

## Privacy Foundation NZ Newsletter

No 4 November 2020

Welcome to the 4th issue of the Foundation's newsletter to bring members up to date with developments since the last newsletter in July.

### Chair's message



This has been a difficult year for many but there has been light at the end of the tunnel, notably the enactment of the new Privacy Act and the return to a semblance of normalcy after the frequent interruptions caused by COVID-19. The silver lining, if there is one, is the increased profile the Foundation has attained due to the pandemic: the numerous privacy-related issues arising this year has given us an opportunity to raise awareness of privacy issues and to engage with the public and Government. In addition, our working groups have produced valuable contributions to the discourse around current topics including encryption and the proposed consumer data right (see below).

The Foundation's position paper seen below on the new Act provides a critical perspective as well as serving to highlight practical and technical issues thrown up in the new legislation. Looking further ahead, the committee hopes to resume a program of events such as the Sir Bruce Slane memorial lecture and perhaps other such events next year. I hope also that you will join us to engage in blue sky thinking that moves beyond simple implementation of the Act. This requires re-evaluating fundamental concepts such as the definition of personal information and whether existing definitions are still fit for their purpose. The Foundation hopes to lead discussion on these issues. I would like to thank my fellow committee members and together with them wish you all a safe and restful summer break.

### Annual General Meeting: New Committee

The AGM was held on 31 August and a new Committee was elected.

The full committee now comprises: Gehan Gunasekara (Chair), Marie Shroff (past-Chair), Kathryn Dalziel and Kent Newman (joint secretaries), Alida van Klink (Treasurer), Barbara Robson, Marcin Betkier, Anelka Phillips and Blair Stewart.

Katrine Evans, an original Committee member from the start of the Foundation, stepped down from the Committee. Katrine regularly writes and speaks on privacy topics and is an active member of the Law Society's Human Rights and Privacy Committee. From 2004-2015 she was Assistant Privacy Commissioner, including being the Commissioner's legal counsel. The Committee thanks Katrine for her invaluable service.

Kent Newman joined the Committee for the first time. Kent is active in privacy both professionally and academically and is currently a Senior Consultant with Two Black Labs, a privacy-focused consultancy based in Wellington. The Committee welcomes Kent's addition to the Committee.

## Media releases

The Committee issued three media releases:

[Concern at reports of privacy breach of Covid-19 cases](#) (July 2020): This expressed concerns at reports of a privacy breach in which members of the media were given access to a document that included the full names, addresses, and age of the 18 people described as “active cases” of COVID-19 as well as the names of the hotel and one hospital in which they were located. Shortly afterwards it transpires that a political operative and MP were implicated in the leak of private health information. Later the Foundation incorporated in a position paper released in November that:

The exemption for members of Parliament in their official capacities should be reviewed following the leaking of medical information by an MP with a view to ensuring the application of standards and accountabilities in a constitutionally appropriate way.

[Privacy Foundation New Zealand releases position paper on Privacy Act 2020](#) (November 2020): The paper set out where the Foundation stands on the new law which was due to come into force a month later on 1 December.

[Privacy Foundation releases response to Government Statement on Encryption](#) (5 November): The statement was in response to the “International statement - End-to-end encryption and public safety” of 12 October 2020 drafted by representatives from the UK, US, Australia, New Zealand, Canada, India and Japan. The statement linked to a commentary by the Privacy in Internet Economy working group.

## Commentaries

The Foundation frequently releases commentaries by members on its websites. These do not formally represent the Foundation’s position but they seek to promote informed discussion on privacy.

Two commentaries were released:

- Gehan Gunasekara, “[TikTok, echo chambers and data control](#)”, 5 August 2020. This first appeared on newsroom.
- Privacy in Internet Economy working group, “[The Ignorance of Anonymisation to Protect Privacy](#)”, 26 September 2020. This was prepared by Marcin Betkier and Natasha Mazey of the Privacy in Internet Economy Working Group.
- Privacy in Internet Economy working group, [Position on ‘International statement - End-to-end encryption and public safety’ of 12 October 2020 drafted by representatives from the UK, US, Australia, New Zealand, Canada, India and Japan](#), 5 November 2020.

## Submissions

Two submissions were made:

- Submission by the Health Care and Policy working group to the Privacy Commissioner, “[Revocation and replacement of the Health Information Privacy Code under Privacy Act 2020](#)”, 12 August 2020.
- Submission by the Privacy in Internet Economy working group, “[Submission on discussion document: Options for establishing a consumer data right in New Zealand](#)”, 7 October 2020.

## Privacy Foundation New Zealand commitment to Te Tiriti O Waitangi (Treaty of Waitangi)

During the period the Committee adopted the following statement:

“PFNZ is committed to being responsive to Māori as tangata whenua and recognising Te Tiriti O Waitangi as New Zealand’s founding document.

