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DEPARTMENT OF SCIENCE AND TECHNOLOGY, TELECOM AUSTRALIA AND THE AUSTRALIAN COMPUTER SOCIETY

INFORMATION TECHNOLOGY WEEK 1982

SOUTH AUSTRALIAN PROGRAM, ADELAIDE, 16 AUGUST 1982, 2 P.M.

PEOPLE AND TECHNOLOGY - THE LEGAL IMPACT

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

August 1982

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THE A.L.R.C. AND INFORMATION TECHNOLOGY

Some people have a stereotype vision of the law: seeing it as a beautiful galleon moving majestically and slowly and with a certain grace, totally impervious to the enormous technological and social changes that are taking place in our time. This picture is only partly true. Law reform bodies, Federal and State, have been created to help our Parliament to reform, modernise and simplify the law. One of the chief forces for change in our time is science and technology. It promotes the urgent need to review our laws and to bring them up-to-date: adjusting old rules to new circumstances and developing new rules to meet problems that were never previously dreamed of.

Almost every task given to the Australian Law Reform Commission involves the interface between science, technology and the law. A number of our projects are specifically relevant to the new information technology. For example, our program on evidence law reform in Federal and Territory courts requires us to reconsider the rules of evidence which limit the reception of hearsay documentary or electronic material out of a preference for oral testimony of a direct witness who can be confronted and cross examined. As more and more information is reduced to documentary and electronic form, the English trial insistence upon direct oral testimony will have to be modified. In the process, it will be important that we do not lose the opportunity for people to test computer generated and telecommunications delivered information. Human error can occur, accidentally or deliberately. The courts must be able to test and expose in computer data such error where disputes arise.

Even more relevant is the Australian Law Reform Commission's enquiry into privacy protection laws. This is a project that was initiated by Attorney-General Ellicott. The Commission hopes to deliver its report on the subject early in 1983. The report will deal with the whole range of issues raised by an enquiry into privacy protection. Amongst matters dealt with are:

* rights of entry of government officials onto private property;
* direct marketing and so-called 'junk mail';
* interception of private telecommunications, including private telephone calls;
* electronic, sound, visual and other surveillance.

However, none of the aspects of our enquiry into privacy is so important for the future of our society as that part of it which has been concerned with the design of new laws to deal with the problems posed by the increasing computerisation of sensitive personal data. Of course, sensitive data can be kept in a little notebook or in a manilla folder at the bottom of the boss's desk. But the rapid penetration of our society by computers, linked by telecommunications (the so-called 'computications effect') presents a new danger to individual privacy which requires a legislative response.

This is not just some local concern of a few civil libertarians, lawyers or other do-gooders. This is the worldwide concern of countries with systems of government, economies and traditions of freedom similar to our own. That is why the Council of Europe and, more relevantly for Australia, the Organisation for Economic Co-operation and Development (O.E.C.D.) in Paris have been seeking to chart basic rules which will promote the development of harmonous local laws that will strike a fair balance between the desirability of maximising the advantages of the new information technology, whilst at the same time protecting basic individual rights, including privacy.

Between 1978 and 1980, I was chairman of a committee of the O.E.C.D. which developed 'basic rules' on privacy protection in the context of trans border data flows. These are the flows of data that have grown at a tremendous rate because of the technology which links computers, chattering away to each other in different parts of the country and different parts of the world, linked by telecommunications, whether terrestrial or by satellite.

The countries of the O.E.C.D. have recognised that in the capacity of the new information technology to collect, assemble and move great masses of information including personal information, there are enormous advantages; but also certain dangers. These dangers arise from the ever increasing quantity of personal information that can be stored indefinitely, the speed with which it can be retrieved by the inquisitive, the ever diminishing cost of using and collective more personal information, the

capacity of the technology to aggregate, separate and combine information to give composite pictures of the persons involved, the tendency of the technology to centralisation of control and the development of an entirely new 'profession' which has grown up in charge of this new technology so quickly that laws and practices to instil fair and proper conduct have not kept pace with the changes.

