# TRANS NATIONAL DATA REPORT

## AUSTRALIAN PRIVACY INQUIRY: PROGRESS REPORT

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Australia's national inquiry into new privacy laws. In Australia, only one State (New South Wales) has a comprehensive privacy law. To remedy the absence of laws to protect privacy, the Australian Federal Government has asked the Australian Law Reform Commission to review Federal laws and to report on new legislation necessary to protect privacy. The Commission is working closely with State bodies in Australia in the preparation of its proposals. It has before it the OECD Guidelines governing the protection of privacy and trans border flows of personal data (see TDR Vol. 3, No. 7, Nov. 1980, 1). Although Australia abstained when these Guidelines were adopted by the Council of the OECD on 23 September 1980, it did so principally to permit Federal/State consultations. Under the Australian Constitution, the protection of privacy is substantially a State matter. Nevertheless, Federal and State bodies looking at privacy law now have an internationally stated standard against which to develop and measure proposals for privacy protection.

In June 1980 the Australian Law Reform Commission issued two discussion papers containing tentative proposals for new Federal laws in Australia on privacy protection. These were Privacy and Intrusions (DP 13) and Privacy and Personal Information (DP 14) (see TDR Vol. 3, No. 5, Sep. 1980). The subject matter of this note is the discussion paper on Personal Information. That paper dealt with the dangers to privacy arising from rapid expansion of personal files, particularly as a result of growing automation and linkage through telecommunications. The paper proposed legislative adoption of certain rules based substantially on the OECD Guidelines. It also proposed the creation of an Australian Privacy Council, to elaborate the guidelines, and a Privacy Commissioner to investigate complaints, conciliate disputes and promote community education about data protection and data security. During November 1980 the Law Commissioners sat in public hearings in all parts of Australia to receive industry, academic and community submissions. They also attended semsinars arranged by industry bodies. Under the direction of Professor Robert Hayes, the Commissioner in charge of the project, the submissions are now being evaluated. A final report with a draft Federal Privacy Act is expected in the second half of 1981.

The purpose of this note is to outline some of the themes relevant to information privacy which arose during the course of the public hearings. A resolution of these themes will influence the future shape of Australia's information privacy laws.

Criminal and child welfare records. One matter which was not specifically dealt with in the discussion paper was the subject of several submissions, namely criminal and like official personal records. Many people making submissions referred to the damage that can be done to personal reputations by the indefinite retention of such records. Reference was made to the sliding scale provided in the English Rehabilitation of Offenders Act. The enactment of similar legislation in Australia was urged at a number of public hearings.

Problems raised by consideration of criminal record privacy include problems of the security of such records from reticulation to a wide range of would-be recipients. It was pointed out that some police and criminal records in Australia are sometimes passed on to insurance companies and others. It was suggested that a proposed national criminal data system would have dangers and would inhibit people 'living it down'.

A clear perception of the way in which old records worry people was given by a submission made in Sydney by a former State ward, i.e. a person whose custody and upbringing during childhood had been undertaken by the State. Although his is not the case of a criminal record, it is a problem of a similar order. His wardship file had followed him from one institution to another during his youth. His every offence or suspected offence was noted down. On one occasion he illicitly saw his file and noted with astonishment and embarrassment the large number of prejudicial, unfair and cruel comments which represented his 'data profile'. This young man, now 20, wanted to know how that file could be destroyed, retaining only essential records such as physical health treatment. He mentioned how the file contained allegations of offences he never committed and suspected personal sexual inclinations he did not feel. He objected to the way institutional officers would 'see' him through the file and endeavour to strike a note of familiarity on the basis of the file information, which familiarity he did not feel inclined to accord them, at least at a first meeting. Most children get through life without an annotated catalogue of their suspected joys and woes. The existence of such files worries some sensitive people.

