

31st International Conference of Data Protection and Privacy Commissioners

Madrid, 6 November 2009

6th Plenary Session

Moving towards a global regulation of privacy: proposals and strategies – a New Zealand perspective

Blair Stewart, Assistant Privacy Commissioner, New Zealand

New Zealand is pleased to have co-sponsored the Resolution on International Standards of Privacy.

The resolution is the culmination of the most sustained out of session work that the Conference has yet undertaken. The task was initiated, more than a year ago, with scoping work leading to a resolution of the 30th Conference. Since then, there has been a great deal of research, two meetings, several consultation rounds and much collective input.

The result is a resolution that records a core set of principles, rights, obligations and procedures that should be present in schemes to protect privacy. Coupled with the resolution is a joint proposal that illustrates in more depth the feasibility of international standards.

New Zealand sees this project as expressing the growth in confidence of the International Conference. It demonstrates the willingness of the assembled data protection authorities to contribute their collective expertise to addressing the global challenges of data privacy. Building upon earlier initiatives, the Conference has taken another step towards establishing the essential infrastructure of data protection cooperation.

Data protection authorities are multi-faceted privacy regulators. Their principal roles have been described as *ombudsmen*, *auditors*, *consultants*, *educators*, *negotiators*, *policy advisers*, *enforcers* and *ambassadors*. They are not single purpose agencies that merely enforce the law. Nor are they simply policy advisers, analysing the theory of a subject, but remote from the messy business of carrying the policy forward. The multi-faceted role places Data Protection Authorities in the very centre of the data privacy universe. This initiative is a significant step in fulfilling the potential of the role and meeting the expectations of those that look for global leadership from this group.

I expect that others will speak in more depth about the resolution and the associated joint proposal. Instead, my remarks place the initiative in context, briefly highlighting:

- the evolution of the Conference;
- new data privacy approaches in new regions;
- innovation in data privacy regulation.

These contextual matters are inter-related. Today's challenges require global solutions which in turn require an understanding of the world's varied approaches to regulation. The challenges are so pressing as to warrant the most innovative regulatory ideas on offer.

The choice of these aspects to highlight reflects the New Zealand experience. In our Conference participation, we have placed special emphasis on building the infrastructure needed to act globally. We have, for instance, helped develop approaches to resolutions and accreditation and reviewed the organisational underpinnings of the Conference. While the majority of participating authorities are from Europe, we represent a different experience. We owe our regulatory approaches to OECD origins, not European instruments. We also participate in APEC which is the latest international body to address privacy issues in depth and which represents some 'new thinking' on the subject.

Conference evolution

The Conference has met annually for more than 30 years. In the last decade the Conference has reinvented itself. Not content to rest on its laurels, the Conference has sought to create conditions whereby data protection authorities could collectively engage more effectively at global level. Key steps since 1999 have included:

- adopting guidelines and procedures for conference resolutions;
- establishing accreditation features of data protection authorities;
- expressing expectations in relation to data protection and international organisations;
- encouraging the development of international standards;
- enabling country observers to engage with the conference;
- planning an online platform for co-operation;
- enabling representation before meetings of international organisations.

There have also been the landmark Montreux and London Declarations. Both have been matched with an active programme of review to ensure progress towards the agreed objectives.

Since 2001 the Conference has spoken as one through resolutions. The Conference now draws accredited participation from six continents and contributes to the work of international governmental organisations as a recognised observer. In short, the Conference is turning aspiration into action. As well as ‘talking the talk’, the Conference is increasingly ‘walking the walk’.

The latest resolution is a logical part of this evolution. Global leadership is needed to develop common international frameworks. The Conference has called for this many times over the years. This initiative offers our collective expertise to help ‘kick start’ a process that will engage others in the issues.

New regions, new approaches

The regulation of data privacy is clearly in a state of development across the world.

One of the delights of being involved at this formative stage is to observe the fundamental human right to privacy being implemented gradually through many different cultures and societies. In the last 15 years, we have seen the rapid growth of data protection law beyond Western Europe. We have seen the first data protection authorities established in Asia, South America, Eastern Europe and, mostly recently, Africa and the Middle East.

It has been especially encouraging to see respect for privacy being embedded in states where human rights have previously been under challenge. The Conference has been enriched by the dedication and thoughtfulness of commissioners from societies so recently under authoritarian regimes. Who can forget the Conference presentations recounting the misuse of personal information in East Germany or the absence of reliable information in relation to the ‘missing’ of Argentina?

The absence of an international treaty has meant that a greater load has been placed upon regional treaties, such as those in Europe, or soft law originating from international bodies, such as the OECD.

There remain large regions in the world have no regional instrument, no privacy laws or at best something of a patchwork with large gaps. One such region is the Asia Pacific, a vast area representing a substantial portion of the world's commerce and population. There has been comparatively little penetration of data protection law until recently. However, that may all change as a result of APEC's efforts. Most recent indications are that at least 11 economies are reviewing their laws or contemplating new data protection laws with an eye on the APEC Privacy Framework.

One of challenges that this initiative has been to understand and synthesise the variety of approaches taken to data privacy around the world. An example is the focus upon the accountability principle, which has a particular importance in the APEC Framework. There have also been genuine attempts to try and marry the approaches of the different regional instruments to sensitive data. An attempt has been made to reconcile the prescriptive approaches of the European instruments with the risk assessment orientation of the APEC Framework. Regardless of the differing views on the success in achieving a successful fusion, the importance is that the attempt has been made.

The joint proposal is a first step in a longer march which will involve others in the attempt to build consensus on the most effective approaches. The joint proposal points to the feasibility of attempting that task.

Regulatory innovation

Regulatory innovation is nothing new in privacy. Indeed, data protection authorities are themselves a regulatory innovation springing from an understanding that litigating privacy rights through the courts was not a sufficient response to the nature of the challenges. The multi-faceted data protection authority has at its disposal a variety of tools to use to achieve the policy aims from public education, research, policy work, advocacy and hard edged enforcement. There is particular focus on consumer redress and on changing organisational behaviour.

With 30 years experience there is a clear ongoing need for regulatory innovation. The resolution and joint proposal reflect some innovative ideas. The resolution explicitly records the need for 'proactive measures' such as those oriented to prevent and detect breaches.

The appointment of privacy officers as well as efficient audits and privacy impact assessments are measures particularly mentioned.

Data breach management, drawing on the US experience, is also anticipated. Privacy impact assessment and data breach notification are both approaches having origins in the Asia Pacific and North America and join many others derived from long European experience. The initiative blends these different approaches and offers them as a joint proposal to move forward at global level.

Challenges for the future

The resolution and joint proposal are the conclusion of work undertaken over the last year and a half. However, in another sense, the initiative simply represents the beginning of a process. The Conference has taken a step to suggest what might be possible in terms of global standards. It has thrown down the gauntlet to others to see where that collective work could be taken.