The forthcoming Australian Law Reform Commission report on privacy will propose laws and institutions to commence the long haul back to a system of social control of this new technology. I cannot disclose to you the precise details of the Commission's recommendations. Not only would it be wrong for me to do so in advance of the delivery of the report to the Attorney-General and Parliament. It would not yet be possible; because fine-tuning of the proposed Federal legislation has still to be completed. I am happy to say that we are working on the preparation of our report with the assistance of a very wide range of experts in different specialties and from different parts of Australia. They include people with appropriate expertise in computications. Mr. Ashley Goldsworthy is a consultant to the Commission appointed with the approval of the Federal Attorney-General.

I have now set the scene of my involvement in national and international enquiries concerning aspects of the new information technology. I now turn to examine a number of the questions that were assigned for my talk. Of necessity, I will have to deal with these in a brevity that is especially painful for a lawyer and a judge. Short speeches do not come naturally to people in my position.

IMPACT OF INFORMATION TECHNOLOGY ON THE LAW

The first question posed is 'How has information technology affected different facets of the law?'. I have already mentioned the two that most especially concern the Australian Law Reform Commission: modification of the laws of evidence in the courts and development of new laws for privacy protection. However, this simply scratches the surface of the variety of the impact which the technology has on our laws, its institutions and personnel. Most solicitors offices now have word processors which permit not only information retrieval and more efficient performance of routine tasks, but also monitoring of job performance and costing. It may be hoped that in this way the technology will save costs for the ordinary client in what is inevitably a rather cost-intensive profession. The costs of getting to justice remain the major problem for the administration of justice in Australia. The new information technology may help the fight back, in the solicitor's office and also in the better administration of the courts, the supply of statutory and case law and other information to judges, barristers and solicitors

and the monitoring of court performance in such matters as sentencing and damages awards, to ensure greater consistency in decision making.

One of the proposals in the Australian Law Reform Commission's second report on criminal investigation was the introduction of telephone warrants in urgent cases of police arrest, search and seizure. That proposal was accepted by the Commonwealth and is now contained in the Criminal Investigation Bill 1981 presently before Federal Parliament.[1] I have no doubt that before long tele-fascimile will provide an efficient means by which search warrants can be provided by telecommunications to police officers in the distant regions of our large country. In this way the useful independent scrutiny of urgent police conduct by the independent judicial officer will be maintained, as a protection to our civil liberties.

Another little known development is the growing use of so-called 'tele-conferencing'. The new Administrative Appeals Tribunal, a national body established by the Federal Parliament to hear Federal administrative appeals is increasingly using the telephone for preliminary conferences and even some hearings, where witnesses would otherwise have to travel great distances, the costs of which would not be warranted by the issues involved. Quite a number of social security appeals are being dealt with over the telephone and this is surely the way of the future. The great costs of waiting around court, assembling witnesses, travelling to and from courts and having sufficient staff to pursue library and other requests can all be reduced, if our legal system moves, as the United States already has, in the direction of greater use of telecommunications for at least some of the business of the courts. In the United States, a growing number of interlocutory and chamber applications is now dealt with by telecommunications. It is not at all fantastic to anticipate the day when, to save the costs of litigation and to ensure that more people actually can get to an umpire, proceedings will take place between lawyers, clients and witnesses in different venues linked by telecommunications and possibly video means to the judge or magistrate deciding the matter.

So far as the legal profession is concerned, there is good and bad news. The good news I have already mentioned, the potential of information technology to reduce costs and the performance of routine work and to increase the accessibility of decision makers to more ordinary people. But there is also bad news, at least in the short run. I have no doubt that much land conveyancing will fall victim to the computerisation of legal title and land use data. As this represents 50% of the fee income of the legal profession of Australia, the impact of informatics on the legal profession will be disruptive in the short term. The profession must think positively about this. The potential of the new information

technology to increase the lawyer's ability to serve in the resolution of a wider range of disputes should more than compensate for the short term disruption caused by diminished lawyerly involvement in the increasingly automated land title transfer system.

There are many other matters that I could deal with here. The impact of computers on crime, both in the definition of crime and in the growing amount of computer fraud, the impact of information technology on the vulnerability of society, the impact of national language and culture, on intellectual property law (copyrights, patents and trade marks) the impact on the law of contract where more and more contracts will be effected by instantaneous telecommunications. Enough has been said to show that the new information technology will permeate the courts as it penetrates other sectors of society. Within 10, or at the most 20, years most judges will be sitting on the Bench with a video display unit. Law courses will include specific training in the efficient interrogation of legal data bases, the assembly of which have already begun in Australia.