Privacy and Credit Records. The collection of credit information has been a traditional area of legislative attention to protect privacy. This is partly because increasingly important decisions are being made affecting the pleasures and fulfilment of life on the basis of a 'credit profile' of applicants, retrieved for the benefit of potential creditors. The future, with electronic fund transfers and point of sale credit transactions plainly holds in store even greater importance for credit information. In response to the demands of the credit society, credit bureaux have been established. Increasingly they are computerised. The establishment of computerised credit bureau, was explained. They are not yet linked to bureaux in other Australian States. However, such linkages are only a matter of time. Already international credit linkages for the world wide use of credit cards are capable of virtually instantaneous checking of credit worthiness and fraud. They are well established, efficient features of our society.

Credit bureaux already adopt standards both for security of their data and for its quality. It is in the interest of the bureau to offer accurate and up to date factual information. Most provide access by the data subject, either to the information held, or to the substance of it. In some States of Australia (Victoria, Queensland and South Australia) State legislation has already been enacted conferring on data subjects adversely affected by credit information certain legally enforceable rights of access. In New South Wales (and in part in Victoria) a voluntary scheme of access has been worked out. Nearly 2,500 people each year utilise the New South Wales scheme to check their credit information. There are, however, defects both in the absence of schemes in some parts of Australia (including the Capital Territory) and the inadequacy of some current schemes. Increasing use of computerised credit cards in the place of anonymous cash raise social consequences which must be considered. The 'credit trail' left by purchasers was the subject of several comments. Credit bureaux and certain other organisations (such as suppliers of government services) are armed with enormous quantities of personally identifiable information. What can be used in emergencies for location of people, could also be a source of interrogation by authorities, quite unbeknown to the data subject. The ability of computerised data of this kind to be submitted to interrogatory rhythms so that information supplied for one purpose is put to quite a different and unexpected purpose was mentioned in several places. The need for protection of the data subject against misuse of information in this way was a recurring theme of the Australian public hearings and seminars.

Employment and Referees' Reports. Senior university officers came before the Commission's public hearings to express doubts about the extension of a right of access to employment and referee reports (letters of recommendation). It was suggested that a problem would exist in providing access not only in universities but also in private business and government employment. In universities it would exist both at the point of recruitment and in respect of promotional advancement. In Sydney it was asserted that an employer was also entitled to the privacy of his records and that these included certain personnel information.

University representatives stressed that universities especially must be armed with frank referees' reports if they are to maintain standards of intellectual excellence. It was said to be vital that referees should feel free to disclose derogatory and critical facts about a candidate for appointment or promotion. Fear was expressed that a right by the subject to have access to his whole personnel file, including referees' reports on him, would impede frank referee assessment, encourage bland comment, alternatively lead on to the adoption of a 'code' system by which doubts about a candidate were signalled obliquely. In this regard, reference was made to referees' reports in United States universities and the warning which must be given there to those who write referees' reports concerning subject rights of access. The Privacy Study Protection Commission of the United States suggested that after an initial retreat to bland references and to use of the telephone, more recent experience did not justify such criticism of the right of access. Australian university personnel disputed this assertion based on their experience of referees' reports originating in the United States.

It was put to the university representatives that quite critical decisions would be made on the career of a person, on the basis of false, misleading, out of date or even malicious referee reports. Present secrecy could simply protect error. The possibility that external referees could be sought, of whom the subject knew nothing, was specially offensive. Not only might prejudice be done to the candidate. The decision-maker himself could be armed with inadequate data. In response, it was suggested that this was the regime which university people in most countries well understood. They themselves have to write many reports as referees and they understand the need for confidentiality. Use of the telephone as an alternative or supplementary source of frank assessment was unsatisfactory in the Australian university environment where an international scholarly market tends to be tapped. By the same token, it was conceded that opportunities for university advancement in Australia were declining and that non-academic staff in many institutions already enjoyed or were negotiating the right of access to personal files. Its extension to academics in some form was considered possible. The issue was : is it desirable and if so, in what form and with what limitations?

Privacy and Medical Records. One of the most vigorous debates related to the privacy of medical records. In part, the issue is brought to a head by the increasing computerisation of medical records. Even in the remote and thinly populated Northern Territory of Australia, hospital records on 215,000 Territorians (nearly 90% of the population) are now computerised. In Victoria a State-wide system of computerised hospital records is under study. Computerisation and the use of medical teams going far beyond the medical profession itself raise the possibility of a haemorrhage of private medical information which was simply not possible in the old time doctor's surgery files.

