42

AUSTRALIAN AND NEW ZEALAND ASSOCIATION OF LAW STUDENTS

1977 CONFERENCE

THURSDAY, 19 MAY 1977

PRIVACY Vs. FREEDOM OF INFORMATION : CONFLICT OR COMPLEMENT?

Hon Justice M D Kirby

May 1977

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ABSTRACT

The Australian Law Reform Commission has received a comprehensive Reference from the Attorney-General, Mr. Ellicott, to propose laws, at a Commonwealth level, for the protection of privacy. At the same time, the Attorney-General has announced the intention to introduce legislation to provide a statutory right of access to Government information. He has also announced an intention to establish a Human Rights Commission.

This paper evaluates these important Australian developments against the background of earlier enactments in Australia, notably the Ombudsman Act and the Administrative Appeals Tribunal Act. It also scrutinizes them against overseas moves for privacy protection and for freedom of information. Legislation or proposed legislation in the United States, the United Kingdom and New Zealand is examined.

Because neither privacy nor freedom of information is an absolute value and because one man's desire for information may impinge upon another's desire for privacy, some mechanism for resolving differences is needed. The paper argues that the demand for access to information about oneself held by Government is a privacy concern. The demand for information relevant to the general workings of Government is the proper concern of freedom of information principles. Unfortunately demands when made, do not neatly categorise themselves into one or other classificat

Various possibilities for evaluating conflicting claims are explored. The paper argues strongly for a uniform, simple and if possible single authority to determine privacy issues, so that a consistent approach can be taken to the protection of privacy. It argues against the development of a separate approach to privacy in the Government sector and urges that both privacy and freedom of information should be seen in the context of the wider movement for the protection of human rights in Australia and New Zealand.

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PRIVACY Vs. FREEDOM OF INFORMATION : CONFLICT OR COMPLEMENT? *

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

THE HUMAN RIGHTS DEBATE

Australia and New Zealand stand at the threshold of major developments in the protection of human rights. These are an aspect of an international movement which gained impetus after the Second World War and from which neither country will be quarantined. No doubt the movement is also a reaction to local developments, including higher standards of general education, improved means of mass communication and a growing feeling on the part of the individual that he is alienated from society. Happily, the developments have a substantially bipartisan quality. In New Zealand a Human Rights Commission Bill was introduced in the closing days of 1976. In Australia the *Law Reform Commission Act 1973* and *The Administrative Appeals Tribunal Act 1975* were passed during the former government. The *Ombudsman Act 1976* was substantially the provision promised by that government. Now, major initiatives of the present government are about to face parliamentary and public scrutiny. Sometimes approaches differ. For example, the *Human Rights Bill 1973* is not to be proceeded with. Instead, an Australian Human Rights Commission is to be established.[1]

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* This paper is an abbreviated and edited version of a paper titled "Freedom of Information Vs. Privacy delivered by Mr. Justice Kirby to the Second Symposium on Law and Justice in the Australian Capital Territory on 26 March 1977.

1. Announcement by the Commonwealth Attorney-General, Mr. Ellicott, on 26 December 1976, *mimeo*, 90/76, p.1

Experience teaches that human rights sometimes conflict. This is particularly so where the values involved are ill-defined or disparate. It is especially so where the concepts to be protected are evaluative[2] i.e. involve a weighing of interests. The battle between the claim for legal protection of privacy and for legally enforceable freedom of information from government illustrates the problem acutely. The interface of these values poses, what one American author frankly describes as "the civil libertarian's dilemma".[3] This is not a contest between good and evil. It is a contest between competing "goods". Machinery must be provided to resolve the contest. The issue cannot be long delayed in Australia. One of the most important initiatives promised by the Commonwealth Government is the introduction of legislation on privacy protection.[4] It has also undertaken to introduce legislation providing for freedom of information, i.e. the supply, where requested, of information in the possession of the government and its agencies.

