult its individual member nations before providing feedback on this topic.

NIO partners who provided feedback on this topic felt that greater protections were needed for collective privacy interests, whether that occurred in the *Privacy Act* or elsewhere. One partner saw this issue as an opportunity to align Canadian privacy laws with the *United Nations Declaration on the Rights of Indigenous Peoples*, particularly its provision recognizing Indigenous peoples' collective knowledge and to align privacy protections with the concept of Free, Prior and Informed Consent. This partner also suggested that Indigenous knowledge be explicitly recognized, as in the federal *Impact Assessment Act*.

PART 2: Moving forward and inviting feedback on potential changes

Moving forward with *Privacy Act* modernization

The summary in Part 1 of this report shows that not all questions related to *Privacy Act* modernization raise the same concerns among Indigenous partners. However, many have received a lot of input and could benefit from further comments on potential changes to the *Privacy Act*. Others questions, however, require additional discussions and consideration before potential policy options can be explored.

Most Indigenous partners expressed an interest in having initial or further engagement once policy options for potential changes were identified. They asked Justice Canada and TBS to communicate timelines and opportunities for future engagement on the *Privacy Act* modernization and *Access to Information* (phase 2) review initiatives as they unfold. This part of the report was created with this feedback in mind and is intended to provide information on the next steps for Justice Canada's engagement with Indigenous partners.

Moreover, it is on this basis that we have developed a multi-stage approach for moving forward with *Privacy Act* modernization. The goal of this approach is to ensure that all questions related to *Privacy Act* modernization and its impact on Indigenous peoples are given appropriate consideration and are coherently addressed, while ensuring momentum forward in modernizing the *Privacy Act* as a whole. With this in mind, we are proposing to first discuss the *Privacy Act*'s foundational principles and rules that play a significant role in governing information sharing between federal public bodies and Indigenous peoples with Indigenous governments and organizations. After that, and possibly after the enactment of a new *Privacy Act*, we would then engage partners to discuss the more detailed rules and complex questions to support any initial changes made.

For the next stage, we invite input and comments on the following ideas for potential changes that we have developed based on what have learned so far.

Ideas for potential changes to modernize the *Privacy Act*

1. **Explicitly recognizing advancing reconciliation with Indigenous peoples as a purpose of the *Privacy Act***

Like many federal laws, the *Privacy Act* contains a purpose clause. In the context of the online public consultation on *Privacy Act* modernization, Justice Canada proposed updating the Act's current purpose clause to clearly state the important underlying objectives of federal public sector personal information protection legislation, including advancing reconciliation with Indigenous peoples in Canada by promoting better sharing of Indigenous individuals' personal information with First Nations, Inuit and Métis. Other proposed objectives include:

- protecting individuals' human dignity, personal autonomy, and self-determination;
- enhancing public trust and confidence in government;
- promoting the responsible use and sharing of data to advance federal government objectives in the public interest;
- promoting effective and accountable public governance; and
- supporting sound, ethical and evidence-based public sector decision making.[11]

Including these objectives could better guide the interpretation of the Act and the discretionary decisions it frequently requires. The idea of adopting a better-framed purpose clause that would reflect the broader public objectives of the *Privacy Act* received support from many stakeholders who participated in the online public consultation.

Q1. In what circumstances would you support the inclusion of a purpose clause which recognizes that one purpose of a modernized *Privacy Act* is advancing reconciliation with Indigenous peoples in Canada by promoting improved sharing of Indigenous individuals' personal information with First Nations, Inuit and Métis?

2. Adding a principle stating that a federal public body may disclose Indigenous individuals' personal information under its control to an Indigenous government, organization or entity

A principles-based approach to personal information protection

In its online public consultation discussion paper, Justice Canada proposed that a modernized *Privacy Act* could incorporate a number of internationally recognized principles for protecting personal information, similar to other personal information protection laws in Canada and elsewhere. These would set the baseline expectations for Canadians and federal public bodies as to how personal information should be managed and protected by federal public bodies.[12] These principles would be supported by more detailed rules offering specific direction about what the *Privacy Act* requires or allows these bodies to do.

This principles-based approach garnered substantial support from most stakeholders who participated in the online public consultation. Such principles were widely seen as being part of a contextually sensitive, adaptable and flexible approach to regulating activities involving personal information, as well as supporting the interoperability of the *Privacy Act* with other personal information protection frameworks.

