AUSTRALIAN COMPUTER SOCIETY

LUNCHEON, MELBOURNE, 12 NOVEMBER 1976

COMPUTERS AND LAW REFORM

Hon Justice M D Kirby

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission

Abstract

Mr. Justice Kirby addressed a luncheon of the Victorian Branch of the A.C.S.
in Melbourne on 12 November 1976. He spoke of the approach by his Commission
to the Reference received to propose laws to protect privacy in Australia.
He outlined some of the special problems for privacy posed by the development
of computers. He suggested solutions and asked for the assistance of
members of the A.C.S. with proposals and ideas. This paper is a summary
of the judge's talk.

> Q. How would you sum up the campaign? What have been the
> important themes?
>
> A. [They are] ... additional openness in government. Strip
> away secrecy. Have a greater respect for personal privacy.
> Mr. J. Carter, President-Elect of the U.S.
> November, 1976.

Why The Law Reform Commission?

President Carter's statement demonstrates the universal concern of Western
democracies to preserve some aspects of the basic nature of our societies
and to protect the provision of individuals in them against the inroads of
big business, big government, science and technology. The Law Reform
Commission was established by the Commonwealth in 1975. It is located in
Sydney. It numbers 11 Commissioners and 19 staff. Its statutory function
is to reform, modernize and simplify the law in matters referred to it by
the Commonwealth Attorney-General.

It works on a varied programme. For example, its first reports have related
Complaints Against the Police, Criminal Investigation and *Alcohol, Drugs and*
Other current projects before the Commission range from the reform of defamat:
laws to the provision of new laws for organ and tissue transplants.

The Reference on Privacy is only one of the tasks committed to the Commission
But it is its most important task.

Why give this important job to the L.R.C? Why not prepare laws to protect
privacy through the normal channels, the Department of State? .

The answer to this is found in the way the L.R.C. goes about its work. No brains trust, working away in isolation. It seeks the assistance of experts, of interdisciplinary ideas and the views of the community. Public opinion is sought through the media, through Working Papers and through Public Sittings held by the Commission in all parts of the country. Law reform is an attribute of open Government. Defining the borders of privacy and specifying the remedies that the law should provide ought not to be tasks performed in secret. They require public input. They require laws that will reflect the values held by our society. It will not be good enough to import overseas submissions. We must promote indigenous answers to this problem.

The Privacy Reference

During the 1975 election, the Prime Minister, Mr. Fraser, undertook that if the Coalition Parties were returned, the L.R.C. would be asked to report upon laws relating to the protection of individual privacy in Australia. Subsequently a commitment was given that, after consideration of the A.L.R.C reports, appropriate legislation would be introduced. We are therefore not engaged in a scholarly exercise. We are in the business of recommending laws to the Parliament for adoption throughout the country.

On 9 April 1976, the Federal Attorney-General, Mr Ellicott Q.C., signed the Privacy Reference. It is in the most comprehensive terms. It calls upon the Commission to do a number of things:

* To review Commonwealth laws and test them against proper standards of privacy observance.
* To specifically review the laws relating to Medibank, Social Security, the Census and police powers of entry and search.
* To suggest what laws are necessary to provide proper protection and redress.
* To propose a comprehensive privacy code for the Federal Territories, in which the Commonwealth has plenary power.

The task of the L.R.C. is to review, modernize and simplify Commonwealth laws. But it does so in the forum of the Australian community. It seek participation of its work. That is why public encounters such as the A.C.S. Luncheon are welcomed.

Computers and Law

Lawyers are often slow to adapt to change, including technological change. I do not have to tell this audience about the mushrooming

growth of computers and computer technology, including in Australia.
Especially because of the methods of the common law which we have
inherited in Australia, computers provide ready solutions to many
problems of the lawyer. As in other businesses, they will be useful
in office management. More than this, computer systems lend themselves
readily to the retrieval of legal data which would otherwise be hidden
in obscure or inaccesible law books. Because of the expansion of
statutory law this century, there is a great deal of legal regulation,
binding the citizen, of which neither he nor his lawyer may be aware.
But ignorance of the law is not an excuse in law. Accordingly, methods
that promote the ready retrieval of legal rule give the citizen access
to the legal system.

Efficiency is also promised by computer technology. Is there any doubt
that land conveyancing and mortgage interests in real property and
goods will be facilitated by computer techniques? With proper safe-
guards, the unequal battle against crime can be fairly supplemented
by computerized criminal data. Freedom of information, the other
force referred to by President Carter is very much alive in Australia
too. But it will probably only be feasible in the long run, which the
aid of computers. Let there be no doubt, computers promise many
opportunities for the law and the lawyers.

Some of those opportunities arise from problems created when
technology overtakes current law. I instance only a few examples.
The   . laws of evidence will generally exclude secondary material
and require proof of matters by the use of primary material. For this
reason, computerized data presents difficulties for the laws of evidence.
Statutes must be drawn to overcome these difficulties. In New South Wales
and the Capital Territory such statutes are now in force.

The problems of computer assisted <u>larceny</u> are just being realised in
the United States. (See now *A.C.S. Bulletin*, December 1976,p.4).

Intellectual property: <u>patents, copyright</u> and <u>trade secrets</u>, throw up
difficulties when the computer dimension is added. Is a computer
programme susceptible to copyright? Is it a "literary" work? These
and many like problems are now appearing at last in the law journals
of this country and overseas.

