

New Zealand Amendments' Aim is for EU Adequacy

Report by Blair Stewart

ON DECEMBER 12TH 2000 the New Zealand government introduced a Bill in Parliament to amend the Privacy Act 1993. The amendments are designed to secure a finding from the European Commission that New Zealand's law provides an "adequate level of protection" for the purposes of Article 25 of the European Union Data Protection Directive.

The New Zealand Privacy Act is already well regarded as being the most comprehensive national privacy law outside Europe. However, in a detailed study report, the Privacy Commissioner identified two aspects of the law that might preclude an EU finding of adequacy. The Bill addresses both of those issues in the manner recommended by the Commissioner.

First, the bill will remove the existing requirement that in order to make an access or rectification request, an individual must be a New Zealand citizen, permanent resident, or in New Zealand at the time the request is made. This change will ensure that Europeans and others have enforceable access and rectification rights which can be exercised from outside the country when information is held or processed in New Zealand.

Second, the New Zealand Act has no equivalent to the data export controls that are now a feature of European data protection laws. It has been suggested therefore that data transferred from Europe to New Zealand might remain at risk if there were an onward transfer to a jurisdiction offering no adequate level of protection. While the existing New Zealand law does not take an identical approach to that of Europe, European data transferred to New Zealand is not entirely without protection.

First, most information privacy principles continue to apply to infor-

mation transferred out of the country where the New Zealand organisation continues to hold that information. Second, the New Zealand organisations could only lawfully disclose information onward to another organisation (whether in New Zealand or elsewhere) if it accords with information privacy principle 11. This would generally require the disclosure to be consistent with the purpose for which the information had been received from Europe.

Nonetheless, personal data could theoretically be routed through New Zealand to a third country, and the Bill addresses this possibility by inserting a new part in the Privacy Act dealing with the transfer of personal information outside New Zealand. The Privacy Commissioner will be empowered to prohibit a transfer of personal information from New Zealand to another state if satisfied that:

- personal information will be transferred to a jurisdiction where it will not be subject to a law providing comparable safeguards to the Privacy Act, and
- proposed transfer may circumvent the laws of the State from which the information originated, and
- transfer would be likely to breach basic principles of national applications in Part 2 of the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*

In exercising his new power, the Commissioner must consider several matters, including any existing or developing international guidelines relevant to transborder data flows. The Bill mentions the EU Directive explicitly.

The Privacy Commissioner will act by issuing transfer prohibition notices modelled on similar notices given under current and previous legislation in the UK and Ireland. Persons subject to transfer prohibition notices will be able to appeal to the Complaints Review Tribunal.

The amendments to the Privacy Act have been introduced by a Parliamentary procedure designed for non-controversial legislation. All parties represented in Parliament have considered the proposed legislation in advance and agreed to its introduction. The Bill will be sent to a select committee for study and public submission and, if all goes smoothly, could be enacted by mid-2001.



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