The Law Reform Commission has been assigned an important role to assist the Parliament in suggesting laws for the protection of privacy in Australia.[5] This exercise runs parallel to the government's promise of legislation on access to government information. It is therefore most timely to review the debate on these issues. Only some of the issues can be raised. No final views can be stated. The opinions expressed are my own.

THE FREEDOM OF INFORMATION DEBATE

The First Interdepartmental Committee

The traditional British way of doing the business of government was inherited in Australia and New Zealand. It was, essentially, a somewhat "secretive", authoritarian elitist way.[6] Protected by this tradition and by legislation guarding "official secrets", information when requested by a

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2. S. Uniacke, *Privacy and the Right to Privacy*, paper for the Australian Society of Legal Philosophy, 1976/77, *mimeo*, p.7.

3. A. Reitman, "Freedom of Information and Privacy : The Civil Libertarian's Dilemma", 38 *American Archivist* 501 (1975).

4. Speech by the Governor-General, Sir John Kerr, on opening the 1st Session of the 30th Parliament, 17 February 1976, p.11.

5. See (1976) 50 *A.L.J.* 208.

6. *Official Secrets Act, 1911 (U.K.)*. *Cf.* The Report of the Departmental Committee on Section 2 of the *Official Secrets Act, 1911* (The Franks Report), Cmnd. 5104 (1972).

person could be refused.[7] It might be supplied. But there was generally speaking no statutory duty to give it nor any "right" to enforce supply of it where the Executive declined to hand it over.[8]

No country gives a total right of access to all government documents. But there has been a growing realisation in the last decade that the free flow of information from a government to its citizens is "the life blood of democracy".[9] The recent Royal Commission on Australian Government Administration said that openness of access to information "promotes an aware and participatory democracy".[10] Much the same assertion had been made at the birth of the American Republic. James Madison who introduced the first amendment to the United States Constitution put it this way:

> "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And the people who mean to be their own governors, must arm themselves with the power, which knowledge gives".[11]

In January 1973, following the change of government, the new Commonwealth Attorney-General, Senator Murphy, announced that the Cabinet had authorised him to prepare legislation to provide public access to documents in the possession of government.[12] As a result of this Cabinet decision, an Interdepartmental Committee was established. Its purpose was to report on any modifications that should be made to the United States system, developed for this purpose. The result of the Committee's work is to be found in a report which was tabled in the Parliament in September 1974. No legislation was ever presented to enact the proposals contained in the report

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7. *Ibid.*

8. Report of the Interdepartmental Committee, *Policy Proposals for Freedom of Information Legislation,* November 1976, p.13. (Hereafter called I.D.C. Report).

9. R. Nader, *Freedom from Information : The Act and the Agencies,* 5 *Harvard Civ. Rights - Civ.Lib. L.Rev.* 1 (1970) pp.1-15.

10. Royal Commission on Australian Government Administration, *Report,* para. 10.7.19. See I.D.C. Report p.13.

11. James Madison to W.T. Barry cited in M. Hulett, "Privacy and the Freedom of Information Act", 27 *Administrative L. Rev.* 275 at p.278 (1975).

12. I.D.C. Report, p.1.

The report noted that there were special features of the Australian constitutional and administrative structure that distinguished it significantly from its United States counterpart. In particular, emphasis was laid upon Cabinet Government, the need to protect Cabinet discussions and to maintain the authority of Ministers over the departments for which they are constitutionally responsible.

The report came in for much criticism. Senator Missen described it as "hopeless".[13] In particular, he criticised its failure to acknowledge important amendments to the United States legislation which had signifcantly improved the operation of the United States Act. Generally speaking the criticism stressed the tendency of the report to allow wide categories of exemption from supply of requested information.

