AUSTRALIAN COMPUTER BULLETIN

ARTICLE, OCTOBER 1978

DATA FLOWS - PROGRESS REPORT

Mr. Justice Michael Kirby
Chairman, Australian Law Reform Commission,
Chairman, O.E.C.D. Expert Group on Trans-Border
Data Barriers and the Protection of Privacy

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D A T A F L O W S - P R O G E S S R E P O R T

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1. AN INTERNATIONAL ISSUE

The world, and particularly the Western world, stands poised on the brink of remarkable developments in international co-operation and inter-dependence in the flow of information between countries, across national or federal borders. At the International Conference on Computer Communication (I.C.C.C.) in Toronto in 1976 the first experiences of commercial national and international data networks (Telenet, Tymnet, Mark III and Cybernet in the United States, Datapac in Canada, etc.) were detailed. Plans for data networks were unveiled including Euronet, SWIFT (the international bank network), European Informatics Network, EDS in Germany, Transpac in France and so on.

In 1978 the Fourth I.C.C.C. at Kyoto, Japan examined the variety of private data networks offering their services. They stretch from the United States and Canada to Japan, Australasia and many European countries. Large international companies operate their data network for internal use. The banking network, SWIFT, started operation at the end of 1977 and has now more than 500 European and American banks participating. In Europe the telecommunications systems are planning national public data networks. Most of the networks are being implemented within national boundaries. Some of the private data

networks which already exist come very close to the omnibus service operation characteristic of the public sector. These include SWIFT, SITA (the airlines communication system in which more than 200 airlines participate) and others representing vast developing private international data networks. (See H.P. Gassmann, Data Networks as Information Infrastructures: A Challenge to International Co-operation paper delivered to the Kyoto Conference, 26 September 1978.)

Satellites will increasingly provide access and link-up facilities which may in theory be independent of the various telecommunications carriers. The combination of satellite and computer will make possible instant access to a vast variety of data bases located throughout the world. The integration of mankind's memory, information and mutual dependence must have enormous potential benefits for us all. The increased availability of information, the speed and quantity of its delivery and the integration of information from disparate sources should enhance enconomic and other development.

However, there are problems. Leaving aside fears about unemployment and the vulnerability of States which are so intimately linked with each other, there is an issue which has been described, in the English language as "the protection of individual privacy" but is described in other tongues as "data protection and security" and "the protection of individual liberties".

Because sensitivity of information about an individual is usually limited to his immediate environment, it is unlikely, at least in the short run, that the mere transmission of information out of a country ~~on him~~ will significantly invade individual privacy, in the normally accepted sense. However, with the greater mobility of travel, the diminution in the tyranny of distance, the gradual erosion of the significance of national borders and the movement of people in, through and out of countries, other than their own, the need for means of protecting privacy and other liberties outside one's own country arises as a practical concern.

More to the point, the development of national laws for protection of privacy and other "informational liberties" can be frustrated by disharmony between domestic legislation and enforcement machinery.

In 1970 in the United States a Fair Credits Report Act was passed to provide means to ensure that the individual was not unjustly harmed in obtaining credit, by reason of false information held on him. In the same year, the Land Hesse in the Federal German Republic instituted certain rules that provide for access by citizens to public sector information held on them. Since these early developments, legislation for the assertion of individual rights in respect of information systems, particularly ADP and EDP and especially in the public sector, have proliferated. A Swedish law was passed in 1973. A German federal law in 1976. France enacted legislation in 1977 which has now come into operation. Norway in May 1978, Denmark in June 1978 and Austria most recently have passed laws to establish rules for "privacy" protection and machinery for their enforcement. In the United States a Privacy Act was enacted federally in 1974. Many States of the United States have enacted parallel laws. In Canada a Privacy Commissioner superintending federal data banks was established in 1977. She is Inger Hansen Q.C. who recently visited Australia during September 1978.

Put shortly, then, the international movement of information is advancing apace. Developments of computing, coinciding with telecommunications and satellite developments ensure that this international movement will continue. These developments undoubtedly bring in their train many benefits. However, they portend certain problems that must be faced by law makers: national and international. One only of the problems is that of protecting individual rights at a time when increasingly decisions will be made that affect the individual upon the basis of information retrieved from computers. The fear of diminished "privacy" across the border, trans-border collection

of private information and the frustration of national regulation by the establishment of so-called "data havens" or as a result if disharmonious national laws has led to an international movement. This movement is directed at the establishment of basic rules by which local law makers can be guided towards laws that are harmonious and supportive of each other. Some efforts go even further and seek to establish binding agreements that can ensure the enforcement of an international standard of data protection and data security.