“This means:

- PFNZ advocates for tino rangatiratanga of Māori over their tangible and intangible taonga.
- PFNZ supports the development of privacy laws and policy that accords with Te Tiriti O Waitangi.
- PFNZ seeks to work in partnership with Māori to advance positive privacy outcomes for Aotearoa.”

The statement was posted to the website with indications that “This is our first effort and we invite suggestions for improvement” and that we also hope to have a Te Reo translation soon.

## Privacy Act 2020

The enactment of the Privacy Act 2020 was a once in a generation opportunity to update New Zealand’s privacy law. While introducing some important and well overdue improvements, the law was, in some respect, a missed opportunity to fully grapple with the challenges to privacy in our digital age. The two main reasons for shortcomings were:

- The timing of the Law Commission’s 2011 report – which by an unfortunate twist of events predated completion of the revision of the major international privacy instruments in 2013-18;
- The conservative approach taken by the government which persevered with a bill largely drafted by the previous government and set itself against including GDPR-type reforms urged upon it in select committee submissions.



The Foundation is taking a positive approach to a new law which is ‘good in parts’ by adopting a position statement on the Privacy Act 2020. The statement sets out where we stand – which is very supportive in many areas – and where we think the law needs to change. We also take the view that the positive aspects of the Act will only be achieved by active implementation and compliance activity and offer some suggestions for action.

We also highlight gaps in the law. The position paper states:

### The missing pieces: What the law is lacking

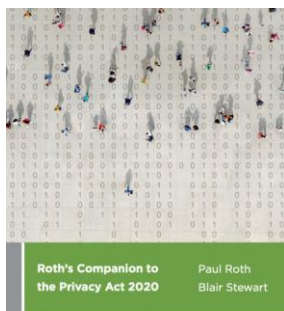
The 2020 Act suffers from the 10-year gap between when the Law Commission undertook its research for the privacy review, culminating in its 2011 report, and the enactment of the new law. This delay meant that some of the features and problems of the digital age that are now apparent were then not then so well understood. Especially problematic is the fact that the 2011 review predated revisions of the key international instruments on privacy (completed respectively: OECD 2013, APEC 2015, EU 2016, Council of Europe 2018). Given its international influence, the key oversight amongst these is the failure fully to assess and, where appropriate, adopt or adapt the

new rights contained in the EU General Data Protection Regulation (GDPR). The Foundation recommends incorporation into the Act of provisions suitably adapted for New Zealand law dealing with the following GDPR-inspired rights or obligations:

- Right to personal information portability.
- Algorithmic transparency and challenge.
- Mandatory privacy impact assessment.
- Right to erasure.
- Special controls on biometrics.

We consider these rights are important for the protection, and empowerment, of New Zealanders in the digital age. We also see the inclusion of some or all of them as desirable from an economic perspective to ensure that New Zealand maintains its status as providing an adequate level of data protection for the purposes of EU data protection law.<sup>19</sup> We would like the Act's accountability mechanisms strengthened as has been recommended in privacy instruments adopted by OECD (2013) and APEC (2015). This would require agencies to be able to demonstrate to the Privacy Commissioner how they are complying with the law.

### New book on Privacy Act 2020



The legal publisher Lexis-Nexis will publish on 1 December a new text Roth's Companion to the Privacy Act 2020 which draws upon the much larger loose-leaf and online publication Privacy Law and Practice, which has been published for 25 years. The authors are Emeritus Professor Paul Roth and Foundation Committee member Blair Stewart. More information and order (including limited time pre-order discount) at:

<https://store.lexisnexis.co.nz/categories/jurisdiction-895/roths-companion-to-the-privacy-act-2020-sku9781988546469/details>



### New Courses on Information Governance

The University of Auckland is launching a new completely online programme aimed at upskilling professionals working in twenty-first century age of data. It is a non-cognate programme meaning it does not require any specific prior knowledge of law or business and is taught from an interdisciplinary perspective covering data privacy regulation, cybersecurity as well as dispute resolution, artificial intelligence and the impact of technologies such as blockchain. It is hoped to expand the programme to a full master's degree by 2023.

[https://www.online.auckland.ac.nz/postgraduate-diploma-in-information-governance/?gclid=Cj0KCQjAhZT9BRDmARIsAN2E-JOHOfrcQBv5wSNIKLEa1QCxUN0tNpLNiG-CDE9QW6uaem5dhKXTqwsaAuHnEALw\\_wcB](https://www.online.auckland.ac.nz/postgraduate-diploma-in-information-governance/?gclid=Cj0KCQjAhZT9BRDmARIsAN2E-JOHOfrcQBv5wSNIKLEa1QCxUN0tNpLNiG-CDE9QW6uaem5dhKXTqwsaAuHnEALw_wcB)