My concern at the moment is with privacy and the problems for the
preservation of proper bounds of privacy in the computer age.

Poblems for Privacy: All Data

What is privacy? In the United States it was said that it is the
"right to be left alone". But that will not do today. No man has

a right to be "let alone" entirely by the modern organized community.
He must provide tax and census information. He must live in relationship
with his neighbour.

Professor Westin says that the difficulty of coming to grips with privacy
arises from its multi-facetted nature. He identifies at least four
strains. The desire for *anonymity*. The desire, on occasions, for
solitude. The desire for *intimacy* with family and friends; and the
human attribute of *reserve*.

Ardrey in his challenging book *The Territorial Imperative* traces the
phenomenon back to our animal nature: our desire to mark off territory,
literally and figuratively, which is "our own".

But whatever the essential meaning of privacy, it is inevitable that
the gathering processing and supply of information about people will
be in tension with privacy. Some problems are common to all data
systems:

> *   Input: the supply of inaccurate, irrelevant or incomplete
>   information.
> *   Throughput: the combination of material and access to it
>   by unwarranted persons.
> *   Output: the supply of information to persons who ought
>   not to have it or for reasons other than those for which
>   it was supplied in the first place.

Problems for Privacy from Computers

The computer age adds new problems. Some of these were identified
by the report of the Working Party tabled in the United Kingdom in
December 1975:

> *   *Quantity:* the vast increase in the amount of
>   information gathered.
> *   *Speed:* the speed and facility with which the information
>   can be retrieved.
> *   *Transfer:* the capacity of computers to transfer information
>   supplied for one purpose to those seeking information
>   for another.
> *   *Combination:* the power of computers to combine multiple
>   information to present a "total" picture which is more
>   than its parts.
> *   *Centralization:* the perils of a centralization of information
>   and the potential control by a few of the mean and sources
>   of information.
> *   *Unintelligibility:* the fact that much of this information
>   is in a form that cannot be understood except by the "priestly
>   caste" of computer technologists.

If to these problems are added rapid advances of technology, the
diminution in costs and vast increase in number and kind of computers,
it can scarcely be denied that there is a potential problem for society.
It is the task of the law to state society's standards and to provide
redress where those standards are breached. That is why the present
Reference is before the L.R.C.

Solutions: Overseas

I have said that we will need indigenous mechanisms to provide protection
to privacy. In Europe scarcely a month goes by but legislation is
introduced to set up systems for controlling data banks. A committee
of experts has been established in the Council of Europe to deal with
the special problem of international transfers of data. It is likely
that in our federation in Australia, we will have similar trans-border
problems.

Following the Younger Committee Report in the United Kingdom, Working Parties
were established which recommended the creation of data protection
committees to draw laws to govern the use of computers. It was too late,
in the opinion of the U.K. Working Party, to leave this problem to
selfdiscipline on the part of the computing profession.

Obviously it is necessary to avoid cumbersome machinery. Equally
clear must be the capacity of the law to cope with the likely future
technological developments in computers. I suggest that control will
be needed at all stages in the processing of information: input, throughput
and output. But what should these controls be?

The Means of Control

It is plain that whatever the law says, the major component in proper
respect for privacy in the use of computers will continue to be self-
discipline on the part of those who design computer programmes and those
who implement them. The code of ethics of the Computer Society is a
start. But it has no force of legal sanction nor is the profession a
homogeneous one with a long history of selfdiscipline. Even in those
professions which have such characteristics, including the legal profession,
moves are now afoot to introduce independent elements to represent
community interests. I therefore agree with the United Kingdom reports.
Selfdiscipline on its own will be a puny shield against those who, with
determination, would abuse computers to intrude into personal privacy.

But what other means are available that would work? This is the subject
upon which I need the assistance of the profession. Various models
have been proposed:

> * *Ombudsmen:* the suggestion that there should be a special
>   Ombudsman to receive complaints on privacy and to investigate
>   and remedy them.

* *Watchdog Privacy Committees:* a Committee, such as the
  New South Wales Privacy Committee might provide a con-
  tinuing watchdog role.
* *Licensing and Supervision:* recent editorials in the
  United Kingdom suggest a system of licensing and
  "on the spot" checks against abuses by those who have
  control of computers.
* *Courts:* Fourthly, it is proposed that courts, traditional
  guardians of our liberties, should be brought into
  action to cope with this prime problem of the 20th Century.
* *Combined Forces:* some say that a combination of the above
  two will be needed if the law is ever to come to grips
  with the potential problem inherent in the explosion of
  information.

Conclusion

Information is power. It is traditonal in our society to control
power. It is hardly likely that this principle will now be abandoned.
Uncomfortable as may be the thought, computer personnel must face the
likelihood of legal controls. These ought to be flexible and not
cumbersome. There must be no Luddite approach here. It is for that
reason that the Law Reform Commission seeks the assistance of the
computing community. Help is needed to identify the problems. Help
is needed to understand the technical implications. Help is needed
to suggest legal controls that would at once state the standards of
our society, preserve its values and work.

Editor's Note

Readers wishing to make submissions or provide information should write
to the Australian Law Reform Commission, Box 3708, G.P.O., SYDNEY 2000.