Following the 1975 election, in March 1976 the Prime Minister, in answer to a parliamentary question, stressed the importance which his government attached to freedom of information. In April 1976 the Attorney- General, at the request of the Prime Minister, convened a new Interdepartmental Committee to revive the 1974 report and to report again to the Parliament on this question

The Second Interdepartmental Committee

The stated function of the 1976 Committee was to study and report to the Attorney-General on policy proposals for freedom of information legislation. It was to take into account the first report, the implications of amendments to the United States *Freedom of Information Act* not dealt with in that report and other matters deemed relevant. One matter which the Committee did take into account was a Bill attached to a minority report of the Royal Commission on Australian Government Administration.[14] That Bill did not secure the endorsement or recommendation of the majority of that Royal Commission. Nevertheless, the majority urged "greater openness and freedom of access to information about governmental processes".

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13. As reported in the *Sydney Morning Herald*, 2 October 1976.

14. I.D.C. Report, p.1. The reference is to the minority report of Mr. P. Munro, one of the Royal Commissioners. See (1976) 5 *Rupert Newsletter*, p.8.

Not surprisingly, the Committee perceived its task to be one of balancing competing public interests, as the Committee saw them. It noted the public interest in openness. But it pointed out that this particular interest is sometimes outweighed by other public interests. Specific examples were cited. Eleven categories of exclusion were spelt out. One of them[15] is especially relevant to this paper. It was :

> "10. Documents the disclosure of which would -
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> (a) constitute an unreasonable invasion of personal privacy".[16]

This exclusion repeated, in terms, an exclusion that had been proposed in the 1973 report.[17] It reflected no idiosyncratic aberration on the part of the Committee. The United States Senate Committee on the Judiciary had pointed to the necessity for government, whilst promoting the value of access to government information, to also :

> "protect certain equally important rights of privacy with respect to certain information in government files, such as medical and personnel records".[18]

Because, normally speaking, a person cannot have "privacy" protection against himself, the exemption proposed by the I.D.C. was recognised as one which would not of itself prevent a person from obtaining access to a file having information about himself. That could not amount to "an unreasonable invasion of personal privacy". Nevertheless, the report suggested that access to such personal, private information might nevertheless be excluded by another head of exemption. It also proposed that, to cover the possible damage that could be done by access to a person's own file in respect of information of a medical nature, a discretion should be allowed to make medical or "psychiatric information" concerning a person available only to a medical practitioner nominated by him and not directly to the person himself.[19] This was advanced as an "interim measure",[20] pending the report of the Law Reform Commission on the protection of privacy. It was

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15. No. 10(a). Exclusion 10(b) relates to trade secrets. Exclusion 10(c) relates to breach of confidence.

16. I.D.C. Report, p.7.

17. This was paragraph 9(F)(a) of the 1974 Report.

18. United States Senate, 89th Congress, *Senate Report* No. 813 (1st Session) p.3. Cited I.D.C. Report, p.2. The same point was made by the Prime Minister of Australia, Mr. Fraser, in his address at the Anniversary Luncheon of the Canberra Times. (1976) 1 *Commonwealth Record,* 738.

19. I.D.C. Report p.55.

based on the premise that in some cases harm to the person might properly override the interest in access to information. It was not based on protection of privacy.

The Promise of Legislation

The Commonwealth Attorney-General, Mr. Ellicott, tabled this 1976 report in the House of Representatives on 9 December 1976. He stated that the government had authorised him to prepare legislation for freedom of information.[21] He said that a Bill would be introduced in the autumn sittings of the Parliament in 1977. It would not necessarily reflect the proposals put forward in the report. The intention of the government would be that the Bill would lie on the table for a reasonable period to secure public comment before the final shape of the legislation was settled. The Attorney-General repeated the importance attached to freedom of information in democracy. It is a vital element in making governments accountable in the electorate. Nevertheless, he recognised that there would be a need to balance this value against the protection of other values, where appropriate.[22] One such other value is clearly the protection of personal privacy.

There has not as yet been a great deal of public discussion of the 1976 report. One sceptical columnist reviewed the "melancholy" history of the Australian quest for a Freedom of Information Act. He criticised the wide categories of exemption proposed and concluded pungently :

> "Reason tells one that to invite a bunch of public servants to review the secrecy surrounding their own service is tantamount to asking a gang of poachers to rewrite the game-keeping laws".[23]

PRIVACY IN AUSTRALIA

Present Protections

Given that the introduction of freedom of information legislation will pose occasional threats to individual privacy unless restrained in some

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21. R.J. Ellicott, *Cwth. Parliamentary Debates (House of Representatives)*, 9 December 1976, p.3577. See also (1976) 1 *Commonwealth Record*, 1476.

