

AUSTRALIAN LAW NEWS

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Two Australian lawyers were amongst participants from many countries taking part in the National Forum on Access to Information and Privacy in Ottawa on 6-7 March, 1986. They were Justice Michael Kirby (President of the NSW Court of Appeal) and Mr. Lindsay Curtis (Deputy Secretary, Federal Attorney-General's Department).

The Forum was convened by the Canadian Minister of Justice (Mr. John Crosbie). It took place in the Canadian Government Conference Centre, Ottawa. The subject matter of the Forum and the international perspectives offered by the participants illustrate:-

- \* The impact of new information technology on the law.
- \* The need for lawyers and social scientists to keep pace with technological developments affecting civic rights.
- \* The similarity of protective legal developments occurring in English speaking countries.
- \* The value of exchanging information on the effectiveness of various legal responses to technological problems, having an international dimension.

In response to developments in technology and social and political changes, a number of countries have introduced laws to provide for access to government information (freedom of information) and privacy protection. Such laws have been

introduced or promised in the United States, Canada and New Zealand. In the United Kingdom, the Data Protection Act was passed in 1984. In Australia, freedom of information (FOI) legislation was enacted at a Federal level in 1982 and in the same year in Victoria. It has also been promised in a number of other States. Privacy legislation has been enacted in New South Wales and is expected to be introduced shortly in the Federal Parliament, following a 1984 report of the Australian Law Reform Commission.

The focus of debate at the Canadian Government Forum was the operation of the Canadian FOI law (Access to Information Act 1983) and privacy law (Privacy Act 1983) in the light of experience since the enactment and experience in other countries with similar laws and problems, including Australia. Justice Kirby and Mr. Curtis were invited to participate, to present the Australian perspective. Mr. Curtis played an important part in the work of the interdepartmental committees which preceded the enactment of the Australian Freedom of Information Act. Justice Kirby was Chairman of the Australian Law Reform Commission when it produced its report on privacy protection. He was also, between 1978 and 1980 Chairman of an expert group of the OECD on transborder data barriers and the protection of privacy. That expert group produced guidelines on privacy which were adopted by the Council of the OECD on 23 September 1980 and adhered to by Australia following the announcement of Attorney-General Gareth Evans on 10 December, 1984. The guidelines provide "basic rules" for the protection of privacy in information flows. They have been followed by many OECD countries in the development of their privacy protection legislation. They formed the basis of

the Law Reform Commission's report on protection of information privacy. They are expected to strongly influence the Australian Federal legislation which is being developed on this subject. Justice Kirby told the Forum that this was the way in which cooperation amongst lawyers and technologists at the international level could influence and assist legal development and reform in domestic jurisdiction.

Program of Forum

The Forum in Ottawa was divided into a number of sessions. Mr. Curtis was the lead panelist in the first session providing a comparative view of access to information and privacy laws. He explained the development and operation of the Australian legislation and the problems which had arisen in that legislation. He referred to the Annual Reports on the operation of the Freedom of Information Act (see eg Australia, Attorney-General's Department, Freedom of Information Act 1982 Annual Report 1983-4, AGPS, 1985). These Annual Reports provide detailed analysis of the use being made of the Act, the "log jams" occurring in various Federal agencies and details on costing and other problems experienced with the legislation. Other participants in the first session included Mr. Bruno Lasserre of the Conseil d'Etat, France and Dr. Harold Relyea, a specialist in United States FOI law from the Library of Congress in Washington. Information was also provided on various initiatives in the Canadian provinces to introduce FOI laws.

The second session, which was chaired by Mr. Tom Riley, a Canadian expert on FOI, provided analysis of the use of FOI laws by media and other interest groups. Participants from a number of Canadian media organisations illustrated the way in which the

Canadian legislation operated from the journalist's perspective. One of the principal users of the Canadian Federal legislation, Mr. Ken Rubin detailed the experience he had had as a "citizen's advocate and researcher". He illustrated the cost, delay and other impediments which could frustrate effective use of FOI law.

The third session took the Forum to an examination of third party protection in access to information laws. One of the difficulties which has arisen in Canada, Australia and other countries with FOI laws, is the use of such laws by business competitors to secure from Government sources, sensitive information supplied to Government by other companies in an expectation of confidence and often under compulsion. The problems posed in this regard were examined by a number of corporate counsel and also by Mr. Jed Baldwin, a former member of the Canadian House of Commons who has been described as the "father" of Canadian FOI legislation. This session was chaired by Ms Inger Hansen, QC, the Information Commissioner of Canada. Ms Hansen is the independent authority with Ombudsman-like functions relevant to the operation of Canada's FOI laws.

