Modernisation of Council of Europe data privacy Convention 108: A non-European perspective on protecting global interests in privacy

Submission to the Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data [ETS No. 108] concerning 'Modernisation of Convention 108 – New Proposals' (T-PD-BUR(2012)01Rev_en, Strasbourg, 5 March 2012)

Submission by the Australian Privacy Foundation International Committee[1]

27 March 2012

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Introduction

We support the objectives of the review, and particularly the objective to 'reaffirm the Convention's potential as a universal standard and its open character.'

The advantages of the 'globalisation' of Convention 108 (developing it into a global data privacy agreement, open to all contries providing an appropriate level of data protection) to countries outside Europe are significant, but only if an appropriately high level of privacy protection is required for non-European accessions. This perspective is argued in detail in Greenleaf (2012), and this submission adopts the views taken in that article as background.

This Submission endorses the proposals set out in 'Modernisation of Convention 108 – New Proposals' (T-PD, March 2012) except insofar as they are discussed and criticised in the following submissions. We have also given specific endorsement below to proposed positive changes that are of particular importance. The submission follows the order of the Convention text.

[1] This Submission was prepared by Graham Greenleaf & Nigel Waters and is submitted on behalf of the Australian Privacy Foundation's International Committee. The other members of the Committee are Chris Connolly (Committee Chair), Roger Clarke (APF Chair), Dan Svantesson, and David Vaile. They have provided input into this Submission. The Australian Privacy Foundation <http://www.privacy.org.au> is the primary association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions since 1987.

Article 1 – Object and purpose

Whether focus is placed on 'territory' or 'jurisdiction' there will be complex issues of delineation. The term 'jurisdiction' is, however, preferable in light of the nature of modern communication technologies, and we support its use.

Article 2 – Definitions - "Personal data"

The proposed Explanatory Report note should be amended by the addition of words such as "Reasonableness of time and effort required for identification must be considered relative to the privacy interests which may be adversely affected if in fact identification does take place, and to the commercial or other factors which may encourage attempts at identification."

Article 3 – Scope

The proposed change "to fully apply the Convention whenever personal data is accessible to persons outside the personal or domestic sphere" is supported strongly.

The deletion of rights of derogation is also supported strongly.

Article 4 – Duties of the Parties

(1) The words "on the basis that the State has taken the necessary measures in its domestic law to give effect to the basic principles for data protection" are the key to whole Convention, at least insofar as accession by non-European States is concerned. It is essential that the Explanatory Statement should clarify that the 'necessary measure' taken do in fact (in practice) 'give effect' to the basic principles, and not merely as a matter of passage of legislation. In the context of EU 'adequacy' determinations, terminology such as 'a good level of compliance', 'provision of appropriate redress' and 'provision of support and help' are used to indicate the substantive effect that is required.

(2) The comment by the Consultative Committee that "Whether all …necessary measures… have been taken will be scrutinised a priori by the Consultative Committee, in order to ensure that the conditions for the free flow of data are met" needs to be incorprorated into, and elaborated on, in the Explanatory Report to the revised Convention, to ensure that all parties acceding to the Convention (particularly non-European parties) are aware that accession is not merely a matter of formal legislative enactment.

Article 5 – Legitimacy of data processing and quality of data

We support strongly the requirement of proportionality in processing in propsoed Article 5(1).

We support strongly the wording used to describe the consent requirement in 2(a) ('the data subject has freely given his/her specific and informed consent').

Article 10 – Sanctions and remedies

Why is no change proposed here? The requirement of the 2001 Additional Protocol (ETS 181) that individuals have a right of appeal to the Courts is not being incorporated into the revised Convention. This is a backward step. The words "(include a right of appeal to a Court)" should be inserted after "domestic law".

Article 12 – Transborder data flows

The proposed Article is supported, and the 'Alternative proposal' is very strongly opposed. In our view, adoption of the 'Alternative proposal' creates the possibility that Civil Society organisations will oppose the Convention becoming a global data privacy Convention, instead of supporting this. Comments on both versions follow.