2. INTERNATIONAL REGULATION

Council of Europe. The two chief efforts to provide an international response to the development of trans-national data flows are proceeding in the Council of Europe and the Organisation for Economic Co-operation and Development (O.E.C.D.) although developments are also taking place in the E.E.C. and Nordic Council. The aim of the Council of Europe is to secure greater unity among its 19 members by agreements, conventions and the adoption of common policies. In 1971 a Committee of Experts was established to consider the need to protect personal privacy in data banks. As a result of the report of this Committee, resolutions were adopted by the Council of Ministers on private sector data banks (1973) and the public sector (1974). These resolutions contained a series of basic principles governing the gathering, storing, processing and dissemination of personal information by means of computers. It was felt at the time that as EDP was still in its initial phase, the time was not yet ripe for a European convention.

By 1976 a new Committee of Experts was created specifically to consider particular problems relating to the protection of privacy in the transmission of data abroad and trans-frontier data processing. Following extensive consultations, a Working Party on data protection has worked out a Draft International Convention on Data Protection. The text of this Draft is now circulating. The Working Party has concluded that only an international agreement can provide satisfactory means of

* minimum rules for national laws for the protection of individual rights in information systems;
* provisions concerning which country's law will apply in international situations; and
* provisions to ensure mutual assistance towards privacy protection by the domestic machinery of member States.

In addition to its work on an International Convention, work has been done under the Committee of Experts for resolutions on the regulation of electronic medical data banks in Europe. A meeting of the Committee of Experts to consider the Draft International Convention is to take place in the Council of Europe in October 1978. The final draft is now very close.

European Economic Community. The E.E.C. is a smaller group than the Council of Europe. Its machinery provides for binding directives and procedures for securing harmonisation of law within the Community. Concern for the protection of the rights of individuals in computerised information systems has been expressed within the E.E.C. on a number of occasions. In 1973 a Report by the Commission of the E.E.C. Community Policy on Data Processing told the Council of Ministers that the creation of data banks "joined increasingly by international links" would oblige the community to establish "common measures for protection of the citizen". The European Parliament in April 1976 invited the Commission to collect information with a possible drafting of a Directive on privacy protection. A Working Group was formed but action has been substantially suspended pending the outcome of the Council of Europe's deliberations and developments in member countries of the E.E.C.

The Nordic Council. In 1975 a special project was initiated in this Scandinavian organisation to harmonise domestic privacy laws and to prepare an international agreement on data flows within the nordic countries and to other jurisdictions. Domestic legislation, largely following the same model, has now been enacted in all Scandinavian countries.

O.E.C.D. The Organisation for Economic Co-operation and Development is the last-mentioned but potentially the most important international body looking at trans-national data regulation. Australia has been a member of the O.E.C.D. since 1971. The member countries include nations of Western Europe, U.K., U.S.A., Canada, Australia, New Zealand and Japan. Accordingly, these are countries with like economic, social and political intitutions and a great deal of economic interdependence. In 1974 the O.E.C.D. established a Data Bank Panel specifically to examine trans-border movements and protection of data. That panel reported with principles and guidelines in 1977 and an international seminar was convened in Vienna, Austria, in September 1977. It brought together nearly 300 participants from government and private industry in member countries. A number of principal points emerged, including the need for an agreed framework within which international data networks should expand, an examination of the economic and political aspects (sovereignty and protectionism), the promotion of harmonisation to discourage national States from "doing their own thing" in privacy protection and a perception of the potential role of the O.E.C.D. in developing international principles, possibly leading to an international convention or at least agreed principles.

Following this symposium, an Expert Group was established within the O.E.C.D. to inquire and report urgently upon certain aspects of the movement of information between countries, the protection of privacy and other rights in those countries and the barriers which such protection may erect against the free flow of information. The work of the Expert Group was voted "top priority" by the O.E.C.D. and it is required to report on guidelines for basic rules governing trans-border flows and the protection of personal data and privacy by 1 July 1979. It is instructed to carry out its work "in close co-operation and consultation with the Council of Europe and the European Community". Its first meeting was held at O.E.C.D. Headquarters, Paris, 3-4 April 1978. As chief Australian representative, I was elected Chairman of the Expert Group.

