FRENCH GOVERNMENT CONFERENCE

INFORMATIQUE ET SOCIETE

PARIS, THURSDAY 27 SEPTEMBER 1979

IMPORTANCE OF THE O.E.C.D. GUIDELINES ON PRIVACY

The Hon. Mr.Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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INTRODUCTION

Nous avons l'habitude en Australie de definir le colloque comme un endroit ou sont rassembles des gens qui, individuellement ne peuvent rien faire et qui, collectivement s'entendent pour reconnaitre que rien ne peut etre fait.

Mais je suis convaincu qu'il n'en est pas de meme du notre.

On a dit de mon pays avant l'ere de l'informatique, qu'il etait une victime de la tyrannie des distances.

Cette tyrannie tend de plus en plus a disparaitre.

Mais la question est:

Ne va-t-elle pas laisser place a d'autres?

PRIVACY PROTECTION IN AUSTRALIA AND THE O.E.C.D.

I propose to start by explaining the circumstances that bring me, an Australian Judge, before this audience.

In Australia a permanent national commission, which I head, has been established to advise Parliament on the reform and modernisation of federal laws. Because the right to privacy is protected inadequately the Attorney-General asked the Commission to report on new laws - including laws on data protection. The Australian Government has a commitment to introduce laws on this subject once it has received our reports. Our work towards final recommendations is well advanced.

In 1978 the O.E.C.D. established an expert group to develop guidelines on, amongst other things, the basic rules that should govern privacy protection legislation in member countries. Australia is a member of the O.E.C.D. The other members are:

- the countries of W. Europe (including France);
- the United States and Canada;
- Japan;
- New Zealand

When the expert group first met I was sent as Australia's rerpresentative - because of the Law Reform Commission's work on privacy. For a reason that still escapes me, I was elected chairman of the group.

The group was instructed to draw up the basic rules and present the guidelines by end of July 1979. This was done. Earlier this month it completed an explanatory memorandum to explain and illustrate the guidelines. Yesterday I saw the Secretary-General of O.E.C.D. (Mr van Lennup) and the Deputy Secretary-General (M. Eldin) to discuss consideration of the guidelines by the higher organs of the O.E.C.D. Put shortly it is proposed that the Council should adopt recommendations to member countries urging them:

- in their privacy laws to take into account the guidelines;
- to remove unjustified obstacles to T.B.D.F. inconsistent with the guidelines;
- to agree on a specific mechanism for co-operation in applying the guidelines.

THE INTEREST OF THE O.E.C.D.

Some people may ask: why is the O.E.C.D. - basically an scientific and economic organisation - getting involved in questions of privacy and human rights?

The answer is simple. About half the member countries of the O.E.C.D. (24 in all) either have (or are developing) laws on data protection and data security. Fears have been expressed including the following two in particular:

- First, that unintended disparities in local laws (or in privacy protection machinery) could impose artificial barriers on the free flows of personal information which (as in the case of airline bookings) are generally to the advantage of mankind if properly handled;
- Secondly, that in the name of protecting privacy - and ostensibly for that purpose - contries might be tempted to introduce artificial barriers, to free flows of data for other reasons of undisclosed national policy - however legitimate. In other words do not dress up other concerns as privacy protection.

Considerations such as these together with mechanical concerns arising from the instantaneous technology and the problems of enforcing local laws in relation to data on local citizens held in data bases in other countries, led to efforts to identify the basic core of principles which could become the factors rendering domestic laws on data protection harmonious or (at least) compatible.

DOMESTIC PRIVACY LAWS

In this Colloqium we are nearing the end of a week of the most intensive debate. I fear that the conscientious amongst us are beginning to suffer a form of intellectual indigestion, if not exhaustion. In any case out of a great conference, one is fortunate if just a few central ideas emerge. Let me attempt very briefly to state the central ideas of my paper.

The first is that data protection laws have developed, are developing and will continue to develop. The undoubted advantages of trans-border data flows (T.B.D.F.) - including of personal information - require that attempts should be made to bring some order into this proliferating municipal legislation.

INTERNATIONAL EFFORTS IN HARMONISATION

The second is that we are already in the midst of active co-operative attempts to secure an international legal regime for T.B.D.F. It is no disrespect to the other bodies engaged in this effort to say that the chief moves have been in the Council of Europe and the O.E.C.D. I am happy to say that between these two bodies, especially, there has been the closest co-operation and consultation.