22. *Ibid.* *Cf.* Mr. Fraser's speech, above, n.18, p.739-40.

23. B. Juddery, "The poachers indulge in a little shadow-boxing", *Canberra Times*, 15 December 1976, p.2.

way, it is necessary to consider that machinery exists or should exist, to exert this restraint. There is no general right to privacy recognised as such by Australian or New Zealand law. No constitutional cases assert such a right. Furthermore the High Court of Australia at least rejected an attempt to develop a tort of privacy along United States lines.[24] There are of course particular torts which are relevant. These include trespass, defamation, nuisance and so on. Equity can intervene to restrain certain breaches of confidence and the use of material obtained thereby. Specific legislation exists prohibiting telephone interceptions.[25] Legislation exists in a number of the Australian States to prohibit or control the use of listening devices.[26] The only comprehensive legislation to protect privacy is the *Privacy Committee Act, 1975 (N.S.W.)* which sets up a Statutory Committee with functions including the function to receive and investigate complaints concerning invasions of privacy. The Committee's jurisdiction is limited to New South Wales. It has no coercive powers.

The *Human Rights Bill 1973* sought to secure Parliamentary approval for the ratification by Australia of the International Convenent on Civil and Political Rights. Article 17 of that Covenant prohibits "arbitrary or unlawful interference with ... privacy". The Bill repeated this prohibition in clause 19(1). It provided certain machinery for enforcement. Principally an Australian Human Rights Commissioner was provided for.[27] The Bill was never passed. No Commissioner has been appointed. There is as yet no comprehensive protection for privacy in the Commonwealth's sphere, beyond certain limited specific legislation and the self-discipline of "good manners" or "fair play". Though important in practice, considerations such as these are not legally enforceable when a dispute arises.

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24. *Victoria Park Racing and Recreation Grounds Co. Limited v. Taylor* (1937) 58 *C.L.R.* 479 esp. 495 (Latham C.J.)

25. For example *Telephonic Communication (Interception) Act,* (1960) (Cwth.)

26. *Listening Devices Act,* 1969 (Vic.); *Listening Devices Act,* 1969 (N.S.W.); *Invasion of Privacy Act,* 1971 (Qld.); *Listening Devices Act,* 1972 (S.A.).

27. Clause 33.

References to the Law Reform Commission

During the 1975 Australian general election, the Prime Minister announced that if the present government was returned, the Law Reform Commission would be asked to suggest laws for the protection of individual privacy in Australia.[28] In announcing the government's legislative programme in 1976, the Governor-General indicated that the reference would be given to the Commission and that, upon receipt of the Commission's report, the government would introduce "appropriate legislation" to protect privacy. On 9 April 1976 the Commonwealth Attorney-General gave the Commission a reference concerning privacy. It is expressed in the widest possible terms. The Commission is asked to inquire into and report upon the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of the Commonwealth or the Territories. In making its inquiry and report, the Commission is specifically directed to address its attention to the subject of this paper. The Terms of Reference require the Commission to :

> "Note the need to strike a balance between protection of privacy and the interests of the community in the development of knowledge and information and law enforcement".

The Commission subsequently[29] received a reference from the Attorney-General for a comprehensive review of defamation law and practice. Work on these two references is proceeding. A working paper and discussion paper on Defamation have been produced. These foreshadow specific, separate treatment for privacy. A paper outlining the issues for the protection of privacy is shortly to be published.

The coincidence of these developments is a happy one because, whilst freedom of information pulls in the direction of openness and access to government material, privacy protection may require limits to be placed upon access to and supply of such information. The values may be in competition. The competing claims will not simply go away. Some people will claim access to information, in the name of that "freedom". Others will object to supplying it in the name of "privacy". Machinery will be needed to define each "right", to weigh the competing claims and to determine them, with authority.