LEGISLATION KEEPING UP

My second question is whether legislation has kept up with the new technology. The answer to this question can be offered without hestitation. The new technology has far outstripped the capacity and speed of our legislators. Many of the problems for law and lawmaking which I have just mentioned remain neglected and unattended. Certainly, there is no overall body looking at the many facets of the diamond. There is no central law development body proposing the comprehensive review of our laws that will be necessary to cope with the multiple ripple effect of the new information technology. Instead, we proceed on an ad hoc, case-by-case approach. The Law Reform Commission looks at privacy and evidence law. A departmental enquiry examines some aspects of intellectual property law. The Australian Science and Technology Council explores robotics. The police are looking at computer crime. The Australian Broadcasting Tribunal is examining aspects of cable television. But no institution (unless it be Cabinet or the Parliament) is established to scrutinise the mosaic of laws and to help our legislators keep pace with the variety and pace of change.

Even if one were to take the special problem of laws on privacy protection, it will be seen that things tend to move slowly. Long after the special problems of computerised personal data systems first emerged, the first legislation to deal with the problem began to be enacted in Western Europe. Sweden was the first country and it has now been followed by legislation in most of the countries of Western Europe. These countries have established data protection authorities with comprehensive powers of scrutiny and licensing to uphold fair standards of data protection and data security.

In the United States, a general Privacy Act has been passed by the Congress. However, it applies only to data banks in the Federal public sector. It has no direct application to the private sector. In Canada the Royal Assent was given as recently as 7 July 1982 to a Privacy Act. However this Act, which is accompanied by the Canadian Assess to Information Act 1982 is likewise restricted to the Federal public sector. It establishes a Privacy Commissioner. Amongst the duties of the Commissioner is the conduct of special studies concerning the extension of the rights conferred under the Act to private sector agencies susceptible to Federal regulation.[2] In Britain it is 10 years since the Younger Committee on privacy reported on the need for new laws for privacy protection. It is 4 years since the Data Protection Committee under Sir Norman Lindop reported proposing specific laws in respect of data protection.[3] In April 1982 the United Kingdom Government delivered a white paper on data protection, setting the government's proposal for legislation. Two reasons were advanced. The first was that the rapid growth of computers and their ability to process and link, at high speed, information about individuals threatenomg privacy. The second was that, without legislation, firms in the United Kingdom might be at a trading disadvantage compared with those based in countries which have data protection legislation. The United Kingdom proposals suggest criminal and civil sanctions for breach of the proposed legislation and it is to apply to the private as well as to the public sector. However, rapid implementation of the legislation cannot be anticipated. According to one report it could be 1984 before the legislation was passed and 1987 before it begins to take effect.[4] Technology moves rapidly. Lawmaking has a much more stately pace.

In Australia the Federal Government is committed to the introduction of privacy legislation. In some ways the Federal Parliament has already taken its stand. The Freedom of Information Act 1982 which is to come into force on 1 December 1982 asserts the right of the individual to have access to personal information about himself to have means of correcting or updating it.[5] In all of the countries of Western Europe that I have mentioned, the recurring theme of privacy protection legislation has been the right of the individual normally to have access to personal information about himself and to have means of correcting, updating or annotating this information, where it is objected to.

CAN PARLIAMENT COPE?

The fourth question posed for me is whether our legislators are sufficiently capable and knowledgeable, adequately to form laws for the new information technology. The same question could be posed for other technologies of our time, including energy technology (involving the dilemmas of nuclear fission) and biological technology (involving

the complex and sensitive question of in vitro fertilization, human cloning, genetic engineering and so on). Can our parliamentary institution, which we have inherited from Britain, and which has been developed over more than 800 years, cope with the pressures of technological change today?

A scrutiny of the progress being made in the area of information technology requires the answer that, without assistance, Parliament cannot cope. Without institutional reform both of Parliament and of the bodies that assist and advise Parliament, our system of government will simply not be able to keep pace with the variety, technicality and controversy of the problems posed by technological change. All too often the progress to the statute book takes the path that I have just indicated in the United Kingdom. A report in 1972. A further report in 1978. A still further white paper in 1982. The prospect of legislation many years off. Meanwhile the technology continues to advance at a dazzling pace.

