

EIGHTH AUSTRALIAN COMPUTER CONFERENCE

CANBERRA, 30 AUGUST, 1978 - 11.00 A.M.

COMPUTERS - WHAT ON EARTH ARE WE DOING?

PRIVACY PROTECTION - NATIONAL AND INTERNATIONAL

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

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THE COMPUTER AGE

We are going through a period of great ferment in our society, and therefore in our laws. The speed and sophistication of the modern world create novel and complex situations for which the ground rules laid down by previous generations are irrelevant or silent. The invention of the internal combustion engine created similar human and sociological situations. A great body of new law had to be hurriedly invented. Much of it was ill-considered and remains so to this day. That we continue to deal with the victims of motor car accidents using the legal remedies invented for the ploughman's dray in village England is a scandal. Let that be a warning to society on the brink of the computer age. The adaptation and modification of old laws is all that can be done if lawmakers fail to address themselves consciously to the needs of law reform which technological change and social change bring in their train.

During the lifetime of most of us astonishing transitions have taken place. In the hands of the computerists

more are on the way -

"Just think: from horse to jet; from steam to nuclear fission; from rifle to hydrogen bomb; from magic lantern to T.V.; from workhouse to welfare state; from a proud and mighty Empire to a junior member of the European Economic Community; from thrift to hire-purchase; from the dress allowance to the lady High Court judge; from original sin to the Id; from the unmentionable topic to State support for family planning; from the 'The love that dares not speak its name' to 'Gay Lib' ... and from 'Little Women' to 'Lolita'."

Lord Edmund-Davies *Ferment in the Law*. Presidential Address to the Holdsworth Club, 1977, 1.

Things are happening to address the needs produced by the exponential developments of computing technology. My short purpose is to outline what is happening in a small but vital sphere. It relates to what we have been pleased in English to call the "protection of privacy". In Europe the same endeavour is described as the "protection of individual liberties in computerized information." There are, of course, other things to be done. The law must take account of computer crime and computer fraud. It must adjust the technical rules against hearsay evidence to permit the tender at a trial of computer data. The law of intellectual property (patents and copyright) must be changed to accommodate the ephemeral but original computer programme. The impact of computing on industrial relations has only begun to be felt. All of these are important. They require the attention of government and of law reformers. But none is more important than the effect of computing science upon individual rights.

THERE IS A PROBLEM

I will not recapitulate the reasons why computing creates a power vacuum, which the law normally seeks to fill. In the Rockefeller Report *National Information Policy*, the following key characteristics of the "new information environment created by information technology" were identified, briefly, as follows -

- * A massive increase in the volume of information flow. Critical observers expect a four-fold to seven-fold increase between now and 1985.
- * A shrinkage of time and distance constraints upon communications. Satellite communications provide long-distance capabilities to use computers and other information technology throughout the world.
- * Greater nationwide dependence upon information and communication services. There are already nearly one million computer terminals in the United States.
- * An increase in the inter-dependence of previously autonomous institutions and services.
- * Conceptual changes in economic, social and political processes induced by increased information and communications. A prime example is the impact of the "cashless" society as a result of electronic funds transfer.
- * The decrease in the "time cushion" between social and technical changes and their impact and consequences. There is no longer time to anticipate the impact of information technology before they become part of our everyday lives, e.g. the pocket calculator and the citizen-band radio.
- * Global shrinkage and its consequent pressure on increased international information exchange and mutual dependency.

Add to these considerations the rapid decline in computing costs, the development of a whole new profession in fifteen years or so

and the mystery that all this is to the average man, even the educated man, and you have a problem.

The problem is recognized by computerists themselves. A survey circulated in the Bulletin of the Victorian Branch of the Australian Computer Society was not scientifically sampled and due allowance must be made for error in the results. The fact remains that 97% of respondents, all members of the Society, concluded that "some form of statutory legislation should be developed to catch the multiple invasions of privacy that can occur".

