LAW INSTITUTE OF VICTORIA

AUSTRALIAN COMPUTER SOCIETY INC. (VICTORIAN BRANCH)

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MELBOURNE SEMINAR ON PRIVACY : A REPORT

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

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A NEW DIALOGUE

It is not often that lawyers and computer scientists get together to discuss mutual problems. The past 20 years have seen remarkable developments in information technology. These developments will surely require great changes in the legal profession and in the substantive and procedural laws of Australia. Amongst areas of the law that will require critical re-appraisal will be:

- Computer crime: including a definition of 'theft' which embraces theft of information, not the medium in which it appears.
- Intellectual property law: new approaches to copyright and patents.
- Conflicts of laws: a new regime to cover information moving constantly between international data bases.
- Vulnerability: laws to prevent or limit greatly increased vulnerability of a wired society.

A seminar in Melbourne on 20 November 1980, organised by the Law Institute of Victoria, the Australian Computer Society Inc. (Victorian Branch) and the Victorian Society for Computers and the Law, addressed one only of the issues raised by the new information technology. Following an electoral commitment by the Prime Minister, the Australian Law Reform Commission (ALRC) has been required to advise on new Federal laws for the protection of privacy. Two discussion papers were issued in July 1980. The first, Privacy and Intrusions (ALRC DP 13), deals with invasions of territorial privacy. Amongst the subject matters considered are the proliferating powers of entry and search of Federal officials, intrusions by telephonic or postal interception, optical and other surveillance,

and new intrusive methods adopted by modern business. The second discusson paper, Privacy and Personal Information (ALRC DP 14), deals with a new perspective of privacy: data protection and data security. Especially because of the growing automation of information, new dangers are presented which require legal attention. The purpose of the Melbourne seminar was to apply the combined experience and intelligence of lawyers and computerists to the directions which Australian law should take.

The Melbourne seminar was one of a series held in every capital city of Australia. Seminars were accompanied by public hearings conducted by members of the Law Reform Commission. The series of seminars and public hearings were remarkably successful: attracting very large numbers of experts and ordinary citizens concerned about the subject matter of the Commission's inquiry. Hundreds of submissions were received focusing on the proposals contained in the two discussion papers. Among the themes to which participants recurred were:

- Privacy and direct mail.
- Privacy and insurance surveillance.
- Criminal and child welfare records.
- Access to credit records.
- Privacy of social security recipients.
- Access to employment and referees' reports.
- Privacy and medical records.
- The commencement and extent of children's privacy.
- Effective machinery to defend privacy.

Not all of these points were considered in the Melbourne seminar. But many of them were. What follows are some of the chief points made during the course of a stimulating encounter between members of one of the oldest of professions and members of one of the newest and most dynamic of 20th century vocations.

THE SPEED OF CHANGE

The mood was set by Mr. Roger Allen, Managing Director of Computer Power Australia Pty Ltd. He referred to the rapid growth of the new technology, especially since the merger of computers and telecommunications and the miniaturisation of computer technology. Mr. Allen listed further developments on the horizon. They included:

- Vastly increased capacity of disc storage.
- Proliferation of intelligent devices to gather information.
- Point of sale analysis of transactions and conduct.

. Prestel adaptation of domestic TV sets to make them responsive computer terminals for searching worldwide data banks.

. Domestic satellites, including several Australian satellites by 1984. This promises further exponential growth of trans border data flows in a very short time.

Mr. Allen felt that privacy laws were needed. Self-regulation of such a new fast-growing technology was inadequate. Employees were often very young and very inexperienced. Security of data was not always good.

Mr. Hermann Plustwick of the Department of Legal Studies, La Trobe University, analysed the language of computerists. He explained the difference between 'data' and 'information'. To enhance privacy he suggested such practical precautions as:

. Coding.
. Use of privileged access such as code words and keys.
. Organisational control.
. Control of the life span of data.

