

PERSONAL DATA PROTECTION IN NEW ZEALAND: LESSONS FOR SOUTH AFRICA?

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Summary

In 1995 the European Union adopted a Directive on data protection. Article 25 of this Directive compels all EU member countries to adopt data protection legislation and to prevent the transfer of personal data to non-EU member countries (“third countries”) that do not provide an adequate level of data protection. Article 25 results in the Directive having extra-territorial effect and exerting an influence in countries outside the EU. Like South Africa, New Zealand is a “third” country in terms of the EU Directive on data protection. New Zealand recognised the need for data protection and adopted a data protection Act over 15 years ago. The focus of this article is on the data protection provisions in New Zealand law with a view to establishing whether South Africa can learn any lessons from them. In general, it can be said that although New Zealand law does not expressly recognise a right to privacy, it has a data protection regime that functions well and that goes a long way to providing adequate data protection as required by the EU Directive on data protection. Nevertheless, the EU has not made a finding to that effect as yet. The New Zealand data protection act requires a couple of amendments before New Zealand might be adjudged ‘adequate’. South Africa’s protection of the right to privacy and identity is better developed and more extensive than that of New Zealand. Privacy is recognised and protected in the law of delict and by the South African Constitution. Despite South Africa’s apparently high regard for the individual’s right to privacy and identity and our well-developed common and constitutional law of privacy, South Africa does not meet the adequacy requirement of the EU Directive, because we do not have a data protection Act. This means that South African participants in the information technology arena are at a constant disadvantage. It is argued that South Africa should follow New Zealand’s example

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and adopt a data protection law as soon as possible.