Kirby – a great patron

By Dr Pamela N. Gray

Following is the third in an occasional series of profiles of persons who have played a significant role in the life of the New South Wales Society for Computers and the Law since the organisation was founded in 1982.

This article also includes the author's own reflections on the challenges of regulating the collection and use of personnel data in the face of evolving technology and the growing popularity of social networking tools.

The NSW Society for Computers and the Law was lucky to have as its Patron from its outset, and continuing to this day, the Honourable Michael D. Kirby AC CMG (www.michaelkirby.com.au/index.php?option=com_g2bridge&view=gallery&Itemid=13&g2_itemId=1366&g2_page=12). At the time when the Society was initially formed, Kirby was the inaugural Chairman of the Australian Law Reform Commission, and dealing with the issue of privacy law, which remains an issue in computers and law as the technology advances. As the field of computers and law expanded and clarified to require new law, so the Patron was ideally placed as a Law Reform Commissioner. Both his interests and his intellect were fortuitous for the field.

The early academic accomplishments of Kirby were a broad basis for his distinguished career. At University of Sydney, he graduated with a BA in 1958, LLB in 1962, BEc in 1966 and he was the only LLM student to receive first-class honours in 1967. His fifth Sydney degree was an honorary doctorate in Law, conferred in 1996; he also holds 12 additional honorary doctorates from Australian and overseas universities. Many honours were awarded to him during his career, in recognition of his work, most recently, a shared award of the Gruber Justice Prize.

From 1978-80, Kirby was engaged, as Australia's representative, in the Organisation for Economic Co-operation and Development (OECD) which formulated Guidelines on privacy protection in transborder data flows and the free flow of electronic information throughout the OECD. He was elected Chairman of its Expert Committee. A reconsideration of these Guidelines is now under way and Kirby made his contribution to this review in Paris in March 2010. Of particular concern in the review is the development and use of search engines to retrieve and assemble data for new purposes, contrary to the Guidelines which ordinarily limit the use of information, or not such information, to its original purposes, what was authorised by law or approved by the data subject. Kirby acknowledges that the flow of information through the technology is global and that the new search engines are useful in new ways. However the inconsistency between the Guidelines and the use of technological advances raises the fundamental issue of whether or not information should be limited.

In 1979, in his address to the French Government Conference on Informatique et Societe, on the Importance of the O.E.C.D. Guidelines on Privacy, Kirby (p.5) stated a golden rule for privacy:

> Above all, the golden rule for the effective disciplining of personal information systems was that, prima facie, and with appropriate exceptions, the individual should normally be entitled, as of right, to secure ready access to personal information about himself.

Further, Kirby (pp.5-6) added:

> Access and the consequential right to correction, deletion, amendment, annotation and erasure are at the heart of national laws on this subject and international efforts to harmonise those laws. There are other rules in the O.E.C.D. guidelines which are also important. These deal with such matters as:
> - limitations on collection of personal information;
> - the quality to be observed in personal information;
> - limitations in the use or disclosure of personal information;
> - provision for adequate security;
> - identification of an accountable operator.

Kirby noted that computer technology impacts upon individual human rights, including privacy or what may be better described as data protection and data security. In his 1979 speech to the Information Technology and Society Colloquium in Paris, he outlined, as follows, (p.10; also p.10 in his speech to the Ninth Conference on the Law of the World in Madrid, 1979, advocating the Guidelines as a basis for world law) the six rules of data quality and data security included in the O.E.C.D. Guidelines Part Two (http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html):

1. The collection limitation principle: that rules be laid down governing the amount and method of collecting personal data.

2. The information quality principle: that information should be accurate, complete and up-to-date for the purposes for which it may be used.

3. The purpose specification principle: that the data purposes for which personal data are collected should be identified at the time of collection. The use made of the data should generally be limited to those purposes or others permitted by law or agreed to.

4. The disclosure limitation principle: that personal data should not be disclosed or made available except by consent, common and routine practice or legal authority.

5. The securities safeguards principle: that personal data should be protected by adequate security.

6. The accountability principle: that there should be an identifiable person accountable in law for complying with the principles.

As the extensive, complex law of privacy was established, the issue became not just a matter of how information should be limited, but also how information should be conveyed. What did Mark Zuckerberg, founder of Facebook, aged 26 in 2010, know of these principles in the Guidelines when he opened up the electronic freedoms and potential of social exchanges? How could Zuckerberg plan the conduct of Facebook in its uncharted technological territory? What information was available to him? What models was he given to follow? What experience did he have? If Facebook seemed like a good idea at the time, its dangers soon emerged. To what extent could Zuckerberg see the care that was required? Was he a naïve entrepreneur, full of the enthusiasm and confidence of a youth-oriented culture? Was he unconstrained by lawmakers, just like BP in the Gulf of Mexico?