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28. J.M. Fraser, *Liberal Party Policy Speech*, 27 November 1976, p.11.
29. The reference was received on 23 June 1976. See (1976) 50 *A.L.J.* 541.

THE AREAS OF CONFLICT AND COMPETITION

Freedom of Information v. Privacy

If, as it seems to me, "privacy" is not an absolute but a qualified "right" bearing a connection with being an individual, a person not an object or "an aspect of being human",[30] a different interest is served by an enforceable claim for freedom of information. It is a value which is sought for the achievement of other ends. These ends are essentially bound up, as has been said, in the efficient operation of the democratic process. The two values may coalesce. On occasions they may compete. Governments may have an interest in openness and in giving access to information. By way of contrast, individuals may have an interest in maintaining their privacy. Governments may in some cases wish individuals not to have access to some information. In some cases the interest in openness and access will be superseded by the government's interest in secrecy. Reports on the subject including the Australian reports seek to delineate the proper areas of this secrecy. The common factor is the concern to protect government or government organs. The exclusion for privacy is different in kind. Its concern is principally with the individual in society. The privacy of an individual affects him directly as a person and only secondarily does it affect society as a whole. Privacy is relevant in a number of ways to the practical operation of any freedom of information legislation. This will be true whatever form such legislation may take. Some privacy considerations are clear. For example a claim by one person to access to government information which contains highly private and personal material about another person clearly raises a conflict of values. Other cases are not so clear but may raise considerations of privacy that have to be accommodated if freedom of information legislation is introduced. Recognition of this dual aspect of privacy is vital for designing the machinery to protect it.

Access to Information Relating to Third Persons

At least until now, government have not organised their collection of information neatly into files dealing with, and only with, each individual in society. It is difficult to imagine that any such arrangement of material would ever be feasible. Much information contained about individuals is held in files that refer to other persons. Sometimes

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30. D.N. Weisstub and C.C. Gotleib, *The Nature of Privacy*, a study by the Privacy and Computer Task Force, Canada, 1975.

such information may be of a highly personal or "private" character. For this reason, it may be thoroughly undesirable to grant indiscriminate access to an entire file, simply because it contains information that another person wants to see. This may even be so if it also contains matter that is relevant to or concerns the applicant. To do so may be to invade the privacy of another. There may well be instances arising in the context of freedom of information where A will seek access to documents relating to himself. He may be denied access because to grant it would involve an unwarranted invasion of the privacy of B. In some cases it may be perfectly feasible to sort out the discrete areas and supply them separately. In other cases this will not be possible. This may be because B could be easily identified or because the cost of removing highly private references may be prohibitive. It may be proper to deny access, in such a case, especially without the consent of B. Clearly, a mechanism will be needed so that decisions concerning the content of privacy, the discrimination of material and the conflict of claims can be settled. The economics of any such scheme will plainly need to be investigated. A large staff might be necessary to expunge names, examine and differentiate material and judge every claim for access made in the name of freedom of information. From the point of view of society idle curiosity may be outweighed by the competing public interest in efficiency and a fair use of resources.[31] On the other hand, one would not want to see the movement to greater openness in government and access to information impeded, simply because a person's name appeared in a government file and his privacy was remotely impinged on by allowing access to it.

Access to Information Relating to Oneself

"Privacy" has positive and negative aspects. Put negatively, it has been characterised, very broadly, as the "right to be let alone".[32] Protecting it may involve preventing intrusions, whether physical or electronic, upon the person or property of the subject.

In the age of databanks, computers and the passion for information, privacy takes on what I would characterise as a more positive

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31. *Cf.* Bill C-25 *Canadian Human Rights Bill,* 1976, clause 55(1). See "towards costing Government Information Services" (1976) 5 *Rupert Newsletter,* 13.

