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INTERNATIONAL PROTECTION OF PRIVACY

The Organisation for Economic Co-operation and Development (OECD) is best known in Australia for its publication of data concerning the Australian economy and comparative inidicia on employment, economic growth and other social issues. The OECD is established in Paris and is the successor to the post War Marshall Plan. The 24 member countries comprise the 16 nations of Western Europe, the United States, Canada, Australia, New Zealand and Japan. Yugoslavia has a special associated status. Australia joined the OECD in 1971.

In recent years, the Directorate for Science, Technology and Industry of the OECD has pioneered important studies into the economic and social implications of new information technology. The linkage of computer and telecommunications technology has produced many social problems common to the advanced economies of OECD countries. The Organisation is therefore a valuable forum for the exchange of information and views. More recently it has turned to the development of normative Guidelines on such inter-jurisdictional questions as escape of pollution and multi-national corporate conduct.

The latest endeavour by the OECD Council to establish an international legal regime to be observed by member countries is of special interest to Australia. At its 523rd meeting on 23 September 1980, the Council adopted a recommendation addressed to member countries of the OECD concerning Guidelines governing the protection of privacy and trans border flows of personal data. The recommendation is of special interest to Australia because it provides an internationally agreed statement of 'basic principles' of privacy protection proposed for national implementation. The current project of the Law Reform Commission (Cth) to develop proposals for Commonwealth privacy laws (see 50 ALJ 201, 54 ALJ 520) makes the OECD statement of special value and importance to Australian lawmakers, coming as it does at a time of national consideration of domestic Australian laws on this subject. It is also of interest that the Expert Committee, which developed the guidelines adopted by the OECD Council, at its first meeting elected the Chairman of the Law Reform Commission, Mr. Justice Kirby, as Chairman of the Committee. It proceeded to hold a series of meetings aimed at clarifying the agreed 'basic rules' concerning privacy of personal data, the basic principles of international application governing the free flow of data between OECD member countries and the legitimate restrictions that may be imposed upon such free flow.

It was generally agreed that trans border flows of personal data (such as airline bookings, hotel reservations, credit card information, banking, insurance and other records) contribute to economic and social development. However, it was also recognised that the virtually instantaneous information technology now available presented new problems of a national and international character. In response to the new technology, a number of countries of Western Europe (Austria, Denmark, France, Germany, Luxembourg, Norway, and Sweden) have already adopted privacy (or data protection and data security) laws. Yet the close proximity of these countries (and also of the United States and Canada) together with the nature of the technology involved, raise the possibility that privacy laws regulating information systems could unduly impede the advantageous free flows of data if requirements such as licensing were imposed. In some quarters, the fear was expressed that legislation ostensibly for privacy purposes would be used for economic or technological protectionism. On the other hand, in other quarters the fear was expressed that legitimate domestic laws for the protection of privacy would be readily circumvented by the simple expedient of storing personal data beyond the jurisdiction. The development of satellites and other new forms of telecommunication suggest that Australia is not immune from these problems.

The OECD Guidelines are in the form of a Recommendation adopted by the Council of the OECD pursuant to the Convention of the Organisation of 14 December 1960. The Recommendation urges member countries to 'take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the guidelines'. It also urges them to 'remove or avoid creating, in the name of privacy protection, unjustified obstacles to trans border flows of personal data. It is suggested that member countries should co-operate in the implementation of the guidelines and agree as soon as possible on specific procedures of consultation and co-operation for their application.

To the Council's Recommendation (OECD Document C(80)58(Final)) is annexed the 'Guidelines Governing the Protection of Privacy and Trans border flows of Personal Data'. An appendix to the Council recommendation is an explanatory memorandum, also prepared by the Expert Committee, elaborating in some detail the brief form of Guidelines adopted by the member countries. As in the domestic sphere, so in the international. The debate, about the weight to be given to privacy consideration, as against the flow of information, is one upon which strongly differing views are held. Broadly speaking, European countries were more favourably disposed to privacy concerns. The outlying English-speaking countries were more sensitive to the advantages of the free flow of information.