Mr. Kevin O'Connor of the Faculty of Law, Universisty of Melbourne, formerly Principal Law Reform Officer with the Australian Law Reform Commission, analysed the proposals in DP 14. He conceded that the term 'information privacy' is not one in daily use. However, it was an important interest that should be protected by the law. He cautioned against approaching privacy protection as a mere matter of convenience and technical efficiency. He said that it was important to look on the ALRC task as one of defending the rights of individuals. The debate was a human rights debate. Mr. O'Connor turned to examine the machinery of regulation and control suggested in DP 14. He expressed the view that self-regulation and a privacy body responsive only to complaints would be inadequate. What was needed was machinery that could state general standards, not least for the guidance of computerists themselves.

AN INTERNATIONAL DEBATE

Professor Gerald Dworkin, Professor of Law in the University of Southampton, who was visiting Monash University at that time, reflected on the international scene. He said that the United Kingdom was lagging behind in the development of data protection laws. In September 1980, the Committee of Ministers of the Council of Europe had adopted a draft Convention on computer privacy law which would be open for signature in 1981. He referred also to the OECD Guidelines on privacy adopted by a committee chaired by Mr. Justice Kirby. He suggested that pressure for domestic legislation would come, partly from the human rights lobby but, possibly more urgently, from the pressure of business interests. The United Kingdom is now losing trade because it cannot guarantee

against the haemorrhage of personal data. Foreign firms are often prevented by their own laws from sending data for processing in Britain. Professor Dworkin described the ALRC proposals as flexible and sensible. He described and contrasted the competing approaches that had been adopted in other privacy laws:

- Licensing, regulation and monitoring: the bureaucratic machinery of Sweden.
- Registration, not licensing of codes of conduct and supervision: the proposal of the Lindop Committee in the United Kingdom.
- Neither licensing nor registration but a monitoring system, complaint handling and codes of conduct: the ALRC proposal.

Professor Dworkin said that the Australian proposals were in many ways the 'lightest' system of regulation suggested at a national level. One problem was the suggestion of further government regulatory bodies: an idea unpopular at a time when qangos are being questioned, criticised and even dismantled. Another danger was excessive specialisation. Access to the courts in some cases may help to cure this.

REASONABLE EXPECTATION OF DATA PROTECTION

Professor Tony Montgomery of the Department of Computer Sciences, Monash University, dealt with security measures that could be applied to protect sensitive data held within a computer. He listed:

- Locking the room.
- Provision of a key to open the terminal.
- Access codes for the actual operation of the computer system.
- Logging, to keep trace of entry to the system.
- Encryption to prevent leakage by theft of physical files.
- Encryption of communications from the computer so that line tapping is ineffective.
- Random changes from time to time in codes and keys.
- Overlapping the responsibility of operators and changing their duties.
- Shredding and burning unwanted computer-generated material.

Professor Montgomery pointed out that many of these precautions would be needed for reasons other than privacy. But they would often have a 'spin-off' result protective for privacy. He suggested that individuals should have a right to expect appropriate controls in the system to guard their privacy: a reasonable expectation of data protection. He suggested this as an enlargement of the 'individual participation' principle:

The individual should have the right to expect that controls will be incorporated within the system which ensure that for an agreed period of time his data is stored, processed and communicated without corruption and without loss.

Professor C. Weeramantry, Professor of Law, Monash University, struck a philosophical note. He said that several forces were at work in society which posed dangers and required a legal response:

- Giantism: the growth of institutions since the Second World War reflect increased powers of organisations and decreased importance of the individual. To redress this balance, privacy laws (and other laws) were needed.

- Aggregate Dossiers: as against the assertion of freedom from interference from government, it had to be recognised that a new problem was created by the computer potential to aggregate dossiers, and to do so both in the public and private sectors. Furthermore, this could now be done on a trans-national basis because of the technology of communications.

- Complacency: the complacency of society about the diminution of freedoms was a major impediment to reform. It had to be tackled by a concerted effort to provide effective laws to which ordinary people could have access.