By May 2010, Facebook, now a large international online social-networking service, had suffered so many attacks over their standards of privacy and access to user data, that it voluntarily undertook a major review of its privacy controls. Concerned law enforcement officials, including the Australian Federal Police Assistant Commissioner, Neil Gaughan, met in the USA to discuss their anxieties about the dangers of the social networking site.

The commercial freedom of Facebook allows them to ban from Facebook, people who have abused the Facebook freedoms. Thus, if a Facebook user murders another Facebook user, as may have happened recently in NSW, at a meeting arranged between them on Facebook, once convicted, the offender should be excluded from using Facebook. The electronic trail that such a criminal leaves greatly assists the police in identification and apprehension of the offender. Such an offender probably would not understand that this could happen. However, if Facebook were to be required by law to ban such offenders, this may be inconsistent with the constitutional protection of free speech in the United States of America.

Questions now emerging for consideration in any Guideline review are:

1. Should Facebook offer a reporting or ombudsman service where users can report abuses?

2. Should Facebook provide warnings as they build up a profile of known abuse?

Perhaps it is too much to ask of the Guidelines to provide privacy rules to prevent the murder of a naive young person, by a Facebook user. But the general rules that should govern such facilities need to be clear, relevant and understood.

On the 30th Anniversary of the OECD Guidelines on Privacy, in 2010, Kirby's speech in Paris to the Round Table of the new OECD Working Party on Information Security and Privacy identified some of the areas of the Guidelines that might require special attention in a review. In particular, he observed (p.11):

> There is an extent, of course, to which the advance of information technology reduces the capacity of the individual to control his or her information penumbra. This is the aspect of individual privacy that is placed at risk by informatics....
>
> The social networks that have arisen in the past decade are an illustration. To what extent would the utility of endeavouring to impose individual control over data in information systems outweigh the cost of erecting impediments and providing pre-access controls?

Further, he observed (p.12-13):

> Privacy as a value is not something dreamed up by the OECD. It was recognised as a basic human right in the *Universal Declaration of Human Rights* (art.12) and in the *International Covenant on Civil and Political Rights* (art.17)....
>
> The intervention of law and principle and of effective practice is needed to continue protection for the individual that safeguards fundamental human rights and upholds the integrity of information systems....

> Privacy protectors must ever be on the lookout for privacy enhancing technology (**PET**) and the ways in which such technology itself can be invoked to afford better privacy protection to the individual.

Kirby (p.13-14) included in the new challenges for the review of the Guidelines, the following observation:

> End-user education may be necessary to sustain community awareness about the value of privacy. The social networks that have grown up in recent years are often used by young persons who may not be fully aware of the way in which their personal data, disclosed today, can return to affect their lives in years or decades to come. Balancing individual freedom against personal immaturity may sometimes require new responses and some impediments to TBDF (**Trans Border Data Flows**) at least for vulnerable users. But these need to be developed in conformity with the basic objectives of the OECD Guidelines which continue to provide a framework for resolving such issues.

The law settles power struggles and standards of human interaction for survival and well-being. It challenges the sciences and technology by requiring their users to address what is foreseeable and what harm must be avoided. Responsible science and technology is required. However, so often, responsibility is not affordable; this is where false economisations will direct cost-cutting, and from where corruption will subversively siphon its income through diminution of responsible provisions.

Human survival and well-being provide the measures and standards for law. These are passed on to the sciences and technologies by legal controls. However, the law has long struggled to impose these measures and standards on business and economics. The power of money has often superseded the power of law-making and administration. Scientists and technologists can give directions on the measures and standards for law, but how can they impose these requirements on business and economies except through law?

The contemporary struggle for dominance between science and technology on the one hand, and business and economics on the other hand, which used to be balanced on the scales of justice, seems to have escaped the law, as the complexity of the struggle eludes the understanding of politicians and lawmakers. So human survival and well being suffers in the ensuing chaos. As the inventor of artificial life, Craig Venter, recently asserted in a TV interview on the ABC: we are now 100% dependent on science. If democracy is to survive, it may have to better integrate scientific expertise.

In his Christmas 1982 address to the International Law Association Australian Branch in Sydney, entitled, "How the computer will make us all citizens of the world", Kirby observed (p.2):

> In the course of the development of the Guidelines on privacy, it became clear to me that the worldwide nature of the informatics technology, the rapid penetration of Western society by computers, the linkage of telecommunications and computers in what has been called 'computications' all present a tremendous challenge and a magnificent opportunity for the development of harmonious international law.

