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Law and Technology: A Discussion with the Honourable Justice Michael Kirby

The **Honourable Justice Michael Kirby** is best known for his time on the Federal Court and High Court bench. Throughout his career, he has also held a number of high profile positions that have overseen and shaped the face of Australia's data, privacy and technology legal landscapes. Some of these include being inaugural Chair of the ALRC and Chair of the OECD Expert Groups on Transborder Data Barriers and the Protection of Privacy and Data Security.

Our **CLB Co-Editor Ashleigh Fehrenbach** reports on his reflections on these roles, as well as his thoughts on technology, privacy and defamation in Australia.

Ashleigh Fehrenbach: Thank you so much for taking the time to speak with the Communications Law Bulletin. What led you to gravitate towards these roles in the spaces of data, privacy and technology?

Michael Kirby: My work in this field grew out of my appointment, from January 1975, to be the Inaugural Chairman of the Australian Law Reform Commission. At the end of 1975, the incoming Fraser Government announced that it would give the commission a reference to prepare recommendations on the better protection of the law of privacy in Australia. In the course of that investigation I was sent to the OECD in Paris and was elected Chair of an Expert Group examining Transborder Data Barriers and the Protection of Privacy. My election to chair the expert group was in 1978. Its report was delivered to the Council of the OECD in 1980. That body adopted the *OECD Principles on the Protection of Privacy*. Those principles state the basic norms that should be applied by OECD member countries to data flows between those countries and

thus to the laws applicable within them. The OECD principles have been very influential. They have resulted in legislation, judicial decisions and voluntary guidelines in most of the countries of the OECD. Those countries comprise substantially democratic advanced economies.

Fehrenbach: 2020 signalled the 31st anniversary of the internet in Australia. To touch on your experience as chair of the OECD Expert Groups, what do you see as being the advantages (or disadvantages) in Australia having an open and free access to the internet? What might be some challenges in achieving this going forward?

Kirby: The internet has revolutionised the spread and use of information and knowledge in Australia and worldwide. Potentially it has enhanced the knowledge base that is available to sustain democratic accountability. However, with these advantages have come risks and dangers. These include the development of social networks with many disadvantages in terms of the

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Editors' Note

Our dear CLB readers,

It's here. The final edition for 2020, and what a year it has been!

We will do our best not to mention what a wildly *unprecedented* year it has been for everyone, including us here at the CLB. We have certainly seen exciting developments across the board on defamation, technology and communication law issues.

In this edition, we're delighted to bring you the annual wrap up from Dr Martyn Taylor, who reflects on CAMLA's year, what events were held and how CAMLA is moving into 2021. We also hear from CAMLA Young Lawyers Committee Chair, Calli Tspidis, on the exceptionally well received events, webinars and most recently, the newly launched podcast brought to you by the CAMLA Young Lawyers Committee.

COVID-19 has demonstrated the need to adapt and change with technology, and the legal industry is no exception. In a highly anticipated interview, Justice Michael Kirby shares his timely thoughts on developments in technology and how lawyers should utilise these advancements to better address problems in the Australian legal system. His Honour also discusses defamation, privacy and data security in his interview with **Ashleigh Fehrenbach**.

Speaking of privacy, **Gina Tresidder** and the team at Russell Kennedy Lawyers report on lessons from the Digital Platforms Inquiry 12 months on and what business need to do to ensure privacy and ACL compliance. And our **Eli Fisher** interviews dynamic dad-daughter duo, **John Gray** (Hall & Wilcox) and **Camille Gray** (Initiative Australia) in his first instalment of the CLB's Intergenerational Interesting Interviews.

We also hear from **Caitlin Whale** (Baker McKenzie) who speaks with **Rachael Zavodnyik**, Head of Legal APAC at Infosys.

On the defamation side, Australia's Model Defamation Provisions have created waves of activity and discussion. In October, CAMLA held its Defamation Reform Panel Discussion to capture some of this activity with presentations from experts **Robert Todd** (Ashurst), the **Hon. Mark Speakman SC MP**, **Associate Professor Jason Bosland** (Melbourne University), **Marlia Saunders** (News Corp Australia) and defamation

barrister **Lyndelle Barnett** (Level 22 Chambers). We're pleased to be able to include a report from what was a fantastically insightful event. For more on this issue, **Peter Bartlett** and the team at MinterEllison share their insights on the reforms and the recent passage of the *Defamation Amendment Bill 2020* (NSW). **Dom Keenan** also looks into the new public interest defence to defamation in New South Wales.