The other challenge to medical privacy emerges as the consequence of the growing government funding of health care in Australia. The involvement of health funds in medical funding raises many complex questions. These include the computer matching analysis and tracing of fraudulent claims by doctors and patients, with consequent need to examine patient health records and even investigate patients themselves. Another issue is whether a health fund may ever be justified to disclose to a patient something unfavourable discovered about the doctor (on the other). An example of the lastmentioned problem was raised. Would a health fund, knowing from its records that a psychiatrist was himself receiving prolonged intensive psychiatric treatment, ever be justified in disclosing this fact 'in the public interest' to one of his patients?

When it came to the issue of access by patients to their own records, strong passions were raised. Many of the medical witnesses conceded that there had been excessive paternalism in the past and that the patient's interests must guide the ultimate judgment on this issue. However, reservations were expressed concerning direct access by patients to medical records. It was said that there would be a need for complex methods to ensure the identity of the applicant. It was said that records (often now contained on reel film or microfiche) could reveal the secrets of other patients. It was said that hospitals and medical facilities generally did not have premises or personnel to supervise such access. It was feared that direct, unsupervised access might lead to tampering by the patient with the file. Some objected to any retrospective principle, given that health records until now have been prepared by officers with an expectation of confidentiality. Some feared that a right of access might discourage the notation of peripheral information, vital for a total profile of the patient. In the psychiatric area the problems of records in the case of group therapy or family therapy were mentioned. The rights of others would have to be respected in any later access to such group or family records. The involvement of medical teams and the need for peer review was said to be an obstacle for an unrestricted right of access.

For all these problems, generally speaking, medical witnesses were content with the notion of intermediate access i.e. through a trained medical officer who could protect patient and record-makers from undue harm, whilst at the same time giving the patient a general right of access to his medical file. It was pointed out that most medical records involve administrative material, factual material and sensitive and hypothetical material. It was only in respect of the last class that significant problems of access were raised.

The question of ownership of records was raised in many centres of Australia, although not addressed by the Commission. The practice of doctors and lawyers selling confidential patient and client files as a business concern, without subject consent, was referred to and criticised.

Children's Privacy. No issue attracted more submissions than a suggestion concerning children's privacy. The suggestion arose in the context of the Commission's view that a general rule of access should be provided so that normally the individual would have access to personal data about himself. Adoption of such a rule requires the definition of rights of access and a statement of its point of commencement. Obviously young people of tender years may not exercise a right of access to records about themselves for themselves. Access by their parents or guardians must therefore be allowed, acting on their behalf. When it comes to children moving into adolescence and adulthood, a time will be reached where the parent's right will be transferred to the child himself. A point will be reached where the integrity and privacy of the child will be respected and upheld by record-keepers who are counselling and advising the young person, upheld even as against an inquiring parent. What is that point? Can it be defined?

The discussion paper suggested that before the age of 12 parents should be absolutely entitled to have a right of access. After the age of 16 the consent of the child should be required in every case. In a grey area between 12 and 16 it was suggested that the consent of the child should normally be required by the doctor or school counsellor, even for parent access, but that such consent could be over-ruled in the interests of the health, safety or welfare of the child. The proposals were not fully explained. The problem of dealing with abused and ill-treated children was not instanced. The spectre of 12-year-old girls securing medical advice on termination of pregnancy and contraception, secretly withheld from their parents, agitated many sincere and concerned community groups and individual citizens throughout Australia.

Most of the groups which came forward had not spoken to children on this issue, although the Commission had. Many groups asserted the need to uphold the Biblical ethic concerning parents' rights over children and children's duties to parents. Many even advanced a somewhat 'mercantile' approach to the problem. According to this view, so long as a child remained under the roof of a parent, eating at his table, the parent should have an absolute right of access to the child's records, however intimate, whether medical, educational or otherwise. If a parent paid the health fund fees, the claims of others (even a child) on such a fund could not be tolerated without the subscriber parent's knowledge and consent.