The Australian Law Reform Commission has a reference from the Government to develop laws for the protection of privacy in Australia. That is why it was considered appropriate to send a lawyer not a computerist to the meeting as Australia's representative.

The Expert Group established a smaller, Drafting Group. This body met in Stockholm, Sweden, 10-12 July 1978. A further meeting of the Expert Group and its Drafting Group has now been set down to take place in Paris 5-8 December 1978.

3. MANDATE OF THE O.E.C.D. EXPERTS AND IMPORTANCE

The Mandate. The mandate given to the O.E.C.D. Expert Group, omitting the deadline and instructions as to consultation and co-operation already mentioned, is as follows:

(i) Develop guidelines on basic rules governing the trans-border flow and the protection of personal data and privacy, in order to facilitate a harmonisation of national legislation, without this precluding at a later date the establishment of an International Convention; and

(ii) Investigate the legal and economic problems relating to the trans border flow of non-personal data, in order to provide a basis for the development of guidelines in this area which should take into account the principle of free flow of information.

Importance. The importance of the exercise for Australia includes the following considerations:

* The social issues presented by computing which are common to all developed countries as increasing technological interdependence demonstrates.
* So far, the "running" in the development of national and international laws for privacy protection has been largely left to European countries and the Council of Europe. These have a somewhat different legal tradition to that of the Anglophone countries, including United States, Australia and New Zealand.

* Australia may have a special vulnerability to international flows of information because of its position in the "off-peak" time zone for the use of data processing facilities in Northern Europe and North America. Our potential dependence on the Northern Hemisphere data processing facilities may make this problem one of more than academic importance for Australia, its economy and sovereignty.
* Australia has, in comparison to European and North American countries, no fully developed legislative response to the proliferation of computing. The closest we get is the Privacy Committee of N.S.W. But there is no equivalent to the detailed legislation presently being enacted in many jurisdictions of Europe and North America for the protection of individual rights with respect to information systems.
* In almost every jurisdiction of Australia, the provision of privacy protection legislation, including in respect of computerised information, is currently under review. The Commonwealth Government has asked the Law Reform Commission to propose legislation on privacy protection in those matters of the public and private sector that are within the constitutional concerns of the Commonwealth. Various State inquiries have also been established. The focus of international attention on the "basic rules" for the protection of informational privacy ought therefore to help Australian law makers to identify the critical rules for privacy protection. It might also help to identify suitable machinery to enforce those rules.
* Within Australia, the danger of different approaches developing in legislative protection of privacy within the differing State jurisdictions is a reflection of the problem that is now being confronted in Europe which has led to the Council of Europe, E.E.C. and, in part, O.E.C.D. projects towards international legal regulation.

* The O.E.C.D. is the only one of the current international bodies actively developing international law for trans-national data regulation of which Australia is a member. Advantage should be taken of the opportunity to influence the development of international law. The pressures of advancing technology and common equipment will expedite the normally languid pace of international law development. We should be part of it.

4. AUSTRALIAN CONSULTATIONS

In order to equip Australian representatives at the O.E.C.D. Expert Group meetings, national seminars have been organised in Canberra by the Department of Science in conjunction with the Australian Law Reform Commission. The first such seminar was held 26-27 June 1978. The second is to be held on 31 October 1978. At these seminars representatives of government, industry, law reform bodies and academic experts are gathered to scrutinise the issues and identify Australian interests in the debate. At the seminar on 26-27 June 1978 papers were presented on behalf of the Australian Law Reform Commission and the N.S.W. Privacy Committee. Mr. P. Moran (First Assistant Commissioner, A.D.P., Public Service Board), delivered a Paper on the implications for Government of privacy protection control. Mr. P. Holmes a'Court (I.B.M. Australia Limited) briefed participants on technological and other developments relevant to trans-border flows. Professor John Bennett (University of Sydney) made a number of observations about the conceptual and scientific difficulties facing the law maker. The 70 participants then divided into five groups to examine an Issues Paper which sought to identify the recurring themes of international and national privacy regulation. At the end of the seminar a plenary session received reports from each of the groups. The Issues Paper and Seminar Report are available to those who are prepared to comment critically upon them.

The second Canberra seminar on 31 October is called to examine proposed guidelines for privacy protection received from the O.E.C.D.

