

Data Protection in Australia by Dr Gordon Hughes (The Law Book Company Ltd, Sydney, 1991) pages v-xxxvi, 1-501, index 503-513. Price \$85.00 (soft cover). ISBN 0 455 21043 8.

Data protection is a subject that many people associate with computers and computer law. The result is that many lawyers treat the subject as a specialized area which can safely be left to a few *cognoscenti*. They are wrong. The concept of data protection, that is, protecting the individual against the abuse of personal information stored in a database, is not limited to computerized databases. It extends to all types of information storage, whether computerized or not. Data protection is also important because the issues that arise, the law that is involved, and the policies that are being developed and implemented transcend a specialized interest in 'computer law'. This is an area of legal development which all lawyers will need to know something about.

Although data storage does not necessitate the use of computers, computers have of course hugely increased our capacity to store and manage data. With this increased capacity comes an increased likelihood of mismanagement, lack of control and abuse which, in turn, has stimulated the need for protection and controls. It is not difficult to cite examples to illustrate these problems. The New South Wales Independent Commission Against Corruption has recently presented a 1300 page parliamentary report following a two year investigation into the illicit trade in confidential information by Commonwealth and N.S.W. government departments.¹ It is alleged that N.S.W. public officials have sold confidential information such as addresses, criminal records, passport details and bank account numbers to insurance companies and banks, for large sums of money. It is unlikely that such occurrences are limited to New South Wales as the still unfolding 'Operation Iceberg' in Victoria shows.² These events are, of course, examples of the unauthorized disclosure of personal information by persons who have lawful access to the data. While not easily controlled, such disclosures constitute a major infringement of privacy rights.

There are other circumstances in which privacy rights are violated. One is the unintended or accidental disclosure of information. A recent case is that in which some 6000 letters, containing personal information extracted from Department of Social Security records, were mistakenly sent to the wrong people. Another aspect of data protection is ensuring the integrity of stored personal information. Computers make the storage of massive amounts of information cheap and relatively easy, but the task of checking and updating that information grows steadily as the amount and age of

1 Independent Commission Against Corruption, *Unauthorised Release of Government Information*, Report, August 1992.

2 *Age* (Melbourne), 15 September 1992; *Age* (Melbourne), 16 September 1992; *Age* (Melbourne), 17 October 1992.

stored data increases. Securing computerized information against unauthorized access and interference (either corruption, alteration or destruction) is also difficult. Remote access to databases is an essential aspect of their usefulness, but, unless technological security is adequate, hackers can gain access and then read, copy, alter or destroy information. The difficulty of ensuring adequate security was highlighted when, in 1991, a Victorian hacker somehow gained access to the American National Aeronautics and Space Administration's computer system, with the result that N.A.S.A. was cut off from the rest of the world for twenty-four hours (and was severely embarrassed by its lack of security).³

In *Data Protection in Australia*, Gordon Hughes has undertaken a comprehensive examination of the nature and scope of the policies and law that either exist or are being developed to respond to these problems. Data protection cuts across many of the traditional divisions of law, bringing together elements of criminal law, tort, contract, equity, constitutional law, international law and conflict of law. It is a subject set in a rapidly changing legal landscape in which the policy debates are not yet over and the legal responses are not yet complete. This book is divided into nine chapters and three appendices. Hughes begins by clearly explaining what data protection is all about. He sets out the major areas of concern surrounding the collection, computerisation, manipulation and use of personal information in public and private sector records. Having identified these, Hughes methodically examines the extent to which the law protects personal data which is stored in computerized and other databanks. This would not be such a difficult task if national comprehensive data protection legislation and regulations had been introduced in Australia (as in some other jurisdictions) but they have not. Instead we have certain common law and equitable remedies which might be available and some less than comprehensive federal and state legislation, the provisions of which are contained not in one or two statutes but in many. It all forms an intricate legal structure and, superficially at least, the underlying order and the governing principles are not clear. Hughes's achievement is that he brings order and insight to this complex subject matter. He adopts a clear and logical framework and follows it steadfastly. This allows him to raise and examine important side issues as well as the main themes without any risk of losing the reader or distorting the main flow of thought.