[11] See Respect, Accountability, Adaptability: A discussion paper on the modernization of the *Privacy Act*.
[12] *Ibid*.

Broadening the scope of disclosure to entities representing the interests of Indigenous peoples

In both the online public consultation and Indigenous engagement so far, Indigenous partners expressed a need for greater disclosure of Indigenous individuals' personal information by federal public bodies to entities representing the interests of Indigenous peoples. In light of this, one idea would be to include a new principle under the Act stating that a federal public body may disclose an Indigenous individual's personal information under its control to an Indigenous government, organization or entity, without requiring the consent of the individual. Such a principle could expand the current disclosure authorities both by authorizing disclosure for more purposes than currently recognized and by authorizing disclosure to a greater variety of Indigenous recipients. For instance, it could recognize that such personal information might be disclosed to a greater number of Indigenous governments than those currently identified under the Act, as well as to Indigenous organizations and entities.

A principle recognizing such an expansive disclosure authority could be a significant step in modernizing the information-sharing relationship between federal public bodies and Indigenous peoples. However, to ensure that Indigenous individuals' personal information remains protected and that federal public bodies meet their responsibilities and accountability obligations, this principle would need to be supported by a more specific privacy protection framework. As such, adequate privacy protections would need to be in place before such a principle could be used to disclose Indigenous individuals' personal information.

Subsections A-D below explore the ways in which a principle could be framed and could work to expand the current disclosure authorities, while subsection E aims to further a discussion on how more specific rules could support such a principle so it could work in practice.

Q2. In what circumstances would you support the addition of a principle recognizing that a federal public body may disclose Indigenous individuals' personal information under its control to an Indigenous government, organization or entity?

A. The purposes for which the information can be disclosed without an individual's consent

There was a consistent message throughout the engagement sessions: First Nations, Inuit and Métis governments and organizations need more access to Indigenous individuals' personal information. Currently, section 8 of the *Privacy Act* authorizes a federal government institution to disclose an individual's personal information for any purpose with his or her consent. Section 8 also identifies specific circumstances that authorize the disclosure of the personal information of any individual without that individual's consent. Some of

these are general authorities for disclosing personal information without an individual's consent,[13] while some are specific to Indigenous peoples.[14]

Indigenous partners expressed support for maintaining the existing disclosure authorities in a modernized Act, but also suggested adding new authorities to allow federal public bodies to disclose Indigenous individuals' personal information without their consent for a greater number of purposes.

Indigenous partners have raised a number of reasons for needing greater access to the personal information of their citizens or members. Many of these reasons are related to the exercise of government functions such as community service delivery, natural resources management, and future governance initiatives. Some Indigenous partners have also expressed that Indigenous data sovereignty justifies disclosure of personal information for greater purposes.

There are two possible approaches for expanding the current list of purposes for the disclosure of Indigenous individuals' personal information to Indigenous entities without the individual's consent. One approach could be to identify all the purposes not already mentioned in the *Privacy Act* for which disclosure of personal information to Indigenous governments, organizations and entities should be authorized, and then listing them in the Act. These purposes could be specific (for example, "for research purposes"), or more general (using language such as "to contribute to the development or well-being of the community that the recipient represents" or "for the purpose of advancing the interests of Indigenous peoples in Canada"). Another approach could be one that simply authorizes disclosure without consent to Indigenous governments, organizations or entities regardless of the purpose of the disclosure.

Q3. For which purposes, in addition to those already included in the *Privacy Act*, should disclosure of Indigenous individuals' personal information to Indigenous governments, organizations or entities be authorized?

Q4. Which approaches would you support to expand the purposes for which Indigenous individuals' personal information could be disclosed without consent?

A) Would you support (a) listing all the purposes for which disclosure is permitted, (b) allowing disclosure regardless of the purpose, or (c) an alternative approach?

[13] See section 8 of the *Privacy Act*. For example, paragraph 8(2)(b): for any purpose in accordance with an Act of Parliament; paragraph 8(2)(j): communication for research purposes; and paragraph 8(2)(m): communication that is in the public interest.