This approach was condemned by other participants. In Melbourne it was said to be symptomatic of a selfish attitude to a 'captive population'. Instances of unkind and cruel parental conduct cited to the Commission. Psychological oppression and cruelty much more common, so it was said, than physical abuse. Instances where parents were selfish and thought of themselves rather than of their children's individuality were mentioned. One witness pointed out that a case where a child, courageously against the parent, asserted a right to the privacy of confidences, was already a case where intra family communication had 'broken down'. All that was proposed was that the law should protect such children as a vulnerable group. It was claimed that children were maturing earlier today than in times gone by. It was also pointed out that in reality doctors, teachers, ministers of religion and priests in Australia did observe the confidences of children between the years of 12 and 16, and indeed, on occasions, even younger.

As against these contentions, strong arguments were advanced by opponents. It was pointed out that parents are generally motivated by the best interests of their children and are usually in the best position to judge those interests. They have a longer term and less superficial knowledge of the child than most record keepers, whether they be doctors, school counsellors or advisors. The effort of society should be to bring parents and children together, to share information. The dangers of abortion, especially on young girls, were stressed by representatives of the Right to Life Association. Certainly at the age of 12 to 16, young people were vulnerable and susceptible to assertive peer group pressure. It was said that many children of this age group were 'bush lawyers'. Adoption of the principle that children could object to parental access might encourage children in rebellion against the legitimate efforts of parents to help them during a period of immaturity. One participant even said that the need to tell parents, for example in the case of pregnancy, would force children and parents together where the easy thing would be to avoid communication. Commenting on this, representatives of the Family Planning Association thought it a naive proposition in the context of pregnancy of a young girl. They said it was more likely that the girl would borrow from friends, steal or even seek non-expert termination of pregnancy rather than face up to parents, if they were known to be unsympathetic.

The general consensus of those who made submissions to the Commission, even some who favoured a child's legal right to privacy, was that the age of 12 was too low for the beginning of any legally enforceable right of privacy. Many expressed themselves more forcefully. Debate about the appropriate age varied. The Family Planning Association of N.S.W. suggested 14 years, that being an average age of puberty. Others supported that age because of its connection with school leaving entitlements in some parts of Australia. Others argued for 16 years on the basis that this was the age for consent to sexual activity in the criminal law. Many religious groups and some others contended for 18 years, that being the age of adulthood, the right to vote, make wills, contracts and so forth. Other participants said that 18 was nowadays 'far too old'. The mean of the submissions received would appear to favour a general age of 16 years, beyond which parental insistence of access to intimate medical or educational information, or the confidences shared with a priest or minister of religion, should not be upheld against the child's objection.

Plainly this controversial proposal relating to children's privacy will have to be reconsidered. An English legal scholar with an international reputation, Professor G. Dworkin, told the Melbourne seminar that in the interests of securing effective privacy and data protection laws, the Commission could do well to postpone the controversial proposal on children's privacy, referees' reports and access to medical records.

Towards Effective Sanctions and Remedies. The controversies about criminal and like records, credit information, employment referees' reports, the privacy of medical records and children's privacy are international debates. They adhere in the information practices of all advanced economies. The OECD Guidelines recognise that in the development of the actual machinery of privacy protection, each country will have to do so in the light of existing institutions and established legal traditions and constitutional limitations. In the Australian Law Reform Commission's consultations, we were left in no doubt as to the problems in the way of effective privacy legislation. Foremost amongst these, in Australia, is the constitutional limitation upon comprehensive Federal legislation. Only by artificial and dubious constitutional argument could a single regime be established to govern automated data systems. Such an approach would be forced to rely upon the Federal power over telecommunications. However, beyond such legal difficulties, many others were listed. They range from the apathy of the community to the mobility of highly trained informatics personnel. The problem of apathy was touched on in many places. In Brisbane, the public hearing was told that privacy was not presently seen as 'cost justified'. Elsewhere we were told that there was 'little interest in the subject'. The need to raise the communitys understanding of the problems and of the subtle dangers that lie ahead was stressed in almost every centre.

