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## NEWSLETTER

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### Changes to the Privacy Act

The Privacy Act 2020 replaced the Privacy Act 1993, and came into force on 1 December 2020. The exponential change in the use of technology in society since 1993 together with globalisation, was a driving force for the necessary change to New Zealand's privacy laws.



The central information privacy principles within the Act regarding how agencies collect, use, disclose and store personal information, fundamentally remain the same, with exceptions. However, enforcement of and penalties under the Act, particularly by the Privacy Commissioner, are now extended and strengthened.

This article touches on the more salient changes to the Act.

**Breach notification** - Where an agency (generally a business or organisation) breaches privacy that causes serious harm to someone or is likely to cause serious harm, it must notify the Privacy Commissioner immediately and any persons affected by the breach. Under the 1993 Act, this was not mandatory, only encouraged. Now, where agencies do not comply, they can be fined up to \$10,000. Online tools are available for agencies to lodge such notifications.

**Compliance notices** - If an agency is not meeting its obligations under the Act, the Privacy Commissioner may serve a compliance notice to that agency to do something or to stop doing something.

**Access requests** - The Act makes it easier and more efficient for people to access information about themselves that is held by an agency. Generally, complaints regarding privacy often arise where an agency refuses to provide information held about a person, to that person, upon their request. The

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Privacy Commissioner can now make binding decisions relating to complaints such as these.

**Information sent overseas** - Agencies can only send personal information overseas provided there are either protections in place that comply with the Privacy Act 2020, the overseas privacy safeguards are similar to the Privacy Act 2020, or the relevant individual to which the personal information relates to, authorises such disclosure.

Overseas businesses may be subject to the Privacy Act even if they do not have a physical office in New Zealand. There may be exemptions to this depending on how the personal information is used, i.e. with cloud-based businesses, however, this is yet to be contested.

**New offences** - Four new offences have been introduced under the Act which may result in a fine of up to \$10,000, namely:

1. Impersonating someone or claiming to have someone's authority to obtain personal information or destroying/altering the personal information.
2. Destroying a document after someone has specifically requested it.
3. Breaching the Privacy Commissioner's compliance order.
4. Failing to report a serious breach notification.

Where you wish to discuss or learn further about your privacy rights as an individual or your obligations as a business owner, it is suggested to get in touch with a lawyer.

If you are a business owner and you have not already reviewed your privacy terms and conditions, now is the time to do this and ensure that you have protocols in place to provide personal information to customers carefully and efficiently, if requested.

## Online harassment: where and how to get help

In an ever-expanding digital world, we will inevitably find ourselves the victim of some form of harmful digital communication.

The definition of a harmful digital communication is ever-increasing, no doubt we have all seen or experienced what is probably the most common form of online abuse: the 'comments' section of the likes of Facebook, YouTube or your favourite online newspaper.

However, a harmful digital communication can come in many forms such as trolling, doxing, bullying, cyberstalking, e-bile, false rumours, deepfake videos, online sexual harassment, physical threats and revenge pornography. It is easy to see that any of these types of harmful digital communications could greatly impact the life of the victim.

There are a variety of ways one can try to handle a harmful digital communication. Some may find it easy not to read the comments, others may seek professional help to deal with their emotions or to call out the perpetrators.

But what happens when it goes too far, when we can no longer avoid the harassment? The first hurdle to overcome, for some people, is the embarrassment and potential feelings of guilt over their digital harassment. The second hurdle is the general feeling that there is little to no point in reporting the issue because there is nothing the law can do to help.

However, things are changing. Born out of an increasing concern to address harmful digital communications, New Zealand implemented The Harmful Digital Communications Act 2015. There to deter, prevent and mitigate harmful digital



communications, it has a number of key aspects, one being the appointment of an approved agency to assist with resolving complaints. This agency is called Netsafe.

A criminal offence is committed where a person posts a digital communication with the intention of causing harm to their victim, which an ordinary reasonable person put in the same position as the victim, would also experience that harm and where the posting of the digital communication does cause harm. Harm is defined under the Act to be serious emotional distress, and there are a number of factors that are considered when determining if an online post has caused harm. These include, but are not limited to, repetition of the post, the language used and the age and characteristics of the victim.

If the person committing the offence is found guilty, they can expect to receive a term in prison that does not exceed two years or a fine of no more than \$50,000.

So, if you are the victim of an unwanted harmful digital communication you should not suffer in silence. You can report your incident via the Netsafe website. Once you have completed the form, it will be reviewed and you will be contacted with advice. And whilst Netsafe are not an enforcement agency, they are backed up by new powers given to the District Court who are now able to make orders in favour of those who experience harm from harmful digital communications.

The more we report what happens to us, the better equipped Netsafe will be to manage the problem and make changes that matter, resulting in a safer online world for everyone.

## Virtually witnessed documents – are they valid?

The main purpose of having a witness to a document is to authenticate that the person signing was in fact the person noted on the document.



The implementation of electronic signatures was already common practice and with the advancement of technology, was always likely to increase in use.

In New Zealand, however, law requires that for an electronic signature to be legitimate, it must comply with the following:

1. The document must identify the signatory.
2. The electronic signature is as reliable as appropriate for the purpose of the document being signed.
3. A signature is presumed to be 'as reliable as appropriate' if it has been provided by the signatory with their knowledge and consent. It must be an accurate signature and the electronic document cannot be changed once it has been signed.
4. The person receiving the signature fully permits the use of it in electronic form.

These requirements are to ensure that electronically signed documents are correctly executed and that the signatory is fully aware that they are legally bound to the documents which they electronically sign. Just because the document was not signed in 'wet ink', does not mean the document or contract does not exist.

Witnessing serves as a safeguard against forgery and duress, however it has been argued that face to face interaction is still the best way to achieve this.