[14] See paragraph 8(2)(f) of the *Privacy Act*: for the purpose of administrative or enforcing any law or carrying out a lawful investigation; and paragraph 8(2)(k): for the purpose of researching and validating claims, disputes and grievances. These provisions were adopted in 1982 to address the perceived needs of Indigenous governments at the time.

B. Recognizing the diversity of Indigenous governments

Indigenous partners are in overall agreement that the *Privacy Act* provisions authorizing the disclosure of personal information without consent need to recognize the scope and diversity of Indigenous governments. This would mean no longer limiting disclosure to those who are "Indian Bands", who are listed as an "aboriginal government", and those who are expressly identified as authorized recipients of personal information.[15] It would also mean no longer distinguishing between these Indigenous governments. To achieve this goal, a modernized *Privacy Act* could include new concepts or definitions encompassing First Nations, Inuit and Métis Nation governments as governments to whom personal information could be disclosed. One consideration would be avoiding a legislative list that needs to be constantly updated, yet having a concept clear enough to prevent interpretation issues, delays in disclosures, and potential privacy breaches.

Lawmakers have tried multiple ways to recognize the diversity of Indigenous governments. Some provincial data-protection statutes refer to Indigenous organizations "exercising government functions",[16] while some federal statutes refer to the concept of an "Indigenous governing body" and define it as "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*".[17]

Q5. Which concepts and definitions would you support to ensure that the *Privacy Act* appropriately recognizes the diversity of First Nations, Inuit, and Métis Nation governments?

C. Disclosures of personal information to Indigenous organizations and entities

Adding a principle to the *Privacy Act* that would expand the purposes for which the personal information of Indigenous individuals can be disclosed without consent raises another question: whether this personal information should be disclosed without consent to Indigenous organizations or entities other than Indigenous governments? For example, the *Privacy Act* could authorize disclosure to any "Indigenous organization", which could be defined as in other federal statutes as an "entity that represents the interests of an Indigenous group and its members".[18] Furthermore, the *Privacy Act* could allow personal information to be shared with recipients regardless of the purpose or only for some specific purposes, depending on the recipient. This issue raises

[15] See for example sections 8(2)(k), 8(2)(f), 8(6), 8(7) and 8(8) of the *Privacy Act*.
[16] See for example schedule 1 of the B.C. *Freedom of Information and Protection of Privacy Act*: "aboriginal government" means "an aboriginal organization exercising governmental functions".
[17] See for example: *An Act respecting First Nations, Inuit and Métis children, youth and families*; *Canadian Energy Regulator Act*; *Department of Crown-Indigenous Relations Act*; *Department of Indigenous Services Act*, *Fisheries Act*; *Impact Assessment Act* and *Indigenous Languages Act*.
[18] See for example Canadian Energy Regulator Act; *Department of Crown-Indigenous Relations Act*; *Department of Indigenous Services Act*, and *Indigenous Languages Act*. Please note that for the purposes of some statutes, an Indigenous organization also includes an Indigenous governing body.

related questions about which Indigenous entities have the endorsement and trust of First Nations, Inuit and Métis to receive their personal information and for which purposes.

Q6. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information regardless of the purpose, should this broad disclosure authority be for Indigenous governments only or for all Indigenous governments, organizations and entities?

Q7. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information for a new list of specific purposes, which types of Indigenous entities (governments, organizations and/or other entities) should be identified as authorized recipients for each of these purposes?

Q8. What measures should be used to assist a federal public body in ensuring that an Indigenous government, organization, or entity is authorized to receive the personal information of its citizens or members?

D. The transfer of personal information

Some Indigenous partners have emphasized the importance of Indigenous data sovereignty and suggested that the *Privacy Act* should also authorize federal public bodies to transfer personal information about First Nations, Inuit and Métis to their respective governments and representative organizations. For the purposes of this discussion, a transfer is different from the usual situation where a copy of the personal information is provided to the requestor. Instead, with a transfer, a federal public body would provide the personal information and then would cease to have control over or even a copy of the information transferred, subject to its own obligations pursuant to the *Library and Archives of Canada Act*. This would mean that the federal public body would be unable to use or disclose the information anymore, including giving access to it to the individual to whom it relates.

Q9. In what circumstances would you support expanding the *Privacy Act*'s disclosure provisions to authorize federal public bodies to transfer personal information?

A) Should the transfer of personal information be authorized in general or limited to specific situations, such as where there is also a transfer of a program or activity?