The inclination of Kirby is against national censorship of online information, even if this was possible. He is aware of an opposition in Australia to online pornography, and notes that even the Entry form to be filled in by travellers arriving in the country now includes a question as to whether or not the entrant is bringing pornography into the country. But just as some extremes are objectionable, he believes that we must not allow what he describes as "the God Botherers" to take Australia back to earlier prohibitions on the publication of erotic material.

At present, an internet war of words between self-defined atheists and religious fundamentalists or God Botherers is underway. The internet shows, Kirby says, that there is a very large market for pornography in the real world; commercial as well as theological and cultural interests are at stake in this freedom of speech and freedom of information. The issue he takes with the God Botherers on the limitation of online information, shows that, even if religious fundamentalists could provide evidence of the existence of God, as required by the self-defined atheists, they would then have even greater difficulty providing evidence that their social dictates are God's, especially as these dictates are not all common to the various religions. The common law has sometimes used Christian dictates in the development of its rules; for example, love thy neighbour was used to develop the law of negligence, which then founded an extensive insurance industry. However, the rules of common law are also more broadly justifiable in terms of social organisation and the historical consistency of case law. The ultimate question, for Kirby, is whether or not the dictates of law are just.

During his period of patronage, Kirby became a judge, firstly in the federal jurisdiction, then in NSW, and finally in the High Court of Australia, where he could observe and contribute to the development of computer law. His main concerns were with the protection of the technology, its security, and privacy. His judicial appointments were as follows:

- Deputy President of the Australian Conciliation and Arbitration Commission 1975-1983;
- Inaugural Chairman of the Australian Law Reform Commission 1975-1984;
- Judge of the Federal Court of Australia 1983-1984;

- President of the New South Wales Court of Appeal 1984-1996;
- President of the Court of Appeal of Solomon Islands 1995-1996;
- Justice of the High Court of Australia 1996-2009.

Kirby saw the NSW Computers and Law Society as a multi-disciplinary group of experts, talking a global language with mutual respect, at the developing edges of the field, who could raise problems that should be addressed so that the implications and explorations of the technology could be better understood; he thought that the group could shape for others glimpses of the emerging technology that were intellectually enlightening.

In Kirby's last case in the High Court, *Wurridjal v Commonwealth* (2009), he explained the need to give the word "property", in the constitutional provision requiring compensation for compulsory acquisition, a broad meaning where aboriginal "property" was concerned. This dicta sets a new benchmark for the common law boundaries of property, which contemporary times also may require for useful innovations. At the time when Kirby, as the Australian Law Reform Commissioner, considered aboriginal land rights in the mid seventies, aboriginal art was not a significant industry as it is today and lawyers were hindered by deeply entrenched legal notions of property. They barely understood that when Captain Cook, by planting an English flag on a beach in North Queensland, claimed, inter alia, the aboriginal lands of Gove in the Northern Territory. The Gove Territorians did not know of the claim until it became apparent when a mining company arrived about 200 years later to take away some of their earth.

For the early years of the development of computer law, Kirby acknowledges that Philip Argy may be correct when he says that the judiciary lacked a knowledge of the technology, but, he says that, more recently, the computer knowledge of the judiciary has probably improved. In any event, the judiciary is sometimes called upon to understand matters of scientific and judicial expertise. Procedures allow for this and counsel are required to provide the relevant expert evidence and submissions that transfer understanding to the judiciary.

Alternative dispute resolution, Kirby agrees, has some advantages for technology dispute resolution. It is not merely a means of avoiding court. Disputants may choose an agreed expert arbitrator. According to Kirby, who, for 2009-10, was President of IAMA (Institute of Arbitrators & Mediators Australia), ADR procedures can be more empowering for the disputants; it is a bottom up power framework that is an alternative to the top down power procedures of courts. Conciliation and arbitration are more party participatory and can be faster and cheaper. There may be additional costs for the hire of a room, ADR specialists, and transcribers of proceedings. However, outcomes are designed to be final.

The current proposal of the NSW Society for Computers and Law to join with the Victorian Computers and Law Society, to metamorphose as the Australasian Computers and Law Society, is welcomed by Kirby and he wonders why this has not happened earlier. He observes the trend of international professionals to associate internationally, for the betterment of the group and the purposes they share. Expressly, he is concerned to see Papua New Guinea joined in the new association, to assist their technological advances and overcome professional isolation. Suggestions like this, from an influential patron, remind the Society of opportunities and care that should be taken. The new informatics, says Kirby, if it is to come to fruition, should include the full scope of its potential.

In the formation of the new Australasian Society, Kirby would like to see the role of the Patron better articulated, so that instances of Patron participation or consultation are clearer. It seems to him that the time between drinks and dinners of the Society with its Patron should be shorter.