Other interesting results were:

- q. Should there be arrangements whereby the subject could be told about the information held concerning him?
- | | | |
|------------|-----|-----|
| Yes | ... | 88% |
| Partly Yes | ... | 11% |
| No | ... | 1% |
- q. What role is there for self-regulation of the computing industry?
- | | | |
|---|-----|-----|
| Full | ... | 17% |
| Partial | ... | 50% |
| None, i.e. regulatory authorities totally independent of industry | ... | 33% |
- q. Does the computer dimension add a special, new, discrete problem which calls for new statutory initiatives?
- | | | |
|-----|-----|-----|
| Yes | ... | 77% |
| No | ... | 23% |

These results are reflected in a similar poll of N.S.W. computerists. It is my hope that the Society will conduct a properly sampled survey, on a national basis and in consultation with the Law

Reform Commission to guide us towards appropriate legislation.

WHAT IS BEING DONE NATIONALLY?

Only one State of Australia has legislation to protect privacy as such. This is the N.S.W. Privacy Committee which has a watchdog role and does a great deal of good work by persuasion and conciliation. It has no power to issue injunctions, award compensation or impose fines.

In almost every other jurisdiction of the country expert bodies are now looking at the development of privacy protection legislation to deal especially with computerized data on all of us:

- * Federal: at a Commonwealth level, and for the Territories the Australian Law Reform Commission has a comprehensive Reference to develop privacy protection laws. These cannot be proposed for the whole nation, right across the board. The Constitution does not assign privacy protection, as such, to the Commonwealth. But in the Government's sphere and in major areas such as telecommunications, the Federal Government has substantial powers which it will use to ensure proper privacy protection.
- * Victoria: the Statute Law Revision Committee is examining privacy protection in Victoria.
- * South Australia: a special Committee established in July in the Premier's Office, has a brief to develop privacy protection laws.
- * Western Australia: the Western Australian Law Reform Commission has a Reference which exactly parallels that of the Australian Commission and the two bodies are working in close co-operation with each other.
- * Tasmania: a Parliamentary Committee in Tasmania is re-examining the Bill, introduced some years ago, to create a general statutory "right of privacy".
- * Queensland: the Queensland Minister for Justice announce that the Queensland Law Reform Commission would be looking at privacy protection.

There is some co-operation between these various bodies. A Conference was recently organized in Canberra to bring officers of government and representatives of the computer industry together to test some of the principles of privacy protection that are now under consideration. A further Conference is to be held in October. Of this you can be sure: the development of legislative regulations in this country is proceeding in close consultation with those to be regulated. The aim is to provide a law which is effective and will work. The *rationale* of the exercise is to ensure that the potential of computers to collect and deliver information on all of us, cradle to the grave, is kept under adequate social control. The information supplied should be accurate, timely, fair and generally accessible to the data subject.

If one looks at the proliferating laws of Europe and North America, designed to protect "privacy" or "individual rights" a common theme emerges. The machinery differs from jurisdiction to jurisdiction. In some, the courts are relied upon. In others, a data inspection board is created with licensing, and inspectorate and other paraphernalia of administrative control. But, though the machinery differs, the recurring principles are remarkably similar. They include -

- * There should be no personal data record systems, the very existence of which is secret.
- * An individual about whom information is maintained in an identifiable form should generally have a right to see and copy that information.
- * He should have a right to correct or amend the substance of that information where it is false or unfair.
- * There should be limits on the collection of certain types of information.
- * There should be limits on the internal uses of information about an individual.

- * There should be limits on the external disclosure of that information.
- * There should be responsibility and accountability for data collection and security.

The "universal facility" which has been developed to ensure against misuse of information and to guarantee its fairness and accuracy is the provision of a right of individual access to information about oneself. Not only is this a feature of Swedish, West German and recent French legislation. It is the ingredient that works the United States *Privacy Act*.

