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AUSTRALIAN & NEW ZEALAND ASSOCIATION

FOR THE ADVANCEMENT OF SCIENCE

JUBILEE CONGRESS

ADELAIDE, 15 MAY, 1980

# AN INTRODUCTION TO THE BASIC RULES OF DATA PROTECTION AND DATA SECURITY

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May 1980

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

Because the right to privacy and fair information practices is protected inadequately in Australia, the Federal Attorney-General has asked the Australian Law Reform 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. Two discussion papers will be issued on 11 June. Those willing to comment on the discussion papers should give me their names.

In 1978 the Organisation for Economic Co-operation and Development (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 representative - because of the Law Reform Commission's work on privacy. I was elected Chairman of the Group.

The Group was instructed to draw up the basic rules and present the guidelines by the end of July 1969. This was done. Late last year it completed an Explanatory Memorandum to explain and illustrate the Guidelines. Put shortly, it proposed that the Council of the O.E.C.D. should adopt recommendations to member countries, urging them to do three things :

(1) In their privacy laws to take into account the guidelines
(2) To remove unjustified obstacles to T.B.D.F. inconsistent with the Guidelines
(3) To agree on a specific mechanism for international co-operation in applying the Guidelines.

THE INTERESTS OF THE O.E.C.D.

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

The answer is simple. About half of the 24 member countries of the O.E.C.D. 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. Further, some laws could be circumvented by the creation of local 'data havens' in which domestic laws for the protection of privacy could not be enforced.
* Secondly, that in the name of protecting privacy - and ostensibly for that purpose - countries might be tempted to introduce

artificial barriers to free flows of data for other reasons of undisclosed national policy - however legitimate (such as prevention of unemployment, maintenance of technological excellence and the defence of national culture, language and pride). 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 Congress 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.

Thirdly, the O.E.C.D. exercise had certain special features :

(1) 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.;

(2) its mandate was limited to automated data but deals conceptually with data (however handled) which is dangerous to privacy and individual liberties; and

(3) its mandate included - 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, not personally identifiable.

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 stop.

COMMON THEMES IN PRIVACY LAWS

Fourthly, when we turned in the Expert Group to seek out the benchmark 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 of disclosure of personal information;
* provision for adequate security;
* identification of an accountable operator.

My paper for this Congress specifies the suggested basic rules and includes comparisons with international and national legislation designed to uphold those rules. It follows a chronological pattern, indicating general rules and then special rules on the input, throughput and output of data at various stages in an information system. It then suggests machinery for the implementation of those rules. All of these points are important. But the greatest of them is the principle of individual access.

THE SPECIFIC VALUE OF GUIDELINES

My fifth point is one of realism. Some people say - what is the use of guidelines, even if O.E.C.D. adopts them. 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 Australia - 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 if one lifts one's sights from Europe, 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 of personal information.

Coercive international conventions, in advance of clear thinking legislation at home, are likely, I am afraid, to terrify political leaders, especially in Australia (with its Federal/State Divisions) where they 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 required us to face these facts of international life. The French do not like this. They want an immediate convention.

In Australia, where we are in the midst of designing laws on privacy, we will take the O.E.C.D. guidelines seriously. They will reinforce 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, throughput and output of personal information.

If a similar result 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 presented 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. It also includes us. It is our only effective means of influencing the basic rules

(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. They are parallelled in my suggested ten principles

(5) Guidelines may be more effective in the short run than a binding convention, in affecting domestic law making. A convention may be needed later.