There are some people who, confronting this difficulty, throw up their hands and say we cannot hope to adapt our lawmaking institution to deal with this new technology. Certainly there are institutional difficulties. Parliamentary procedures call out for reform. Federation politicises society. All too often politics becomes the game of winning. Issues, even desperately important issues, if they are too sensitive or complicated, are left for another time. Mr. Barry Jones has offered a thoughtful critique of Parliament as an instrument for providing the voice of the ordinary man and woman in science and technology policy in his recent book Sleepers Wake!.[6]

It is my view that we should persist with efforts to help Parliament to scrutinise at least the most important and sensitive questions that are posed by technological advances. Otherwise we are making a positive decision to withdraw from control of the kind of society we will live in. Even if it is to sort out the legal consequences of technology and in no way to put impediments in its path, there is a constant need for law reform. I like to look on the Australian Law Reform Commission as one of the new instruments which has been developed to help Parliament to cope with the pressures of change - including technological change. Even if the ordinary men and women in Parliament are not themselves capable of understanding the technology in all its diversity and complexity, expert advisory bodies can pull together some of the best talent in the country and in this way aid the legislators. They must be seen as standing for the ordinary citizen and asserting the social conscience and moral principles of ordinary folk. I am not one to join the Australian chorus of denigration of politicans and the parliamentary institution. On the contrary, I believe that we should all be seeking to make our parliaments work better and more effectively. But parliaments themselves have a responsibility here, to translate the work of advisory committees into the law of the land and to so reform their own procedures as to ensure that reports and recommendations do

... languish in the pigeon-hole. In short, we must not abandon such a valuable instrument as parliament. Churchill said, it is only when we look at the alternatives that we remember its preferable qualities. Important scientific and technological changes must be considered for their social consequences. Ultimately there is no better place for that consideration to take place than in the body that contains representatives drawn from all parts of the country, from all walks of life, from all shades of opinion.

MAJOR CHANGES OR TRENDS: INTER-ACTIVE CABLE

Finally, I have been asked to say something about major changes or trends. Under this rubric I could orate about the way in which the new information technology will spur the development of international law. If a technology is international and instantaneous in its application, the pretentions of domestic law will frequently have to succumb to the necessities of an international market. On a small scale, the same thing can be said of the Australian Federation. One urgent task which will face our legislators is the extent to which, in a technology which is universal to the whole nation, we can afford the inefficiencies that will attend State by State regulation of computers.

Instead of painting with such a broad brush, I want to come back to the problem which has brought me into this field, the protection of personal privacy. I want to illustrate the need for new laws by reference to just one developing communications technology - inter-active (two-way) cable television. This kind of technology takes television beyond a medium of entertainment and diversion to a means of directly and indirectly collecting and supplying information, including personal information from an individual and families concerning their views, their purchasing practices and their financial transactions.[7] There are some commentators who suggest that within the next decade or so, it will be possible to develop interactive cable television in such a way as to permit effective opinion sampling by government, to enhance the democratic accountability of lawmakers to the people. But with the obvious advantages of interactive cable television come certain problems, including problems for individual privacy. This should not surprise us, for the introduction of first telegraph and then telephone in the 19th century posed new and previously unthought of problems for individual privacy when personal communication went beyond the face to face encounter and passed through several hands and distance, susceptible to interception and invasion of privacy. If, for example, cable TV services were developed to the point that opinions on political matters or transactions could be recorded, the monitoring of these, the marketing habits of the individual or family or simply the choice of program could provide personal data to build up a profile of users.

In the United States, a staple product of pay cable television in many American cities is the so-called R-rated movie. Operators of the cable television system, including the financial institutions debiting transactions, would be, technologically, in an excellent position to produce a detailed profile of the different characteristics of various viewers. If cable television programs in Australia followed a similar pattern to the United States, detailed accounts for the provision of interactive cable television services would make perfectly possible a fairly precise monitoring of aspects of behaviour within the family. For example, parents might discover some surprising insights into the viewing practices of adolescent children, whose privacy will thereby be at risk if this data were made available.

If a two-way cable television were to record personal information in a mechanised fashion, the data could be stored, reused and transmitted to third parties, including the government, law enforcement agencies, private investigators, lawyers, providers of market services and so on. Even if the information gathering activity is simply for the purpose of sending the monthly bill for the services rendered, access to this information, particularly in its accumulated form and especially if analysed with the aid of computer processes, could be an extremely valuable source of highly personal, intimate information about ordinary citizens. Cable providers will not wish to undermine their business by adopting practices which cause anxiety or alienation amongst customers. Furthermore, the notion of individual privacy is not frozen. We may come to a time when people simply do not care if the government, their neighbours or anyone else knows that are watching R-rated movies. The simple facts of the sale of video cassettes indicate that a market is already here, and well established in Australia. Times change.