When the OECD Council adopted the recommendation, Australia, Canada, Iceland, Ireland, Turkey and the United Kingdom abstained. The Icelandic abstention was subsequently withdrawn. Australia's abstention was recorded for the purpose of permitting consultations between the Commonwealth and the States, the latter having substantial legislative authority in the area of privacy. Paragraph 5 of the Guidelines, a Federal clause, specifically recognises that the observance of the Guidelines could be affected in federal countries by the division of powers. At the time of this note, the Commonwealth/State negotiations are continuing in Australia.

The Guidelines are not, in terms, limited in their application to automated (computerised) information systems. They apply to public and private sectors and to personal data which either because of the manner in which it is processed or its nature and content, may 'pose a danger to privacy and individual liberties'. Certain exceptions are envisaged as are variations in the national application of the Guidelines. From the Australian point of view, the most interesting and immediately useful provisions are those contained in Part 2 ('Basic Principles of National Application'). The titles of the 'basic principles' will give some indication as to the subject matter dealt with. They are 'Collection Limitation Principle', 'Data Quality Principle', 'Purpose Specification Principle', 'Use Limitation Principle', 'Security Safeguards Principle', 'Openness Principle', 'Individual Participation Principle' and 'Accountability Principle'.

The 'Individual Participation Principle' was generally recognised to be the critical provision of the guidelines. It adopts the so-called 'golden rule' of information privacy protection. It is a rule reflected in the privacy legislation so far adopted in Western Europe and it is contained in Canadian and United States privacy laws. The principle (Guidelines para. 13) provides that an individual should have the right to obtain from a data controller or otherwise confirmation of whether or not he has data relating to the subject, to have such data communicated to him within a reasonable time, at a charge, if any, that is not excessive, in a reasonable manner and in a form that is readily intelligible to him; to be given reasons if such a request is denied and to challenge such denial and to challenge data relating to him. If the challenge is successful he is to have the data erased, rectified, completed or amended. In a time of 'data profiles' upon the basis of which increasing numbers of important decisions will be made concerning individuals in society, this proposed Guideline is of obvious importance.

The OECD Guidelines represent one only of the international efforts to promote the harmonisation of domestic privacy laws, in the hope of reducing non-intentional barriers to free flows of information between friendly countries. The Nordic Council and various non-governmental organisations such as the International Federation for Information Processing (IFIP) and the International Council of Automated Data Processing (ICADP) have also been working on the problem. Within the United Nations itself, the General Assembly adopted, in December 1968, a resolution inviting the Secretary-General to undertake a study of human rights' problems in connection with the development of science and technology. Some relevant work has also been done within UNESCO. The European Parliament, in May 1979, adopted a resolution for consideration by the EEC Commission and Council, concerning the 'principles' which should form the basis of a Community Directive for laws in member countries on the protection of individual rights 'in the face of technical developments in data processing'. (See Resolution on the Rights of the Individual in the Face of Technical Developments in Data Processing, 22 O.J.Eur.Com. (No. C.140) 34 (1979)). However, no action has been taken on this resolution pending the outcome of the other major effort for a legal regime proceeding in the Council of Europe.

The Committee of Ministers of the Council of Europe adopted resolutions on the principles to be observed in laws dealing with personal information stored in electronic data banks in September 1973 (private sector) and September 1974 (public sector). Thereafter, a Committee of Experts was established to prepare a draft International Convention on this subject. The final draft was adopted by the Committee of Ministers of the Council of Europe on 17 September 1980. The draft Convention was opened for signature at Strasbourg on 28 January 1981 (Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data). It will enter into force when ratified by five member countries of the Council of Europe. An interesting provision is Article 23 which envisages accession by non-member States. There are obvious parallels between the Council of Europe Convention and the OECD Guidelines. Unlike the OECD Guidelines, the Council of Europe instrument is limited to automated (computerised) personal data. It is in the form of an international, binding convention and confers rights on data subjects which are enforceable in countries party to the Convention.

The international character of the new information technology is bound to require the urgent development of new international law to govern the exponential growth of data transfers, both personal and non personal. The OECD Working Party on Information, Computer and Communications Policy is now examining the identification of the various legal problems of an interjurisdictional character raised by the rapid advent of the new technology. Australian policy-makers will do well to continue to show an interest in these developments.

M.D.K.