(1) The proposed revision (supported, subject to necessary clarifications): The proviso to 3(b) is not sufficiently clear. Strong support is given to the condition of prior disclosure of 'accountability' measures to the competent supervisory authority, so that it can test (and accept or reject) them. This is essential to stopping 'adequacy' becoming the private assessment of the party with something to gain from making it. In 4(c), 'consent' should be replaced with 'explicit consent' so as to exclude the possibility of implied consent being allowed. Preferably, the same wording should be used as in proposed Article 5 2(a) ('the data subject has freely given his/her specific and informed consent'), or a general definition of 'consent' in these terms should be included in the Convention.

(2) The alternative proposal (opposed, irrespective of modifications): The proviso to 2 is inadequate because it does not require that protections be implemented by law, leaving 'adequacy' to be some vague notion of being observed in practice. 'Rights and obligations' are created by law, not practice, and it is doublespeak to pretend otherwise. Sub-clause 3 is fraudulent, because it is based on a (hypothetical) request from a supervisory authority that has no means of knowing that the transfer has ever happened, and therefore no reason to ever request a demonstration of 'accountability'. This is the bogus version of accountability at its most blatant. Here, the transferor has only 'adduced adequate safeguards' to its own satisfaction (and its own benefit), safe in the knowledge that its judgement will never be likely to be put to the test (or in the unlikely worst case, only after the damage is done). This alternative should be rejected completely.

The application of Article 12 also would benefit from further clarification of the meaning of the phrase 'a recipient who is not subject to its jurisdiction'. The data protection schemes of several countries cater for extraterritorial application (see e.g. the recent EU proposal, the Australian legislation, and the recent proposal for a privacy regulation in Singapore). In other words, such regulatory schemes claim jurisdiction over foreign organisations in certain circumstances. There may then be a risk that it could be argued that the communication, or making accessible, of data to such organisations does not fall within the regulation of Article 12 as the recipient accessing the data is in fact subject to the jurisdiction of the country from which the data is accessed. This would be undesirable, because the effective reach of extra-territorial laws may fall short of the effectiveness of its territorial application.

Article 18 – Composition of the committee

This change is supported strongly. It is important that Civil Society and Business observers be able to be invited. The change should say "voting", not "entitled to vote", given the difficulty that the Consultative Committee seems to have in getting responses from members, if the Uruguay accession is any indication. To do otherwise would be a *de facto* veto of non-State observers.

Article 19 – Functions of the committee

(1) In proposed item (d) the deletion of "at the request of a party" is supported strongly. The Committee should be able to issue opinions of its own motion.

(2) Proposed item (e) is supported strongly, and (as already stated in relation to Article 4), the basis on which the Committee draws up such opinions needs to be clarified in Article 4 and in the Explanatory Statement. It should state that any such opinion shall be made public.

(3) Item (f) should state that (i) such evaluation is for the purposes of Article 12, and (ii) any such evaluation shall be made public.

(4) Item (g) needs clarification: How can the Committee assess whether the standards set out in Article 12 offer sufficient guarantees, when they are deemed to do so? Presumably what is meant here is the preparation of a report (pursuant to Article 12(2)) on whether a particular country's standards offer such guarantees, whether the report is requested by the country concerned, or by another country.

Article 23 – Accession by non-member States or international organisations

(1) Following the words "accede to this Convention", the words "on the basis that the State has taken the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this Convention" should be inserted. If such words are not inserted, then (in theory) the Committee of Ministers could invite any State, no matter what its level of data protection, to accede. Furthermore, without such a clear statement of the basis of accession, there is no clear standard against which the Consultative Committee must prepare its report, and the criteria for accession by non-member States could be weaker than for member States..

(2) The Explanatory Statement should set out in detail what factors the Consultative Committee is likely to take into account in preparing its opinion, and in particular that that it is an opinion not only on formal legal measures but also includes an assessment of the extent to which data protection is delivered in practice in order to 'give effect' to the 'basic principles'.

(3) In particular, it should be made clear that an opinion of the Consultative Committee is not made on the same basis as the EU's WP29 opinions on 'adequacy'. The basis of an Article 23 opinion must be the provision of data protection to the citizens of the acceding country, not the adequacy of protection to European citizens.