5. O.E.C.D. SESSIONS: DIFFERENT VIEWPOINTS

The first meeting of the O.E.C.D. Expert Group in Paris in April 1978 saw the emergence of somewhat different approaches to the mandate taken by United States representatives, on the one hand, and European representatives, on the other. These differences were to be expected. The chief U.S. spokesman, Mr. W. Fishman, stressed the need to limit the O.E.C.D. exercise to identifying the substantive principles for privacy protection, leaving the detailed means by which they could be attained to the local legal tradition of different member States. The special difficulties of federations which do not have plenary power to deal single handed with privacy protection and the different machinery typically used in Anglophone common law countries to uphold rights, were mentioned as reasons for adopting this approach. In the United States, the legislative framework for privacy protection has been a "sector" rather than a "total" approach. The machinery relied upon to uphold privacy is, principally, the courts rather than the bureaucracy. European representatives, led by M. Louis Joinet (France) naturally feel that the work pursued by them within the Council of Europe provides the proper basis for the O.E.C.D.'s own effort. Some European representatives find it difficult to see why the hard work done over many years in the context of the Council of Europe exercise cannot simply be adopted by the Anglophone countries. But allowance will have to be made for the different legal traditions, the different mode of legislative drafting, the common law propensity to use courts rather than administrative machinery and the other special problems posed by the English-speaking federations, including Australia.

The April meeting decided to establish a smaller Drafting Group with a balanced representation of the competing points of view identified above. This Group was instructed to give special study to the economic aspects of the mandate, including the impact of customs and other laws upon the free flow of information between O.E.C.D. members.

At the meeting of the Drafting Group in July 1978 in Stockholm a paper by Dr. P. Seipel, a consultant, was scrutinised and the U.S. representatives were requested to prepare an alternative paper identifying their suggested approach to privacy principles. According to a report in Computerworld (28 August 1978) this paper has "drawn fire from American D.P. spokesmen". The Association of Data Processing Service Organisations (ADAPSO) and the Computer and Business Equipment Manufacturers Association (CBEMA) criticised the fact that they were not given the opportunity of considering Draft U.S. paper. However, the same article discloses that the U.S. document has now been officially cleared by the United States Government. The paper was defended on the basis of the need to "pull an American statement together to counter a set of draft guidelines based on the European privacy model and present it to the O.E.C.D. Group charged with forming guidelines on trans-border data barriers and privacy protection". The Computerworld article asserts that the European approach to privacy "relies on a regulatory structure complete with a licence and registration system considered onerous by the U.S.". It also "assumes total control by each nation over personal information on its citizens and in its files". Dr. Seipel's first effort at guidelines were alleged to make "no attempt to find the middle ground between the European omnibus approach to privacy and the U.S. view that privacy protections should fit the abuses peculiar to specific industries".

6. THE FUTURE?

The O.E.C.D. Expert Group is scheduled to meet again in Paris on 5-6 December 1978. This meeting will scrutinise revised papers by Dr. Seipel and the U.S. representatives. It will also have before it comparative documents which will seek to identify the points of similarity and difference in the approaches suggested by the Council of Europe, Dr. Seipel and the United States. Australian representatives will take with them the results of the scrutiny of these documents at the seminar in Canberra on 31 October. Following the meeting of the Expert Group, the smaller Drafting Group will meet for two days in order to consider the action that should be taken in the light of decisions made at the Expert Group. A document will then be drawn which, hopefully, may harmonise the approaches proposed in Europe and North America. Although an observer at the Council of Europe Committee, the United States is a member of the O.E.C.D. Its primary position in computing science and technology makes it vital that if it is to be effective, the United States should be brought into any international regulation of trans-national data flows. This fact is recognised by European participants. It represents both the problem of and opportunity for the O.E.C.D. experts.

Following the December meeting a further document will be distributed early in 1979. It is hoped that a third Australian seminar and further consultations throughout Australia can be held in order to scrutinise this document. The process towards international regulation is a time-consuming, tedious one. But the issues at stake are important and the difficulties of harmonising different legal approaches are significant.

The value to Australia of all this is simple. It includes, most importantly, the focus which international discussion puts upon the "hard core" principles for the protection of individual rights in automated information. If, with the aid of the international debate, we in Australia can clarify these

"hard core" principles they may form the basis of Australia's privacy protection laws. Not only will this be a contribution to national and international uniformity of laws, it may also diminish the inefficiencies and costs which would undoubtedly flow from differing State and national approaches to legal regulation.

For further information write to The Secretary, The Law Reform Commission, Box 3708, G.P.O., Sydney (02) 231 1733.