32. Judge T.M. Cooley, *Treatise on Torts,* 1879.

aspect. This is the desire of an individual to control information that is compiled about him and to have access to that information and some say in its dissemination. In his essay *Some Psychological Aspects of Privacy*, Sidney Jourard explains how one particular "freedom of information" right, i.e. access to government-held information about oneself is in truth a privacy right :

> "... the state of privacy is related to the act of concealment. Privacy is the outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future. The wish for privacy expresses a desire to be an enigma to others or more generally, *a desire to control others' perceptions and beliefs vis-a-vis the self concealing person.*"[33]

In times gone by, the threats to privacy arose from frank physical intrusions. Such invasions of privacy still exist. But nowadays, the greater threat to privacy is the accumulation of information about people, available to others to which the subject may have no right of access. It is on this basis that freedom of information, meaning access to information, may overlap the positive aspect of privacy protection. If you can have access to information about yourself, check it, remove it in some cases and correct it when it is wrong, you have a most powerful weapon to protect your privacy. This is privacy not used as a shield, to protect another from the inquisitiveness of the applicant for government-held information. It is privacy used as a sword by which the applicant may seek to protect and assert his own personal interests from the inquisitiveness of government and of others alike.

Of course views will differ about how these different aspects of privacy should be protected. Some would say that the latter kind of privacy "control" should be included in freedom of information legislation : i.e. freedom of access to information about oneself. But I should prefer to see this aspect of privacy protection to be dealt with as part and parcel of

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33. S. Jourard, *Some Psychological Aspects of Privacy*

general privacy protection legislation. There should not be different approaches to protecting an applicant's own privacy and protecting the privacy of third parties against an applicant's inquiry. Most of those who write about protecting privacy stress the need to fashion sensitive not clumsy or ill-focussed protections. A common doctrine (and, if possible, common machinery) should be developed. This is the way the matter has been approached in the United States. The *Freedom of Information Act* has its focus on the government's interests in providing access or denying it for reasons of secrecy. The *Privacy Act* has its focus on the rights of individuals to control information held by government about them. Clearly this class is a very large and important area of the matter now before the Law Reform Commission.

MACHINERY FOR RESOLUTION OF THE CONFLICTING VALUES

In the United States, freedom of information legislation has existed in one form or other since 1946, reinforced substantially in 1966. Privacy was protected in some States by the common law and in some respects by interpretations of the Constitution. In 1974 a *Privacy Act* was passed providing citizens with access to government information held about them. The machinery is enforceable in the courts.[34] The approach taken in the United States has been that access to information about the subject himself is a privacy right dealt with under the *Privacy Act*. Access to other information in the hands of government is a freedom of information right dealt with under the legislation known as the *Freedom of Information Act*.

In Britain, as recently as February 1977, legislation from a Joint Parliamentary Committee has been introduced, designed to provide for freedom of information and privacy in the one Bill. The Bill is a Private Members' measure and it is not yet known whether it will have Parliamentary support. Where information in the hands of government about the individual or about the processes of government is withheld, it is for the courts to say whether the information was properly withheld.

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34. A most comprehensive description of the operation of the *Freedom of Information Act* is to be found in the *Michigan L.Rev.* project referred to. See esp. pp.1332f.

In Canada, the availability of freedom of information in the United States has caused pressure of late for similar rights to be afforded to Canadian citizens. In November 1976 the government introduced Bill C-25 for the *Canadian Human Rights Act*. The aim of the Bill is to give effect to the principle that the privacy of individuals should be protected to the greatest extent consistent with public order and wellbing. It creates a Canadian Human Rights Commission. Part III provides for the appointment of conciliators and of a tribunal. The Bill states the general principle that every individual is entitled to ascertain what records concerning him are contained in government information. It establishes a Privacy Commissioner[35] who is to be a member of the Canadian Human Rights Commission. His role is to receive, investigate and report upon complaints from individuals about privacy intrusion.[36] At last report the Bill was still before the Parliament. It applies only to federal databanks because Canada faces similar divisions of constitutional authority to those which face us in Australia.