OPEN DISCUSSION

After the presentation of the prepared papers, the Chairman, Mr. Roy Paterson, Chairman of the Australian Computer Society (Victorian Branch) conducted a colloquium with all seminar participants. A number of points were made. Some participants expressed the view that a public sector 'super data bank' would be useful as removing the pressure for multiple supply of private information and intrusive questioning of citizens. Other participants felt that this would be a disaster and the very negation of privacy, which involves values other than efficiency and economy.

The question of identification cards was raised and a similar debate took place: some feeling it would protect privacy and ensure proper identification, for example for access purposes. Others, however, felt it would simply encourage and facilitate the proliferation of personal files.

Mr. Julian Burnside, Barrister and Chairman of the Victorian Society for Computers and the Law, said that information of itself was context-free. The danger arose from the context in which information appeared. He said that the computing industry contained a large and growing number of people not bound together by a common discipline or common code of ethics and therefore not susceptible to an effective regime of self-regulation.

Many speakers cautioned that there was little or no interest in privacy protection amongst most computerists. In large corporations and government offices, standards had been developed, generally for purposes of confidentiality. The proliferation of computers and their use by many smaller bodies and individuals removed this discipline and created the need for external sanctions and remedies. A computer auditor said that companies of international size especially had introduced quality control systems against the risk of computer crime, loss of trade secrets to competitors and other values. Though some of these would protect privacy, it was unfortunately true that computerists did not have an agreed set of ethical standards. Society should provide machinery to develop and elaborate such standards for the guidance of all.

One participant raised the question of who pays for privacy protection. He suggested that a cost/benefit analysis should be completed before privacy machinery was proposed. On the other hand, other participants urged that the cost of data protection was marginally insignificant when compared to the enormous advantages and cost savings accruing to computer users. It should be looked upon as part of the price of the system and as a means of ensuring proper standards of quality and security.

Professor Dworkin concluded that it was absolutely vital that the ALRC should seek to 'sell' privacy, not least to computer people themselves. Most of them were concerned with economic aspects. Somehow the lawyer had to persuade the technologist about the value of intangibles. He suggested that there was general agreement on the principles of the ALRC discussion paper at the seminar. Particular items of special controversy could be identified. They included:

- The extent to which the privacy of children's records should be respected, even as against their parents.
- The extent to which access should be given to referees' reports.
- The extent to which access should be given to medical data.

Professor Dworkin proposed that these controversies should be left to one side for the Privacy Council or for a later time, so that the enactment of umbrella legislation should not be delayed or impeded. He urged all participants and members of the participating organisations to comment on the ALRC discussion papers. He suggested that the remedies proposed were still vague and needed a great deal of refinement before the ALRC report was written. On the issue of money damages for privacy invasions, he pointed out that courts had generally retreated from affording compensation for intangible losses. The proposal in the discussion paper would go far beyond this. He said that it would be important for the ALRC to work out the relationship between the privacy administrative bodies and the courts. Would it be necessary, for example, to impose an obligation to agree not to take a matter to the courts if it were investigated and determined at an administrative level?

Professor Weeramantry, in his conclusion, stressed the importance of providing legal machinery which could make a start on the business of protecting privacy. He said that a Privacy Commissioner could develop a new body of jurisprudence in the light of experience. He saw the work on privacy protection as an illustration of a wider issue: the need for a greater interaction between the law, laymen and scientists. He considered that an important aspect of the work of the privacy bodies would be public education: alerting the community, before it was too late, to the dangers of undue diminutions of individual integrity and privacy.

In concluding the seminar, Mr. Justice Kirby (ALRC Chairman) expressed thanks to the organisations which had arranged it. He paid a special tribute to Mr. Kevin O'Connor of the Melbourne Law School, who had taken such an active part in the Law Reform Commission's work in the preparation of the discussion papers. He said that in the preparation of its report to the Federal Government and Parliament, the Law Reform Commission would consider closely the comments and suggestions made at the seminar.