One of Hughes's main contentions is that our current law of data protection is inadequate. In order to justify this view, he examines the various legal bases from which it might be possible to derive such protection. Some of these possibilities are very remote indeed, such as the notion that the use of a computerized database without authority amounts to the theft or unlawful use of electricity. Another example of a relatively remote possibility is that a tort of violation of privacy might be developed in the future by

³ *Age* (Melbourne), 13 August 1991; *Age* (Melbourne), 15 August 1991. A twenty year old student was committed to stand trial in the County Court in September 1992.

our courts, thus providing relief in cases of unauthorized use of, or access to, personal information. Hughes does not dismiss such ideas out of hand: he examines their legal basis, presents and evaluates the arguments, identifies the difficulties and draws conclusions. The result is that these less realistic possibilities are pinned down and exposed for what they are; while the more promising avenues are also identified and illuminated. Most important, as Hughes intends, the gaps in our law become clear and the need to further develop data protection is highlighted.

Chapters 2, 3 and 4 of the book are concerned mainly with privacy. After examining the concept of privacy at common law, Hughes outlines Commonwealth and State privacy reform initiatives. He reviews overseas initiatives, the constitutional considerations and international obligations that govern Australia's response, and then details the progress of the Commonwealth Privacy Bills and the emergence of the Commonwealth Privacy Act in 1988, The Privacy Amendment Act 1990 (Cth) and the Data-matching Program (Assistance and Tax) Act 1990 (Cth). Thereafter, Hughes traces privacy reform at State level — the various reports, legislative initiatives, and voluntary guidelines. The treatment is comprehensive and at the end of each chapter the writer sets out his conclusions in a clear and unequivocal manner. One such conclusion is that both Commonwealth and State legislation fail to provide complete protection of privacy interests.

In Chapter 5, Hughes turns to freedom of information laws, particularly from the point of view of the right of an individual to have access to personal information about him or herself which is stored in a database, and to have the information amended if it is not accurate.

Chapters 6 and 7 explore the action for breach of confidence as a possible means of further protecting privacy interests. The chapter also deals with other possible miscellaneous causes of action, such as breach of contract, breach of a fiduciary obligation, negligence, breach of a statutory duty, trespass, conversion, nuisance, deceit, *etc.* In Chapter 8, Hughes deals with criminal sanctions for computer abuse. Hughes identifies the weaknesses of traditional crimes such as theft, fraud and forgery when faced with the special circumstances of computer abuse, particularly, such questions as whether a computerized record is a document, or whether a computer system can be deceived by a fraudulent misrepresentation. He then reviews the legislative amendments that have been introduced by the States and Commonwealth. The final chapter of the book deals with conflict of laws and jurisdictional questions.

Because many of the primary sources on which Hughes draws are not easily available, he has included a selection of official reports and other documents in three appendices. These are very useful. Included are the 1983 Australian Law Reform Commission Report on Privacy, the 1988 Senate Standing Committee Tax File Number Report, the Morrison report, the Mann Report, the O.E.C.D. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, the 1984 United Kingdom Data Protection Principles, the various Commonwealth Privacy Bills, and other

documents; in all there are 166 pages of reproduced source documents.

Another element of Hughes book is noteworthy: although the title rather implies that the work is solely concerned with Australian law, this is not the case. Hughes draws on the experience of other jurisdictions, detailing their approaches and experiences, comparing their success or failure, highlighting differences and similarities. For example, in his chapter on privacy reform and the Australian Privacy Act, the author describes and analyses relevant developments in the United Kingdom, Western Europe, Canada, The United States of America and New Zealand. International comparisons occur elsewhere, for example in the chapter on criminal sanctions for computer abuse, where English and Canadian cases are analysed.

Hughes's writing is formal and relatively dry, perhaps because the book is based on his doctoral thesis. While this style may not appeal to some readers, the pay-off is clarity and order. This may not be a book to read from cover to cover on a rainy weekend, but it is a valuable resource for anybody who wishes to acquaint themselves with this important area of law, and is a worthwhile addition to any lawyer's library.

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