Before the change of administration in New Zealand in December 1975 a number of Bills had been introduced to protect privacy. One of these, the *Wanganui Computer Centre Bill* passed into law. It was designed to ensure that no unwarranted intrusion upon the privacy of individuals was made by the computer based information system established by various government departments. Another Bill, titled *The Privacy Commissioner Bill, 1975*, did not pass into law. But its substance has now been incorporated by the new government in a *Human Rights Commission Bill, 1976*. That Bill would establish a Human Rights Commissioner for New Zealand. Part V of the Bill confers on the Commission general powers to inquire into any matter, including laws practices or procedure "or any technical development" if it appears to the Commission that the privacy of an individual is being unduly infringed.[37] The Commission is empowered to report to the Prime Minister from time to time on the need for action to protect privacy or on any other matter that should be drawn to his attention and to make suggestions to any person in relation to action by that person "in the

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35. *Canadian Human Rights Bill*, 1976, clause 57.

36. *Ibid*, clause 58(1).

37. *Human Rights Commission Bill*, 1976 (New Zealand), clause 58(1)(a).

interests of the privacy of the individual". It may gather information, receive representations and make public statements and shall report to the Prime Minister when required to do so.

None of these powers entitle the Commission to investigate particular complaints by a person that his privacy has been intruded upon. However, the mere fact that such a complaint initiates an inquiry does not limit the Commission's power to carry out the general inquiry envisaged by the Bill. In short, no power of investigation or determination of the merits of individual cases is envisaged : simply general inquiry, the collection of information and views, the suggestion of action and the making of reports to the Parliament. New Zealand does not have freedom of information legislation, nor does the *Human Rights Commission Bill 1976* provide for a right of access to government information. Its other parts deal with unlawful discrimination, unequal opportunity and unfair conduct on the part of industrial unions and like associations. The closest New Zealand gets to freedom of information legislation is the *Wanganui Computer Centre Act 1976* which authorises a person to apply to a Commissioner for copy of all or part of the information recorded on the computer system about him, other than information held under classifications relating to the criminal justice system.[38] Because of the absence of a general right to access to Government information and a general, enforceable right of privacy, no present machinery is needed or provided to balance the occasions of conflict between these rights.[39]

CONCLUSIONS

Freedom of information, the protection of privacy and the advancement of human rights generally are worldwide developments. They will certainly have their impact in the Antipodes. A number of conclusions can be drawn about the debate which has been sketched in this paper. The practical problem which faces legislators in Australia and New Zealand is how approach the reconciliation of the claim for information, which is at the heart of the freedom of information debate and the claim to limit the information or to control its content and movement, which is necessary for the protection of individual privacy.

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38. Section 14, *Wanganui Computer Centre Act*, 1976.

39. For a favourable evaluation of the New Zealand Act see [1977] N.Z.L.J. 17

On a very tentative basis, I would suggest the following conclusions as a basis for discussion :

1. "Freedom of information" and "privacy" are not absolute values but relative.
2. They need not clash. Sometimes, access to government information positively advances aspects of individual privacy.
3. However, occasionally, these values will clash, as for example where one person seeks information that contains highly personal information about another.
4. The resolution of such a conflict cannot depend exclusively upon the personal opinion of the parties involved. Although privacy is an individual value, no system of legal protection for privacy can repose the ultimate decision about the boundaries of each individual's privacy in that individual alone.
5. Accordingly, machinery will be required to judge between competing values. Such machinery will need to understand the proper scope of privacy and to weigh competing claims and determine them with the authority of law.
6. It is undesirable in principle that a multiplicity of government authorities should be created to protect citizens' rights. All too frequently, this leads to the referral of citizens from one agency to another, causing confusion and disenchantment. Confusion already exists in Australia because of the multiplicity of agencies and the division of responsibilities between Federal and State offices. To add further confusion and multiplicity must be avoided.

