Privacy (Cross-Border Information) Amendment Bill

10 June 2008

Attorney-General

Privacy (Cross-Border Information) Amendment Bill (221/1)
consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/65

1. I have reviewed the Privacy (Cross-Border Information) Amendment Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990. I conclude that the Bill appears to be consistent with that Act.

2. The Bill amends the Privacy Act 1993 to allow:

2.1 information privacy requests to be made by individuals overseas;
2.2 the Privacy Commissioner to authorise a public sector agency to charge for making personal information available to overseas persons;
2.3 the Privacy Commissioner to refer complaints to overseas privacy enforcement authorities where appropriate;
2.4 the Privacy Commissioner to prohibit a transfer of personal information from New Zealand to another State.

3. This last proposed amendment, which arises under cl 8 of the Bill, raises a prima facie issue under s 14 of the Bill of Rights Act:

"Freedom of expression - everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

4. An order prohibiting transfer of information is a direct restriction upon the right to impart information.

5. The question is therefore whether the restriction falls within s 5 as a reasonable limit that can be demonstrably justified in a free and democratic society.

6. The application of s 5 entails an assessment of whether the restriction is rationally connected to an important objective and is proportionate to that objective. [1]

7. Here, the objective of the provision is stated in the explanatory note as: "to ensure foreign personal data cannot be sent, via New Zealand, to jurisdictions without adequate privacy protection. These amendments will enable New Zealanders and New Zealand companies to assure their trade partners that New Zealand law will ensure their privacy is protected."

8. The Bill also makes it clear in proposed s 114B(2)(c) that the proposal is intended, in particular, to allow compliance with principles set out in Part 2 of the OECD Guidelines governing the protection of privacy and transborder flows of personal data and with the European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.

9. Further, the Bill does not automatically restrict such transfer but rather provides the Privacy Commissioner with a discretion to make prohibition orders:

9.1 The Bill permits the making of such an order only if satisfied on reasonable grounds that the information has come in from another State and is likely to be transferred to a third State where it will not be subject to comparable privacy safeguards, and that the transfer would be likely to lead to a contravention of the basic principles set out in Part 2 of the OECD Guidelines. The Privacy Commissioner must also take into account various other factors before making the order. The prohibition order is therefore available only in very limited circumstances, and is restricted by quite tight guidelines. Further, there is provision to apply for a variation or discharge of the order, and a right of appeal to the Human Rights Review Tribunal against the making of the order.

9.2 Under s 6 of the Bill of Rights Act, the discretionary power must, moreover, be read consistently with that Act, including s 14.[2]

10. It follows that the prima facie restriction of the right to freedom of expression serves an important objective and is both rationally connected and proportionate to that objective. The Bill appears consistent with the Bill of Rights Act.

11. In accordance with Crown Law practice, this opinion has been peer reviewed by Ben Keith, Crown Counsel.

Victoria Casey
Crown Counsel

Footnotes

1. See, most recently, R v Hansen [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].
2. Drew v Attorney-General [2001] 1 NZLR 428 (CA).

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