Other considerations of a general character were also stressed. Privacy is not an absolute value but must be balanced with other freedoms, including the right to information. This thought led the Victorian Society of Computers and the Law to urge the creation not of a Privacy Council and Commissioner but an Information Council which could weigh equally the claims to privacy and information. It was important to avoid an obsessive and 'over-tender' concern for privacy. Professor Dworkin stressed that any machinery developed should be flexible because of the infinite variety of information systems, in particular, and the fast-developing technology which almost daily creates new problems for the slow-moving lawmaker. The role of the law was limited and its limits were recognised in all parts of the country.

The cost of privacy protection was mentioned in many places. Some urged that indemnity charges should be made for the suggested right of access. Others urged that any such costs should not be so unreasonable as effectively to prevent utilisation of the salutory right of access. Still others pointed out that access and data quality rules should be seen as elements in a good information system. Data cleansing and auditing should be compulsory as part of the costs of computerisation. Given the enormous efficiencies and economies, especially of the new information technology, the cost of information privacy would be modest and marginal. Strong interest was expressed in many seminars concerning the achievement of effective security of automated personal information systems. A strong mood came through that encryption would be required to protect sensitive personal data in computers from 'raiders'.

Computerists constantly stressed the limits within which any Australian legislation must be developed. Australia is overwhelmingly an importer of information and information technology. It is overwhelmingly an importer of computer hardware and software. Satellites and the new technology make it relatively easy, technologically, to bypass national legal systems. It may even be impossible to say precisely where a data file is, if its content is moved about for reasons of economy and efficiency. By way of reassurance, it was pointed out that Australia will pick up various security measures provided for in United States legislation. Numerous participants urged the need to 'phase in' legislation and to provide machinery that would ensure that the regulation of privacy and the provision of effective data protection laws was an 'ongoing' procedure.

So far as the actual machinery for privacy protection was concerned, an important difference of view emerged. On the one hand, some proponents urged that it was necessary to go no further than the model of the New South Wales Privacy Committee. Generally speaking, this provides a mechanism for investigating complaints and generalising to voluntary, non-enforceable 'guidelines' which are given publicity through the media. The Law Reform Commission's discussion paper urged an extra step in the provision of a residual right of access to the courts, at least in some cases of privacy invasion, both in respect of unlawful intrusions and breaches of established fair information practices. The success of the New South Wales Privacy Committee has been most notable in its accessibility to ordinary citizens, across the table. In this it contrasts markedly with the relative disuse of general tort remedies provided in Canadian legislation. Nearly 10,000 complaints have been dealt with in the five year history of the Committee. However, the other view was expressed that legislation and court-enforced remedies were appropriate and necessary for effective protection in addition to conciliation and persuasion with reliance on media coverage to ensure compliance.

Self-regulation was mentioned in many centres. Although it is obvious that self-discipline will be an important aspect of effective privacy laws, most participants agreed that self-regulation alone, with no statutory backup, would be inappropriate and ineffective, particularly in the area of data protection and data security.

## CONCLUSIONS

The Australian Law Reform Commission is now entering the final phase of the preparation of its privacy report. Procedures of public and expert consultation take a long time, particularly in a big country with scattered communities. However, the end result should be a law which is well considered and sensitive to the perceived needs and attitudes of the Australian public. A recent national public opinion poll, conducted by The Age newspaper in Melbourne for the Law Reform Commission, showed that:

* 83% of people surveyed thought that those who were in a job should have a right to see their personnel file if they ask for it.
* 89% thought that a person seeking a loan should have a right to see and comment on any report obtained by lending bodies.
* 83% were aware that information gathered by government departments about individuals was not universally treated as confidential, in the sense that it was sometimes passed to other government departments or outside bodies.
* Yet only 31% of Australians felt that their personal liberty was threatened. 65% felt that it was not under threat.

The Australian Prime Minister, Mr. Fraser, has committed the Australian Government to the introduction of privacy legislation following the report of the Law Reform Commission. Freedom of information legislation will be re-introduced into the Australian Parliament in 1981. The world of proliferating data banks and the intimate computer profile is no longer an Orwellian spectre. It is a world in embryo. The completion of its task in the provision of effective laws on privacy is now a major priority of the Australian Law Reform Commission.

* Chairman of the Australian Law Reform Commission 1975—; Chairman of the OECD Expert Group on Trans Border Data Barriers and the Protection of Privacy 1978-80.