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<u>ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT</u>

<u>SECOND SYMPOSIUM ON TRANSBORDER DATA FLOWS</u>

<u>LONDON, 30 NOVEMBER 1983</u>

<u>TBDF - THE HUMAN TISSUES</u>

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TBDF — THE HUMAN TISSUES

The Hon Justice M D Kirby CMG *

Chairman of the Australian Law Reform Commission 1975—;

Chairman of OECD Expert Group on TBDF and Privacy 1978-80

OF GOOD AND BAD NEWS

In Australia a popular magazine – definitely written for the laity not the clergy — recently ventured a religious cartoon. It showed Moses coming down from the mountain with the original law reform reports — the tablets of stone. He told the assembled Israelites 'I have good news and bad news'. 'The good news is that I got Him down to ten. The bad news is adultery stays'.

Well, the good news this morning is that I have got these observations down to ten — ten minutes : a Herculean task for any lawyer. The bad news is that you now have to listen to my contribution rther than the words of Judge Jan Freese of Sweden. Freese particularly, and Sweden in general, have been in the vanguard of practical concern about the human issues of the remarkable new technology of informatics. It is about those issues that I will speak. My thesis is a simple one. Whilst the technology brings overwhelming and obvious benefits, it also brings problems. It is urgent that we tackle those problems. The OECD is the body of Western countries which dominate world data traffic. It has the opportunity, the skills and the responsibility to provide leadership to home governments in the perplexing social and human questions resulting from computers linked by telecommunications.

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* Personal views only

OECD PRIVACY GUIDELINES

In fact, the OECD has already accepted this role. In 1980 it endorsed guidelines on the protection of individual privacy in the context of transborder movement of personal data. These guidelines included certain 'basic rules' for the protection of privacy:

. limiting the unnecessary collection of personal data;

. limiting the use of data collected for one purpose, then being used for other purposes;

. limiting the storage of such data; and

. upholding the normal right of the individual to have access to computerised data about himself — and to correct the record if it is wrong or irrelevant.

Many OECD countries already have laws which uphold these, and other basic rights. But Australia — the United Kingdom and other countries — are still developing their data protection laws. In Australia a major report of the Law Reform Commission will be tabled in Parliament next week. The report proposes new laws for better protection of privacy. In the field of information privacy, I give nothing away in saying that we, like others before, will draw heavily on the OECD guidelines. This is as it should be. Not only does the OECD provide a relevant and informed body to pool expertise concerning the many and varied problems here. By providing non-coersive rules which can guide domestic law-making, it can sieze an opportunity to reduce the Babel that will result if each country goes it alone. In the world of instantaneous transborder data flows (TBDF) the very notion of State sovereignty needs review. We must act together or laws for the protection of our citizens can be quite readily' circumvented, frustrated or ignored. This could be done by the simple device of storing data beyond the jurisdiction or at least beyond the effective power of any one jurisdiction. Universal, instantaneous information technology adds urgency to the need to develop international law and to harmonise local laws:

. the technological people realise this — simply because they must get the linkages that make the systems work;

. Treasury officials begin to realise this — because the spectre of protectionist lawmaking is already with us : laws ostensibly for human rights but aimed also to protect hi-tech local industry;

. but who is working on the wide range of social issues that together may affect profoundly the shape of our societies in the 21st century? The answer is, I am afraid, very few outside the small dedicated band of part-time OECD cognoscente, many of them in this room.

FUTURE PRIVACY ISSUES

Even the OECD Privacy Guidelines were only the beginning of the consideration of privacy issues raised by TBDF:

. What of developments beyond guidelines? Of enforceable rules that permit a citizen in Britain to enforce protection of his data privacy in say, Australia? Ultimately without such remedies, will principles and guidelines amount to much when stacked up against the dynamics of computications?

. What of the protection of the privacy or confidentiality of legal persons?

. Should codes of ethics be developed? Would they control the conduct of data personnel more effectively than the remote prospect of legal redress?

. Will privatisation and deregulation of public sector telecommunications authorities — with their privacy protective traditions of secrecy — endanger individual privacy?

. Will the right of access to data — central to the OECD guidelines and most domestic privacy laws — flourish into a right to handle terminals and to interrogate them about one's own personal data? As the data profile becomes more critical for the lives of future citizens and as document copies become less common, it seems likely to me that citizens will demand a right to handle the equipment, and the softwear will need to be programmed accordingly.

OTHER SOCIAL ISSUES

Furthermore, privacy is just the first issue to be considered. Others wait in the wings for international attention:

. Harmonisation of freedom of information laws is necessary as illustrated by the recent case reported in Norway. There, interrogation of a US computer under that country's Freedom of Information Act, secured instantaneously, data which in Norway was, in law, a State secret.

. The vulnerability of the wired society was studied a few years ago in Sweden. But who is looking at the implications for the international community of heavy dependence on vitally important data, control over which may be beyond the power of a particular country?

. Crime, at least at common law, is strictly local. Courts are typically confined to punishing crime in their own territory. But informatics brings a world in which antisocial conduct may be initiated in one jurisdiction transmitted over and switched in many others and result in harm in still another. How will our legal systems and police forces cope with problems of this kind?

I have listed only a few of the complex questions that come in the train of the remarkable and beneficial developments of transborder data flows. Still others may be touched on in the closing session:

. the development of a new principle for resolving the choice of legal regime in transactions having instantaneous connexion with many lands;
. the implications for copyright law;
. the liability for loss and insurance against computer error; and
. the impact on our courts — such as in the formal proof of computer evidence.

And so on.

THREE LESSONS FOR THE SOCIOLOGY OF INFORMATICS

In closing, I want to advance a few simple propositions for your consideration:

. The first is that the social problems presented by informatics are many and difficult. There needs to be a heightened sense of the urgency of tackling them. We need a new Luther of Jurisprudence to guide the law into the technological age. Law-making tends to move at a snail's paceif the Rule of Law is to survive in our countries as more than a political cliche we will need lawyers and legal institutions as imaginative as the technologists.

. Secondly, there needs to be a heightened awareness amongst the technologists themselves of the importance of these issues. Unless there is such a realisation, there will surely be a social backlash as citizens come to realise that their rights can be put at nought by TBDF and that local laws are incompetent or just plain silent when their vital interests are at stake.

. Thirdly, if the OECD is to earn its place as a leader in the sociology of informatics, it must mend its own ways:

.. it should throw off — at least partially — its bureaucratic-technocratic self-image — and frankly face the fact that the OECD countries must address the social and human rights implications of the new information technology. Nothing could be more dangerous or more beguiling than to ignore them because they are elusive and hard issues;

.. the OECD must show a heightened concern about the implications of informatics for developing countries;

.. it should be more open and less secretive in its operations. When we are gathered — in this holy place — to talk about free flow of data we should, like the clerics, practise what we preach. I cannot for the life of me see why this whole symposium is not open to the press and public. Our free communities — which are vitally interested in all of the issues we will be discussing — have a right, indeed a need, to be consulted and informed.

Faced by the social and legal problems of informatics, I will find it difficult to lead my flock out of 'CLERGY AYE' or 'CLERGY NO'.** At this stage the best advice I can give is to exit by the 'AYE' door. But keep — if it is possible here — a Jesuitical mental reservation. And also keep your fingers crossed, that the law-makers and the people's representatives, so close at hand, can keep pace with the technological revolution that is embracing us all.

** This is a reference to the markings above the doors of the meeting room of the Anglican Synod, where the symposium took place.