B) Should federal public bodies be authorized to transfer personal information to all or some Indigenous governments, organizations or entities?

E. Mitigating impacts on Indigenous individuals' privacy interests

Many Indigenous partners recognized the need to mitigate impacts on Indigenous individuals' privacy interests and to ensure there are adequate privacy protections in place before a federal public body discloses or transfers the individual's personal information to a First Nations, Inuit or Métis government, organization or another entity. This means there would need to be a framework in place to ensure adequate privacy protections before the principle extending the current scope of authorized disclosure could be used.

Some Indigenous partners have identified measures and mechanisms that could ensure the protection of the personal information after disclosure or transfer, in line with federal public bodies' responsibilities and accountability obligations. Information-sharing agreements were recognized by some partners as a good tool for establishing minimal privacy protections but also as very resource intensive. Consequently, some partners proposed creating an ISA template to establish baseline privacy protections and making a regulation power to establish it. As an alternative to an ISA, others suggested that federal public bodies could rely on the privacy protections provided by Indigenous governments' own privacy legislation or codes where these exist. This alternative would align with the approach of many jurisdictions that authorize the disclosure of personal information when the recipient is subject to a personal information protection framework that provides a "similar", "equivalent", or "adequate" level of protection as the one that applies to the disclosing entity.

Q10. What mechanisms should the *Privacy Act* recognize to support expanded information sharing and to ensure the protection of personal information disclosed or transferred to First Nations, Inuit and Métis governments and organizations in line with federal public bodies' responsibilities and accountability obligations?

A) Should a new Act explicitly recognize ISAs and Indigenous peoples' own legislation and privacy codes as mechanisms to support personal information sharing and protection?

Q11. In what circumstances would you support the development of legislative or regulatory requirements to establish the baseline privacy protections that any chosen mechanism (whether ISAs, Indigenous privacy legislation or code) should include to mitigate the impacts of disclosure and transfer on Indigenous individuals' privacy interests?

Q12. What baseline privacy requirements should be discussed after engagement on the potential changes identified in Part 2 has concluded?

PART 3: Questions for future discussion and consideration

In addition to the ideas presented above for potential changes to modernize the *Privacy Act*, there remain many other related questions that may or may not need to be addressed by the *Privacy Act* itself. For these questions, there is a need to discuss how to address them as well as the most appropriate tools (legislation, regulations, policies, guidelines, etc.) to do so.

Following engagement on the ideas for potential changes set out in Part 2 of this report and the possible enactment of a modernized *Privacy Act*, we are proposing a later stage to discuss the more detailed rules and complex questions that could support and complement any initial changes made to modernize the *Privacy Act*. This further engagement would also provide an opportunity to discuss any additional issues that Indigenous partners consider relevant and important. Below are some of the issues that have been identified so far that would benefit from future discussion and consideration.

Mitigating impacts on Indigenous individuals' privacy interests

Once we have gathered feedback on questions 10 to 12 above, we will be better able to determine whether and how to continue discussions on the best way to ensure that Indigenous individuals' privacy interests are adequately protected when their personal information is disclosed or transferred to First Nations, Inuit and Métis governments or organizations.

If needed, future discussion on this issue would focus on identifying more precise measures and mechanisms that could be used to ensure the protection of such personal information, in line with federal public bodies' responsibilities and accountability obligations.

It could also address measures to appropriately balance the privacy interests of those individuals whose personal information is disclosed or transferred with communal access to that information (for example, an individual being given a right to opt out, to file a complaint, or to request access to and correction of their personal information).

New governance mechanisms

Some Indigenous partners have raised the possibility of Indigenous governments and organizations participating in the decisions of federal public bodies about their handling of personal information about Indigenous peoples, individually and collectively. This could include more general situations where any personal information is disclosed or specific circumstances (e.g. where personal information is disclosed for research purposes, where it is disclosed outside of Canada, or where there is a privacy breach).

The discussion on this issue would focus on obtaining input from a greater number of Indigenous partners and, if required, identifying the means and tools necessary to support a participatory approach. It could also include

measures to assist employees of federal public bodies in discharging their stewardship obligations in a way that better meets the expectations and needs of Indigenous peoples.