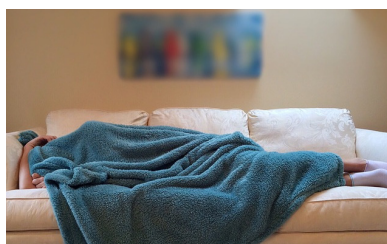
The onset of the Covid-19 pandemic forced businesses and individuals to find alternative ways to sign documents that required witnessing. In response to Covid-19, the New Zealand Government implemented multiple immediate modification orders under section 15 of the Epidemic Preparedness Act 2006 relating to the requirements of signing and witnessing wills, enduring powers of attorney, deeds, oaths and declarations. These temporary orders modified the witnessing requirements of specific legislation and allowed for certain documents to be witnessed virtually through the use of platforms such as Zoom, Skype and FaceTime.

Many banks and commercial institutions in New Zealand are now allowing electronic signatures and virtual witnessing, provided that a clause is inserted into each document which specifies that the documents were virtually witnessed and the signatory has been adequately identified in accordance with Anti-Money Laundering legislation.

So yes – virtually witnessed documents are valid. However, caution should be taken when witnessing is required for a contract that is covered under the law of another country or jurisdiction that has not yet introduced or allowed for remote witnessing.

## Changes to sick leave entitlements

As has been anticipated, there are some proposed changes to the Holidays Act 1993 ("the Act") that are expected to come into effect later on this year. The changes look to double the minimum number of sick days available to employees from 5 to 10 days per annum, after they have worked with an employer for six months.



The Holidays (Increasing Sick Leave) Amendment Bill ("the Bill") is currently before the Select Committee of the New Zealand Parliament and is under review. As part of their review, they will be gathering information and opinions from a range of sources, including the public, as to the positive and negative impact of the Bill before preparing a report to go before Parliament.

The Bill does not propose wide ranging or expansive changes, but primarily seeks to provide a further five days sick leave to all employees, subject to them qualifying for full sick leave entitlements under their

existing conditions of employment. This will come into effect two months from receiving royal assent.

However, employees will only be able to utilise the further sick leave as from their next sick leave entitlement date (subject to start dates of employment) following the

Bill receiving royal assent. This means, for employees who have worked for less than six months, this will be on the six-month anniversary date of their employment contract, or for employees who have worked longer than six months, when they reach the anniversary of the first time they completed six months.

The changes are brought on primarily in the wake of the COVID 19 pandemic, however, the request for changes to the minimum numbers of sick days has long been a topic of public interest and is reflective of a call for greater care and treatment for workers. This is highlighted by New Zealand having

comparatively less sick leave days than many other OECD nations.

Despite the changes to the Act, there will be no changes to an employee's entitlement to roll-over their sick leave each year. The maximum amount of sick leave an employee can hold unused is 20 days.

## Snippets

### Traps when buying a used car



While the process of buying a used car is usually completed without legal advice, it is useful to refresh the checklist of the key points you should follow. This is particularly important if there is no intermediary, such as a used car dealership, overseeing the purchase.

There are some key points to reflect upon. Firstly, the person or entity registered on the Motor Vehicle Dealer Register is the one responsible for the vehicle, not necessarily the legal owner. This person or entity is entitled to possession however, and must ensure the car is roadworthy. This particular Register does not record legal ownership.

Legal ownership is based on a sale and purchase agreement for the vehicle. If this document is not available (and it is quite common for either party not to have one or it becomes misplaced) then there are search services available that trawl the relevant agencies to help establish a chain of ownership.

A logical place to start is to check whether any debt is secured against the vehicle. This query can be satisfied by searching the Personal Property Securities Register. If you complete the car purchase and have not ensured that any loan charge against the car has been cleared by the previous owner, then repossession of the car may still occur if the previous owner defaults on the loan secured against the car. Regardless of the fact you have paid the purchase price for the car and registered yourself as the owner, the existing loan is a matter of public record and as such, puts you on notice that the debt secured against your new car purchase exists.

If this were to happen, you would still have legal rights against the seller, however it would be extremely inconvenient to be car-less and chasing funds from the seller who was less than honest with you in the first place.

The purchase of a used car is a common transaction and is often made in haste. However, follow the check list and make sure to avoid the traps.

Keep an eye out for the changes later on this year when the Bill is expected to come into effect and ensure your employer is aware of the changes moving forward. If you have any queries as to your entitlements under the Bill or the Act, we suggest you contact a solicitor for further advice.

### Leaving chattels under a will

There is a presumption often made by the will maker that they can leave the chattels they have to the executors and the family to sort out once they have died. A generic chattels clause is inserted in the will and the rest is left to chance.



Let it be known that chattels division issues cause a great deal of friction and angst for a grieving family, more often than it should. The deceased would never have intended these consequences.

Specific thought, instructions and drafting are needed with your lawyer when considering a will. Some options include:

- If specific gifts from the chattels are to go to a specific person, then state that under the gift section of the will.
- If you are making a list, including the gifts in a document, state in the will that there is a list - the Court asks to see the list if it is mentioned in the will itself.
- Make sure at least one of the Executors is in the family group and can organise and control the family in respect of chattels issues – nothing should be taken or distributed other than in accordance with the will protocols.
- If a spouse survives the deceased and is a second wife/husband or long term partner, then if the deceased has children from a previous relationship the status of the chattels requires some decisions. While the surviving spouse / partner has relationship property rights, the deceased's children have rights too.

As careful planning is needed, the advice is to make haste slowly, understand that grief and emotions at the time around a death can blur clear thinking. Keep your lawyer in the loop to help chart the best course.

*If you have any questions about the newsletter items, please contact us, we are here to help.*