The fourth session of the forum dealt with law enforcement and security issues raised by FOI and privacy laws. This session was chaired by Mr. Evan Hendricks, Editor of the Privacy Times, a regular journal on privacy issues published in Washington. He detailed the United States experience and certain problems which had arisen for law enforcement and security under the United States Freedom of Information Act. Other panelists outlined problems which had arisen in Canada. A senior officer of the Royal Canadian Mounted Police (Mr. P. E. Banning) specified the difficulty of the "mosaic effect" produced when enforcement of

access rights allowed criminal or anti-social elements to build up a competent picture of government perspectives of their operations. The legitimate needs to protect secrecy and confidentiality in police and security information was stressed in this session.

The fifth session, which was chaired by Justice Kirby, outlined developments in privacy laws in a number of countries. Specific attention was paid to the OECD Guidelines and the extent to which these were reflected in various privacy laws. Justice Kirby outlined the developments towards privacy legislation in Australia. He referred to the commitment of the Federal Government to the introduction of a Federal privacy Act. He also detailed the way in which a limited privacy right was provided under the Freedom of Information Act 1982. Under that Act, individuals may request access to Federal records concerning themselves and have rights of correction, amendment and annotation of challenged records. Justice Kirby also detailed the proposal for a national identity card in Australia (the "Australia Card") and the suggestion for the creation of a data protection agency in the Department of Health to monitor the use of such a card. He referred to privacy concerns that had been raised in this connection. He also mentioned development of Bills of Rights legislation and proposals for State privacy laws.

Mr. Eric Howe, United Kingdom Data Protection Registrar, detailed the objectives and operations of the Data Protection Act 1984 (UK). This Act was described in the session as "unbelievably bureaucratic" by Professor David Flaherty, presently of the Stanford Law School in the United States. The UK Act is very similar to a number of European laws on the

subject of data protection. Its enactment was, in part, the result of pressure by British industry which was fearful of losing data processing contracts because of the lack of effective data laws similar to those operating in Europe.

Details of the Canadian legislation on privacy protection were provided by Mr. John Grace, the Privacy Commissioner of Canada.

The final session of the Forum examined information management and the way in which information technology could enhance the availability of information to managers in the public and private sectors.

#### Modern ten commandments

At the dinner hosted by the Canadian Minister of Justice and the Secretary to the Treasury Board, the Forum was addressed by Justice Kirby on "The Ten Information Commandments". Illustrating his remarks by reference to the lyrics of a song by the popular group "The Police" ("Every Breath You Take") Justice Kirby said that the growth of government following the Second World War, the advances in community education and the developments of new technology imposed on legislators an obligation to address the social consequences of technology as these affect a modern society. He said that the impact of information technology was but one illustration of the need to address, in the law, the impact of technological change.

Justice Kirby then delivered what he described as the "ten information commandments". Among the points made were that the common law would be inadequate to provide effective responses to the complex problems posed by technology; that technology often undermines domestic law and even state sovereignty; that lulled

by modern media, citizens were often ready apathetically to surrender their rights to developments of technology; and that the costs of providing "information rights needed to be counted, but equally the intangible benefits accruing from such rights to be assessed". Justice Kirby stressed the need for flexibility in law making as it affects information technology because of the rapidly changing nature of the technology and the changing perceptions of the problems. He also suggested that information rights, which have until now developed largely in the public sector would spread, in due course, to the private sector. He said that because information technology presented international issues, international solutions to problems would be necessary in the future, more than in the past. Justice Kirby questioned whether democratic institutions could adequately respond to the challenges of technology because of their complexity, urgency and controversy. He said that there was, at least, a doubt as to whether democratic parliamentary institutions could cope with the tendency of technology towards an autocratic, elitist and authoritarian society.

Other consultations

Whilst in Canada Justice Kirby had a meeting and lunch with the Chief Justice and Justices of the Supreme Court of Canada. He also met the heads of the Courts of Appeal of Quebec and British Columbia who were in Ottawa and Justice William Stevenson, of the Alberta Court of Appeal, who is conducting a national inquiry for the Canadian Government on judicial education. Mr. Lindsay Curtis had discussions with senior officers of the Canadian Department of Justice, including Mr. Stephen Skelly, QC who was the organiser, on behalf of the Minister, of the Canadian National Forum.

The Forum illustrates the growing tendency of countries, particularly in the common law world, to meet regularly to exchange detailed information and experiences on the operations of similar legislation, enacted in numerous jurisdictions to address common problems, many of them presented by advances in technology.

It is expected that the Canadian Department of Justice will publish the papers of the Forum and that these will be studied in the countries which participated, and beyond.

Photographs

Attached are photographs

1. Photograph showing Justice Kirby with the Justices of the Supreme Court of Canada. Justice Kirby is third from the right. The Chief Justice of Canada (Justice Brian Dickson) is at the extreme right.
2. Photograph showing Mr. Lindsay Curtis addressing the National Forum from the floor in the Canadian Government Conference Centre.
3. Supreme Court of Canada, Ottawa, Canada, Court House.