New oversight mechanisms

As mentioned in Part 1 of this report, some Indigenous partners have suggested there is a need to develop new oversight mechanisms or to review the current ones. Suggestions include having a dedicated Indigenous Privacy Commissioner or an advisory body to resolve complaints related to Indigenous people's privacy concerns. Another suggestion is to modify the existing powers of the Privacy Commissioner to ensure appropriate recourse in resolving Indigenous individuals' privacy complaints.

The input received so far on the need to develop new oversight mechanisms has been raised by very few partners. Consequently, future discussion on this issue would focus on obtaining the perspectives of a greater number of Indigenous partners to better understand the needs underlining this recommendation and, if necessary, to identify the best way to meet these expectations.

Protection of Indigenous peoples' collective and unique privacy interests

Another question that was raised during the Indigenous engagement was whether the *Privacy Act,* which is designed to protect an individual's personal information, should expand its scope to also protect community, aggregated or de-identified information about Indigenous peoples or their unique privacy interests relating to certain information (for example, oral histories or Indigenous traditional knowledge).

There was divided opinion among Indigenous partners on whether the *Privacy Act* itself, other federal laws, or Indigenous laws would be the appropriate legal framework to protect Indigenous peoples' collective and unique privacy interests. These issues are very complex; further discussion would help identify the real impacts of any proposed approach.

Conclusion and Next Steps

Questions about *Privacy Act* modernization and its potential impacts on First Nations, Inuit and Métis are complex, important, and will require further engagement with Indigenous partners. As a next step, Justice Canada officials are inviting Indigenous partners to provide input on the ideas for potential changes to the *Privacy Act* raised in Part 2 of this report.

We would be pleased to meet virtually with representatives from First Nations, Inuit and Métis governments and organizations and/or to receive written comments on the ideas for potential changes. Indigenous governments and organizations are invited to share this report with their citizens and members and to obtain their points of view before providing input and perspectives to us. We also welcome written comments on the questions identified for future discussion, though these questions will be the focus of dedicated engagement activities in the future.

To schedule a meeting or to provide written comments, please send an email to the *Privacy Act* modernization team at: privacyactmodernization-modernisationdelaLPRP@justice.gc.ca. You may also contact us by postal mail at:

Privacy Act Modernization Initiative
Department of Justice Canada
284 Wellington Street
Ottawa, ON
K1A 0H8

We invite you to schedule a meeting and/or provide your written comments before **April 30, 2022**.

ANNEX A. Backgrounder document provided to support bilateral engagement sessions

Privacy Act Modernization Engagement: Taking into Account the Perspectives of First Nations, Inuit and Métis Peoples

What is the *Privacy Act*?

- The *Privacy Act* is Canada's federal public sector personal information protection statute. It applies to approximately 265 federal government institutions, including agencies, departments, offices, crown corporations, national councils, agents of parliament, and many more. It does not apply to private sector businesses, nor to Indigenous governments and organizations.

- The *Privacy Act* governs how federal government institutions may collect, use, disclose, retain and dispose of personal information, and gives individuals the right to access their own personal information from federal government institutions. It provides individuals with the right to file a complaint to the Privacy Commissioner of Canada if they are concerned with how a federal government institution handles their personal information or with the response received to a request to access their personal information.

- The *Privacy Act* is organized around the concept of "personal information" which is defined in the Act as information about an identifiable individual that is recorded in any form. This means that the Act offers privacy protection to information associated with an identifiable individual. To date, information about groups or nations has not been specifically protected under this law.

- The *Privacy Act* is a very important piece of the federal public sector privacy framework, but does not contain all the legal rules that can have an impact on the privacy of individuals. It creates a set of general rules that can be supplemented, expanded, or restricted by provisions included in other federal laws. The *Privacy Act* works alongside the *Access to Information Act*, the *Canadian Charter of Rights and Freedoms*, and treaties, many of which contain detailed provisions about information sharing and confidentiality.

What are the goals of modernizing the *Privacy Act*?

- The *Privacy Act* has not been substantially amended since it became law in 1983. A modern *Privacy Act* should update rights and obligations to protect individuals' modern expectations of privacy, allow adaptability for innovative governance in a world of disruptive change, and incorporate meaningful and transparent accountability mechanisms backed by strong governance and oversight.

