PRIVACY BILL – JUSTICE COMMITTEE OF PARLIAMENT

SUBMISSION BY: Dr Alan Toy
24 MAY 2018

ABOUT ME:
I am a Senior Lecturer in the Department of Commercial Law at the University of Auckland Business School. I am an enrolled barrister and solicitor of the High Court of New Zealand and my PhD from the University of Auckland was in the area of privacy auditing.

MY SUBMISSION:
Large overseas organisations operate business models that are not confined to just one country. The internet allows ease of access to consumers in New Zealand and it is now time to update our privacy law to make it clear whether or not it applies to overseas organisations.

The Privacy Bill contains the following provision relating to extraterritorial application of the Information Privacy Principles (IPPs), which is effectively the same as section 10 of the Privacy Act 1993:

20 Application of IPPs to personal information held overseas
(1) For the purposes of IPP 5 and IPPs 8 to 11, personal information held by an agency includes personal information that is held outside New Zealand by that agency, if the information has been transferred out of New Zealand by that agency or any other agency.
(2) For the purposes of IPPs 6 and 7, personal information held by an agency includes personal information held outside New Zealand by that agency.
(3) Nothing in this section applies to render an agency in breach of any of the IPPs in respect of any action that the agency is required to take by or under the law of any place outside New Zealand.

However, I argued that the rules above are unclear and ineffective to protect the privacy rights of consumers in New Zealand: Alan Toy ‘Cross-border and Extraterritorial Application of New Zealand Data Protection Laws to Online Activity’ (2010) 24 New Zealand Universities Law Review 222-238.

Such a provision is confusing because, while it clearly gives extraterritorial application to the IPPs, it does not make clear which agencies are subject to it. For example, if a consumer in NZ enters personal information on a social networking service based in the US, has that information been transferred out of NZ by an agency? If any other agency has transferred the information out of NZ, the agency that now holds it overseas is also subject to the Privacy Bill, but this rule also appears to have no logical basis.

With could computing and other technological advances, the location of the information is now irrelevant. Also irrelevant is the rule about who has transferred the information out of NZ. These concepts make little sense in the modern environment.

Another problem is that far too many overseas agencies would be caught by the rule in the Privacy Bill and there needs to be limitation of liability otherwise NZ law will
present an unjustified burden on overseas organisations. The test should have limits to only those organisations that do business in NZ and where the individual’s interests are prejudiced in NZ.

Accordingly, clause 20 of the privacy bill should be amended to read:

20 Application of IPPs to personal information held overseas
   (1) This act extends to the engaging of conduct outside New Zealand by an agency where that agency –
       (a) carries on business in New Zealand; and
       (b) the privacy interests of an individual have been or are likely to be prejudiced in New Zealand.

This is a simple test that is easy to understand and apply. For example, a NZ consumer enters into a contract with an overseas social networking organisation (even if the consumer pays no money to use the service, they are still agreeing to a contract). Such an organisation may have millions of customers in NZ and it is therefore carrying on business in NZ because that is where the consumers see the information on their screens, even though the screens may be connected through the internet to a computer in another country. If the individual consumer suffers interference with their privacy interests then the Privacy Bill should apply. Prejudice to privacy interests in NZ would cover situations such as the overseas organisation using the information for sale to a health insurer. If the individual’s insurance premiums are affected by the information then this is prejudice to the individual’s privacy interests in NZ (breach of IPP 10(1)(a) in the Privacy Bill).