Also inside, we have reports from a number of the CAMLA Young Lawyers Committee representatives. **Tom Barkl** (ACMA) reports on the CAMLA Breakfast Seminar with the Hon. Paul Fletcher MP, who discussed a staged approach to media reform, where we are and the road ahead. **Jessica Norgard** (NBN Co) fills us in on the CAMLA Streaming Services 101 event.

The Courts have been kept busy in the lead up to the end of the year with important developments in both media and consumer law spaces. **Gina McWilliams** (News Corp Australia) shares her insights on the *F v Crime and Corruption Commission* (QSC) case. **Kirsten Webb**, **Damiano Fritz** and the team at Clayton Utz share the Federal Court's view on misleading and deceptive conduct in advertising in the *Telstra v Optus* case.

So, to say the least, 2020 has been a big one and we're already poised for an exciting and intriguing 2021. We will kick off the new year with an announcement of the winner of the CAMLA Essay Competition at the CAMLA Young Lawyers Networking event. We look forward to publishing the entries of the top three finalists, Kate Mani (*Social media and suppression orders: the end of e-secrecy?*); Anna Kretowicz (*Don't Ask Journalists To Keep Your Secret: Source Confidentiality In Australian Media*); and Isabella Barrett (*Comment is free, but at what cost?: An evaluation of the impacts of Voller on the concept of defamatory publication*). Well done to everyone who entered the competition!

Many thanks to Cath Hill for pretty much everything this year, and to Michael Ritchie at MKR Productions for making us look so good (even when we're WFH).

Finally, thank you to all the contributors and to you, our readers for sticking with us in this unprecedented time (well, we tried). We wish you all the best for the festive season. Here's to 2021!

Eli Fisher and Ashleigh Fehrenbach

spread of hostile and unwelcome information and opinions about others. The development of mass-media and the scrutiny by governments of mega data have also enhanced the risks to individual freedom. The introduction of artificial intelligence and automated scrutiny of data to impose control and restrictions on individual freedoms, including upon privacy, have also presented urgent new problems. With the enhancement of information systems have come significant dangers and challenges. Responses to those dangers and challenges have often been extremely slow and hesitant. Misuse is inescapable. Misuse by government and large corporations can be dangerous. What is needed is a more effective response by the law-making institutions of society so as to protect and preserve fundamental human rights, including privacy, honour and reputation, public health and similar values.

Fehrenbach: There have been significant global shifts throughout Europe in respect of privacy and data security, demonstrated in particular by the General Data Protection Regulation. You helped to develop the 1980 OECD Privacy Guidelines, which were highly influential in developing Australia's own Privacy Principles. How does Australia's privacy landscape today compare to the recent international developments?

Kirby: Australia has been lagging behind in the development of privacy and data security laws such as the general *Data Protection Regulation* of Europe. The OECD Guidelines of 1980 have, to some extent, been overtaken by new information technology. The determination in those Guidelines that personal data collected for one purpose might only be used for



another purpose with the consent of the data subject or by (specific) authority of law is difficult to reconcile with the search engines that permit data to be scanned for purposes that were not considered and might not even have existed at the time of the original collection. However, the international community, including OECD, has not been able to agree on modifications of the OECD Guidelines. A new Privacy Commissioner has been created by the United Nations Human Rights Council for the purpose of developing principles in the context of the United Nations more generally. It was difficult enough to formulate the OECD Guidelines in a substantially uniform political and economic context of the OECD in 1980. Doing so for an organisation that serves almost 200 member states of the United Nations is an even greater challenge. It seems inevitable that global developments for better privacy protection will be patchy and slow.

Fehrenbach: In 1998, you wrote about the impact of technology on human rights. As we set our sights on 2021, do you still consider one of the chief challenges to human rights in the coming years to be the impact of technology on who we are, how we are governed and how we live?

Kirby: It will be apparent from what I have already said that I do believe that the impacts of technology on the human species constitute many of the greatest challenges. For example, these can be seen in the impact of the stockpiles of nuclear weapons and the failure to prevent proliferation of nuclear weapons technology. The recent ratification by the 50th member country to join the *Nuclear Weapons Ban Treaty*, which will come into force in January 2021, indicates the growing recognition of the seriousness of this failure. Likewise there is the impact of the modern technology of energy supply that has contributed to global climate change. Fracking is another potentially dangerous technology. Unless this problem can be addressed quickly, the impact on climate change may be irreversible. In addition to these technological developments, those in the field of informatics present many risks and dangers, some of which are mentioned above. Although the internet potentially releases the spread of information from control by limited media outlets, it also releases “fake news”, misuse of information and risks of far greater governmental surveillance of individual human lives. The fundamental problem has been the failure of modern democratic

countries to keep pace with the needs for new regulations to control or supervise the distribution of knowledge and opinions in a way compatible with democratic governance and accountability.