SPECIAL FEATURES OF THE O.E.C.D. PROJECT

Thirdly, it is appropriate to state clearly that the O.E.C.D. exercise has certain special features:

(a) its membership is wider, more Anglophone, more geographically scattered and (because it contains the United States and Japan) is in some ways more relevant to the development of an international legal regime on T.B.D.F.;

(b) its mandate is not limited to automated data but deals conceptually with data (however handled) which is dangerous to privacy and individual liberties; and

(c) its mandate includes - as a second exercise - attention to trans border flows of non personal data. It is said that 98% of T.B.D.F are not personal data - but are business and commercial data.

The Council of Europe is designing a draft convention. The O.E.C.D. (without excluding a convention at a later stage) takes the view that at this phase of international development - guidelines are an appropriate first step.

COMMON THEMES IN PRIVACY LAWS

Fourthly, when we turned in the O.E.C.D. to seek out the bench mark or standard of rules for the effective protection of privacy and individual liberties in information systems, we discovered a remarkable thing. It was that, despite the differences of language, culture and legal traditions, domestic laws already developed on this subject did have certain common themes.

Above all, the golden rule for the effective disciplining of personal information systems was that prima facie, and with appropriate exceptions, the individual should normally be entitled, as of a right, to secure ready access to personal information about himself.

If nothing else is established by the O.E.C.D. project and the Council of Europe Convention than the assertion on the national and international stage of this pivotal principle, I believe it is already a very important achievement.

Access and the consequential right to correction, deletion, amendment, annotation and erasure are at the heart of national laws on this subject and international efforts to harmonise those laws.

There are other rules in the O.E.C.D. guidelines which are also important. These deal with such matters as:

. limitations on collection of personal information;
. the quality to be observed in personal information;
. limitations in the use or disclosure of personal information;
. provision for adequate security;
. identification of an accountable operator.

These are important, but the greatest of these is the principle of individual access.

THE SPECIFIC VALUE OF GUIDELINES

My fifth point is one of realism. For as you know the Anglo-Saxons are supposed to be a crass, but pragmatic and realistic lot. Some people say - what is the use of guidelines? They will not:

. solve conflicts of laws questions;
. determine which domestic law applies; or
. prevent so called "data havens" in countries insensitive to individual liberties.

The strict answer to these questions is in the affirmative. But I believe that in our own countries - and at an international level between sovereign nations - we will see an increasing movement away from the orthodox Austinian legal theory that if you do not have a sanction, immediately enforced, you do not have a law.

The fact is that when you lift your sights from the European continent to the wider world (increasingly involving itself in data processing and T.B.D.F.) there is relatively little municipal legislation governing the quality of personal information and the rules to be observed in upholding that quality.

Coercive international conventions, in advance of clear thinking legislation at home, are likely, I am afraid, to terrify political leaders who are already bemused enough by the new technology. Much more likely of success - at least in the first instance - are general educative statements which assert an agreed international standard. In many O.E.C.D. countries

(about half) - including Japan and Australia - it is more likely that the international consensus in broad guidelines will have an impact on lawmakers than that, in advance of their own data protection laws, they will subscribe to a binding convention. This may be all very unfortunate but frankness requires us to face these facts of international life.

In my own country, where we are in the midst of designing laws on privacy, we will take the O.E.C.D. guidelines most seriously. They will re-inforce those who argue for the golden rule (the right of access). They will provide a conceptual framework for legislation on the protection of the input, throughout and output of personal information.

If a similar resilt occurs in other countries of the world data processing community we will have made a significant contribution to reducing disparities that could otherwise - even innocently - arise adversely to impact T.B.D.F.

CONCLUSIONS

I have endeavoured to present five ideas:

1. Order should be brought into proliferating data processing laws because the technology is universal and pervasive.
2. Especially in The Council of Europe and the O.E.C.D. the effort has begun.
3. The O.E.C.D. has certain advantages - most especially the involvement of the United States and Japan.
4. Harmonising local laws is less difficult than feared because, so far at least, there are common themes. These are spelt out in the O.E.C.D. guidelines.
5. Guidelines may be more effective in the short run than a binding convention, in affecting domestic law making.

Can I say before I stop that I have found this week most useful and instructive. In Australia the Government and the unions and citizens are concerned about the same matters we debate here. Not only do I have a brief from the Law Reform Commission. There is in my country a major national inquiry into technological change. I was asked to report to this inquiry in detail on the Colloqium. This I shall do.

Il me faut vous avouver que j'ai tout particuliarement apprecie l'occasion que m'a ete donne de me trouver parmi vous au cours de cette semaine. C'est le meilleur des souvenirs que j'en rapportorai dans mon pays.