7. In this context, and against the background of overseas developments, it is both inevitable and proper that those who are drawing Australian legislation should consider the agencies that already exist to evaluate the claims between privacy and access to government information where they come into competition. These agencies include the Courts, the Ombudsman, the Administrative Appeals Tribunal and the proposed Human Rights Commission. It is to be remembered under the former *Human Rights Bill, 1973* specific provision was made to protect privacy. The machinery for enforcement was the Human Rights Commissioner, who was to have access to the Courts. The Canadian and New Zealand Bills, in different ways, establish a Human Rights Commission and repose specific privacy obligations in the Commissioners. In Canada one of the Human Rights Commissioners has been specifically designated a Privacy Commissioner.

8. It would seem inappropriate to cast the obligation of evaluating privacy rights generally in the Ombudsman or the Administrative Appeals Tribunal. Privacy is threatened in our society as much by the non-government sector as by the government sector. It would be thoroughly undesirable to divide the standards and machinery of privacy protection in the government sector from that enforced outside the government circle. Given our special problems in Australia, it seems preferable to encourage a consistent approach to privacy by reposing decisions about it in the one authority. It is

this notion that makes an adaptation of the Canadian and New Zealand legislation attractive. I imagine the confusion and resentment that would be caused if a different standard of privacy were upheld by the Ombudsman in respect of government intrusions into privacy from that upheld elsewhere in respect of non-government intrusions. Because the functions of the Commonwealth Ombudsman and the Administrative Appeals Tribunal are limited to the public sector and because privacy intrusion is not so limited, it seems unlikely that either of these important institutions can be developed to provide comprehensive protection for privacy in the Commonwealth's sphere.

9. Furthermore, an additional attraction of the Human Rights Commission as the machinery for doing the balance here is that, however important, privacy and freedom of information are not absolutes. They are important values that have to be weighed in the context of many other values of our society. The danger of dealing with either of them in isolation is the development of dogmatism and unreality. A Human Rights Commission with its eye on other competing human rights and the courts with their long tradition of protecting citizens' liberties may provide a more balanced viewpoint than bodies that have a focus of attention which is too narrow or specific.

10. Although it may be preferable to provide for freedom of information and the protection of privacy in the one piece of legislation, as suggested in the United Kingdom Bill, that is not necessary. The inability of the Commonwealth

to legislate universally on either subject permits the enactment of separate legislation to deal with each. The likely legislative programme of the government makes it clear that freedom of information legislation will precede legislation on privacy protection.

11. These developments pose two urgent requirements that will have to be resolved. The first is the proper sphere of a *Freedom of Information Act* and a *Privacy Act*. All overseas experience teaches the difficulty of dividing the two spheres. The experience of the United States, Canada and New Zealand at least suggests that access to one's own personal files in the hand of government is a matter of privacy. Access to the information relevant to the general conduct of government affairs is a matter of freedom of information. The former is the specific concern of an individual to control the perception others have of him. It is therefore a privacy right. The latter relates to the individual as a citizen and the supply to him of the information necessary to work the machinery of democracy.

12. The second decision that will have to be made relates to the instrument that should decide between competing claims. There are reasons why the instruments that are suitable for evaluating the claim for access to government information and the refusal to give it on the ground of secrecy, may not be appropriate for evaluating privacy, and the weight to be given to it. If separate Acts are to be passed, specific provisions will have to be made, guiding those who are required to make decisions when a claim for information either conflicts with or asserts a right of privacy.

This is not an academic or scholarly debate only. Hard decisions have to be made by government with the aid of law reformers, departmental advisers, interested experts and the public. It is important both in Australia and New Zealand that we get right our approaches to the new movements. Each of us inherited a common law which attached no legal right to the privacy of the individual. Each of us inherited a bureaucratic system which denied the right of access to information. Yet each of our countries inherited cultural and political values which lay stress upon individual dignity and privacy and attached importance to democratic processes that require information, if they are to work effectively. The Australian Law Reform Commission is engaged in an exercise to assist the Australian Parliament to resolve these contradictions. The Commission invites assistance in discharging its responsibilities.