Fehrenbach: Reflecting on your time as the inaugural chair of the ALRC, you saw the introduction of the internet and a gradual digitisation of court system. What recent technology do you consider to have been of greatest benefit to the Australian legal system?

Kirby: The Australian legal system, and particularly its judicial system could not have survived to the extent that it has during the COVID-19 crisis without the availability of audio visual links (AVL) (Zoom, Teams etc) to permit the argument of cases before courts in a way compatible with maintaining social distances and preventing the avoidable spread of the COVID-19 virus. AVL has been a successful innovation and it points the way to further innovations in court practice. However, suggestions by Professor Richard Susskind (UK) that much more radical technological change will be necessary to permit digitisation of official decision-making based on automated scrutiny of facts through algorithms of data need to be approached with caution. The requirement of maintaining human values and upholding justice remains a major necessity of the independent judge who is guardian both of the rules of legal system and their fundamental justice. Justice is a human value that cannot easily be automatically produced by machines.

Fehrenbach: What role should lawyers play in the development of innovation and technology within the legal system?

Kirby: Lawyers are becoming more technologically experienced and accomplished. They should assist governments, administrators and corporations to address the two principal problems and weaknesses of the present Australian legal system. These are cost and delay.

To some extent, at least with some decisions, automated processing of data may be justifiable in order for society to render decisions more promptly and economically. Costs, delays and inefficiencies of the legal system can bring no satisfaction to the modern lawyer. The challenge will be to retain a legal system that observes democratic accountability (at least in a general way) and accessibility and affordability (at least in essential respects) constitute the major challenge facing the Australian legal system today. Fortunately, the technology promises many benefits, as we have seen through AVL during the COVID-19 crisis. However, technology also presents problems and some dangers. The challenge will be to take advantage of the advantages whilst responding effectively to the dangers and difficulties. Lawyers and their representative societies must be forthright in upholding universal human rights. This is rendered more difficult in Australia because of our failure (almost uniquely) to agree upon, enact and provide a constitutional, national or statutory charter of rights and freedoms. The lack of such a charter at such a time of radical technological change is a serious wound upon the body politic of the Australian Commonwealth.

Fehrenbach: Shifting the discussion to defamation, this year Australian states have agreed to a dramatic overhaul of its defamation laws. In 1977, you penned an article where you posited “Defamation actions show up Australian law at its worst”. Where are we today? Is this still the case?

Kirby: Defamation law is a classic instance of an area of the law of importance to fundamental human rights. However, defamation litigation is now beyond the pocket of virtually every ordinary citizen who claims to be defamed. I hesitate to suggest it, but it might be timely to seek another national inquiry into the law of defamation by the Australian Law Reform Commission. The *International Covenant on*

Civil and Political Rights, art 19(3) (a) acknowledges the need for protection of honour and reputation. This is a basic human right. However, past efforts to secure more cost effective and appropriate remedies for such wrongs have often failed because of the power and resistance of media interests and their influence on political decision-makers.

Fehrenbach: As the year begins to wrap up, some of our readers are looking to wind down with a book. What book are you reading at the moment?

Kirby: Following my work as Chair of the Commission of Inquiry of the Human Rights Council of the United Nations on North Korea, I have become interested in the origins of the international crimes of genocide and crimes against humanity. Also in the conduct of the Nuremburg Trials of 1945-6. At the moment I am reading the excellent and gripping book by Philippe Sands *East West Street* (Weidenfeld and Nicolson, 2016). It sounds a bit heavy; but it is truly an arresting story made personal by the fact that the two competing concepts (genocide and crimes against humanity) originated and were developed by two brilliant Jewish lawyers who grew up in the same city of Lemberg, later Lwov (Poland), still later, Lviv (Ukraine). The book shows that, despite the problems, human beings can grapple with huge challenges and devise just solutions for the international legal system. If Philippe Sands’ book gets too heavy, I will reach out to a new Australian book relevant to the themes of this dialogue: Felicity Ruby and Peter Cronav (eds) *A Secret Australia – Revealed by the Wikileaks Exposés* (Monash University Publishing, 2020). It tells the story of Wikileaks and presents the challenge over Julian Assange, scoundrel or hero, that we should all be pondering. Let us look on 2021 optimistically as the beginning of a new age where humanity learns how to address the legal challenges caused by technology effectively with justice.