- The Act was drafted in a paper-based era, long before the First Nations and Inuit Regional Health Survey National Steering Committee recognized the OCAP® principles, and before the Government of Canada's commitment to implement the United Nations Declaration of the Rights of Indigenous Peoples in Canadian law. One of the goals of the modernization initiative is to support reconciliation with First Nations, Inuit and Métis peoples

What is the purpose of this engagement?

- The purpose of this engagement is to learn about the experience of Indigenous peoples, groups, organizations and governments with the *Privacy Act*. We are seeking their perspectives on what is working well, what could be improved, and how the Act can be modernized to better reflect Indigenous peoples' needs and expectations.

- This engagement builds upon a preliminary targeted technical engagement with experts conducted during the summer of 2019. At that time, the Department of Justice Canada sought the views of privacy, digital, and data experts on five discussion papers and, through this process, gained a preliminary understanding of some of the issues of interest to Indigenous peoples, organizations and governments.[19]

- Our goal is to deepen our understanding of the considerations raised during this earlier engagement, broaden the scope of these preliminary conversations, and discuss potential approaches to responding to issues of concern for Indigenous peoples in Canada.

- In addition, the Department of Justice Canada has launched an online public consultation on *Privacy Act* modernization to which you are invited to participate[20]. The public consultation is proceeding in parallel with our separate engagement efforts with Indigenous governments and organizations in Canada in order to discuss issues in which they have a specific interest.

Some of the specific questions on which we would like to engage

- We welcome any feedback you may have regarding potential changes that could be made to the *Privacy Act*.

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[19] More information about this technical engagement and our work to modernize the *Privacy Act* may be found on the Modernizing Canada's Privacy Act webpage on the Justice Canada website. You may also find the What We Heard Report which summarizes the submissions we received in the context of this engagement.

[20] The online public consultation is open for feedback until February 14, 2021. You can visit the dedicated public consultation website at: https://letstalkprivacyact.ca.

- In addition to the general feedback we are seeking, we have summarized below key themes and questions that emerged from our 2019 preliminary targeted technical engagement that could help to organize our discussions.

1. Recognizing the diversity of Indigenous governments

The *Privacy Act* provides a definition of "Indian Band" and "aboriginal government" which identify specific Indigenous governments to which personal information may be disclosed (see ss. 8(2)(k), 8(2)(f), 8(6), 8(7) and 8(8)).

- How can a modernized *Privacy Act* best recognize a broader and more inclusive approach to these information-sharing partnerships consistent with a renewed nation-to-nation, government-to-government, and Inuit-Crown relationships?

2. Continued disclosures for claims research while mitigating impacts on individual privacy

Subsection 8(2)(k) of the *Privacy Act* authorizes government institutions to disclose personal information, notably to "any aboriginal government" (as defined under paragraph 8(7)), "association of aboriginal people", "Indian band" (as defined by paragraph 8(6)) or to any person acting on behalf of them "for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada".

- While advancing collective claims can require and justify the disclosure of personal information, is there a need to mitigate impacts on individual privacy through new legal, policy or governance measures?

- To what extent should personal information be disclosed to an Indigenous entity with which the subject individual is not associated in any way?

3. New and more flexible information-sharing partnerships

Paragraph 8(2)(f) of the *Privacy Act* facilitates information-sharing agreements with specific First Nation governments for law enforcement purposes or lawful investigations.

- Should this provision be reviewed to ensure that all Indigenous governments, whether they are First Nation, Inuit or Métis, have the same opportunities to access federal personal information for not only law enforcement or lawful investigations, but potentially other purposes?

4. **New governance mechanisms**

Decisions with respect to the protection of and access to the personal information of Indigenous peoples can be particularly complex. For instance, Indigenous organizations and governments want to exercise a measure of control over these decisions, notably in the research context.

- Is there a need for new governance tools supporting a consultative approach that could assist federal institutions in discharging their stewardship obligations in a way that meets the expectations of Indigenous peoples, and if so, what are the preferred options?

5. **Protecting collective-based interests in autonomous Indigenous data governance**

Individual and collective Indigenous privacy interests are intertwined, and are impacted by the federal government's relationship with Indigenous peoples.

- Is there a need to modify the *Privacy Act* to ensure protection for Indigenous peoples as individuals and as members of distinct Indigenous collectivities, whether personal information is de-identified or not and, if so, how could that be achieved?