We in Australia are seeing the same movement towards access to information. At a Commonwealth level important measures have been passed in the government sector. They are ill-perceived in the general community but they will radically alter relationships between citizen and government before this century is out. They relate to the control over information and I briefly sketch them -

- * The Commonwealth Ombudsman gives the citizen, indirectly, access to administrative information affecting him.
- * The Administrative Appeals Tribunal gives affected citizens direct rights of access to reasons for government decisions and documents and facts upon which those decisions have been made.
- * A little known statute, the *Administrative Decisions (Judicial Review) Act*, 1977 passed through the Parliament but not yet proclaimed, will give every person affected by a discretionary decision reposed in a Commonwealth Public Servant under a law of the Commonwealth the right to require a statement of reasons for his decision, a list of the findings of fact upon which the decision was made and reference to the evidence and material upon which the decision was based.

- * The Freedom of Information Bill, 1978 provides, subject to exemptions, all persons, not just those affected adversely with a right of access to government information. Henceforth, *prima facie*, information is to be supplied and not to be secret to the bureaucracy.

These laws of the Commonwealth lead the way into the new information society. They may not be perfect. They have their critics. But who can doubt that they take the necessary first step towards diffusing control over information. The Rockefeller Report to the President of the United States called for a national information policy in that country. Each and every word of Vice-President Rockefeller's Report applies equally to this country. We are taking important, halting steps towards spreading control over information. Forthcoming privacy legislation, enshrining the principle of individual access to his own information, will be simply another step. Who can doubt that someone, somewhere should be co-ordinating and planning our laws and policies as they respond to the implications of the Information Age?

WHAT IS HAPPENING INTERNATIONALLY?

At an international level, too, things are happening. In the Council of Europe, the Commission of the European Communities, various United Nations bodies and the Organization for Economic Co-operation and Development, experts are developing the international principle that should govern access to (and therefore control of) information. Australia has been a member of the O.E.C.D. since 1971. This year an Expert Group was established by the O.E.C.D and I was elected its Chairman. The Group has met twice in Europe and further meetings are planned. We have a mandate, by July 1979, to develop principles that will lay down -

- * The basic rules for the protection of privacy in each country's own legislation; and
- * The rules that should govern the flows of information between nations, to ensure that domestic

legislation is not frustrated by the technological feasibility of collecting information across the border.

The work of the O.E.C.D. parallels an attempt by the Council of Europe to develop an international convention, open to non-European countries, to tackle the issue of transborder flows of data. The advantage of the O.E.C.D. is that it includes a number of Anglophone and non-European countries such as United States, Canada, Australia, New Zealand and Japan. We have a great deal in common with the Anglophone countries and we have a legal tradition which is, possibly, less inclined to regulation and more sympathetic to the free flow of information than the Europeans are. The development of computing technology and satellite communication poses an international problem which only international law can deal with. The first steps are being taken here too. The computer which facilitates a radical increase in international information exchange makes the nations of the world much more interdependent. Some observers fear increasing vulnerability. Others rejoice in the interdependence which technology is forcing upon us.

CONCLUSIONS

The development of computing has come upon Australian society and its lawmakers so rapidly that it has taken a time to adjust to the realization of the need for change, including legal change. Things are happening, though still at a somewhat languid pace. The urgency of technological change is not yet reflected at the level of policy making and law reform. The "time cushion" for adjustment to new technology grows shorter. We must find new ways of coping with the social questions which computers pose for Australian society. This is not, of course, a purely local problem, confined to us. It is as universal as computing technology. Our constitutional division of powers presents special difficulties for Australian lawmakers. But we can and will be assisted by overseas legal developments, and

by international efforts to harness and utilize computers. Properly disciplined by law, they are not a threat to our liberties. On the contrary they will become an instrument to ensure to our citizens greater access to information than ever before. Information, access to it and control over it, will be the vital source of political and economic power in the next century. Realization of this fact will be the beginning of wisdom.