



Privacy Foundation New Zealand

Hon Andrew Little MP
Minister of Justice
Parliament House
WELLINGTON

Copies to:

- Minister of Foreign Affairs
- Minister of Trade
- Minister of Health
- Leader of the House

8 May 2020

Dear Minister

Enactment of Privacy Bill remains vital during emergency

I write on behalf of the Privacy Foundation New Zealand to urge that, subject to higher pandemic priorities, the Privacy Bill be enabled to complete its final parliamentary stages at the earliest opportunity.

There are of course many reasons in normal times why it is important to replace our aging privacy law with something more effective. The all-party support for the Privacy Bill at each parliamentary stage to date has been evidence of that. However, the Foundation wishes to highlight that there are good reasons to enact the bill to support New Zealand's health and economic response to the pandemic. We wish, in particular, to emphasise that:

- Privacy law underpins trust in government which is vital for New Zealand to effectively respond to the pandemic.
- Modern privacy law is an enabler to e-commerce and e-government which have been central to New Zealand's public health and economic responses and will be increasingly important as we move forward in recovery.

Trust in government

New Zealand over recent years has been fortunate in having a relatively high level of trust in government. This is not an accident but has been fostered by the emphasis given by successive governments to good governance.

This high level of trust has stood the nation in good stead as we have been asked temporarily to restrict many of our personal liberties for the greater community good. Most New Zealanders have willingly complied not by dint of legal or physical coercion but by having the reasons explained, the

science shared and by having the political and scientific leadership subject to public scrutiny and accountability.

We need only look across the Pacific to see the daily cost in human lives to a society that takes leave of good governance and allows a political malaise to drain trust in government and science.

However, trust in government is not guaranteed forever. It is a precious legacy that must constantly be protected. It can be chipped away at or quickly lost. In the Foundation's view, responsible, transparent and accountable state use of personal information of New Zealanders is a bedrock of public trust and this is the essence of privacy law.

The existence of safeguards in law is one reason why civil society has been relatively supportive in relation to the extraordinary steps that the government has taken in relation to the pandemic in comparison with some advocacy groups overseas. The Foundation, for example, made a public statement urging agencies that hold personal information to be willing to use legal discretion to share needed information with the government.¹

However, confidence is harder to maintain in the long term when it is recognised that the 25-year old privacy law is no longer effective for today's digital age. Trust in government may wane the longer the emergency continues especially if there is an event that shakes public confidence, such as a major privacy breach. Trust will also be needed, but be at risk, as new surveillance measures are rolled out such as the planned app.

The Foundation recommends that one step that should be taken to maintain public trust is to move forward with enactment of the Privacy Bill. It will strengthen the standards expected for agencies to protect information (such as requiring breach notification) and give the watchdog, the Privacy Commissioner, the necessary powers to act effectively.

A government does not create public trust in a vacuum. It inherits a base level from predecessor governments and its actions, and circumstances, can add or detract from the trust level. There are several New Zealand precedents for enacting privacy law expressly to maintain public trust in anticipation of government measures that were believed to be in the public interest but known to worry many reasonable citizens. These precedents included:

- The Privacy Commissioner Bill 1974 (Labour, not enacted) and Wanganui Computer Centre Act 1976 (National) to establish the Wanganui Computer Centre Privacy Commissioner in anticipation of the centralisation and computerisation of criminal records.
- The Privacy Commissioner Act 1991 in anticipation of government information matching to detect beneficiary fraud.
- The Privacy Act 1993 commencement was brought forward to promote public confidence in the handling of health information in the context of major public health reforms.

E-government and e-commerce

The response to the pandemic may come to be seen as a case study in the agile application of electronic solutions to serious problems in a national emergency. The rapid roll out of the wage subsidy would not have been possible without e-government applications. The overnight emergence of 'contactless' business in Level 3 is the epitome of e-commerce.

¹ Statement from the Privacy Foundation NZ, "[New Zealand's privacy law flexible to meet the challenges of the pandemic](#)", 5 April 2020:

E-commerce will continue to have a pre-eminent role for the foreseeable future as we grapple with the risk of personal contact.

E-government and e-commerce is not without risks and these are magnified in today's environment where many small businesses and consumers are getting involved in online transactions for the first time. Privacy law is one of several core laws that are essential for the safe operation of the digital economy. However, our privacy law is over a quarter century old and has been described as no longer 'fit for purpose'. The plans of this and the previous government to replace our old law were near completion before the current emergency. The Foundation urges that now that Parliament is sitting again that some of the remaining time before the General Election be used to finish the job.

The Foundation also highlights the role of the digital economy globally. While physical connections remain disrupted, New Zealand will want to remain competitive in whatever ways it can find. In this regard we highlight the need to demonstrate to the European Commission (EC) that New Zealand is serious about standards of data protection in order to maintain a finding of third country adequacy under the EU's General Data Protection Regulation (GDPR).

It is well known that New Zealand's existing privacy law, and also the proposed Privacy Bill, do not include some of the provisions found in the GDPR. We are aware that you have publicly stated that you do not intend to change this bill to include features mirroring the missing GDPR features and that the select committee studying the bill also took this course. (We note with approval that you have indicated your intention to return to those aspects after enactment and have not ruled out suitable amendments.)

It will therefore be an uphill task to convince the EC that our law fulfils current European standards. In the Foundation's opinion, the task of convincing the EC will be made much harder if the enactment of the Privacy Bill is postponed as it was the EC's intention to have its first review of existing third country decisions completed by mid-year. We speculate that the EC is likely to be impressed by New Zealand moving forward even at time of emergency to enact such a law. It will demonstrate a strong commitment to values shared with Europe even if the details differ from their legislative model. Enactment of the new stronger privacy law will set New Zealand apart from countries that backslide on human rights commitments in such circumstances.

The Foundation takes the view that it is in New Zealand's trade interests to maintain our status as a third country to which EU businesses can freely share personal data for processing. We expect that the best chance to maintain that status is the enactment of the Privacy Bill and for further work then be done to explore if further enhancements are desirable.

I am available to be contacted in relation to this letter at 021 0743419.

Yours sincerely



Gehan Gunasekara
Chair, Privacy Foundation New Zealand