I make no moral comment on any of this. I simply call attention to one implication of interactive cable television, which mirrors the similar problems in other developments of information technology: electronic fund transfers, the movement of data on travel, hotel bookings and the like, and indeed the movement of personal information generally.

What can we do about this? Clearly, the first step is to produce an awareness that there is a potential problem in yet another development of information technology. Recognition of problems is one thing. Provision of solutions is another. In the United States, where two-way interactive television is much more advanced than anywhere else, a number of control mechanisms are being developed:

* the first, is the inclusion of specifications for the protection of privacy in licences granted to organisations involved. No doubt this approach could be developed in Australia by the Australian Broadcasting Tribunal;

secondly, the leading company in the sector Warner Amex has developed its own privacy rules in the form of a code issued in October 1981 containing a 500 word statement for the voluntary regulation of information practices. Subscribers are informed about practices and it is recorded that no individualised information concerning viewing or responses is to be developed 'unless the subscriber has been advised in advance and given an adequate opportunity not to participate'. This does not exclude the collection and development of information in a statistical and non-identifiable form. Although no promise can be made not to deliver information in response to court process, the Code promises that Warner Amex 'will promptly notify the subscriber prior to responding, if permitted to do so by law'.

* A third approach is the development of legislation, criminal[9] and regulatory in order to impose a privacy code and to provide sanctions for its breach. Already in Illinois, a cable privacy statute has been enacted. Similar statutes are proposed for New York, Wisconson and Maryland.
* Fourthly, instead of proceeding to a sectorial solution for the particular privacy problems of cable television, some non-American commentators urge the development of a more general approach so that this aspect of information privacy can be included in the treatment of privacy protection generally. One advantage of general legislation may be its educative effect: the provision of a small list of general rules may be more readily understood than the enactment of multiple statutes to deal with the particular problems of banking, insurance, cable and other threats to information privacy.[10] It is this consideration that has led most of the countries of Western Europe to create general data protection agencies. The English speaking countries have so far preferred particular and specific legislation dealing with specially identified problems. The variety of the problems being identified and the Federal legislation may force Australia to opt for a mix of legislative solutions which include the provision of a general privacy watchdog whose efforts are supplemented both by specific legislation and industry voluntary codes of fair information practices.

CONCLUSION

I have now completed my assignment. I have told you something of the Law Reform Commission and its work relevant to technological change. I have sketched our privacy inquiry and have indicated some of the other effects of the new information technology on the law. I have pointed out that legislation has not been able to keep up with the technology and I have stressed the importance, for the future good health of our democracy, of assisting law makers to address the social implications of technology. I

have illustrated my observations with reference to yet another aspect of information technology still on the drawing boards of Australia: interactive cable television. Law makers and law reformers must prove themselves as nimble and innovative as information technologists. Though the law can never hope to develop so fast, it is important for us all as citizens that it should not give up the race.

FOOTNOTES

1. Criminal Investigation Bill 1981 (Cwlth), cl. 59.
2. Privacy Act 1982 (Canada), s 60(1).
3. Editorial, 'Protecting Privacy' (1982) 132 New Law Journal 357. See also 'Big Brother's Law', Nature, Vol. 296, 22 April 1982, 694.
4. (1982) 132 New Law Journal 357.
5. Freedom of Information Act 1982 (Cwlth), s 48.
6. B. O. Jones, Sleepers, Wake!, OUP, Melbourne, 1982.
7. This discussion draws on a paper by Professor David H. Flaherty, 'The Challenge of New Information Technology to Personal Privacy: A Canadian Perspective', unpublished paper prepared for the workshop on the 'Micro-electronics Information Technology and Canadian Society', Queens University, Ontario, 5-7 May 1982, mimeo.
8. Professor Flaherty refers to A.F.Westin, Privacy Journal, viii (February 1982) 1-2, 6-7 and ibid viii (March 1982), 3.
9. This was suggested by the present Canadian Privacy Commissioner, Inger Hansen, Q.C.. See Flaherty, 18.
10. Flaherty, 17.