THE UNIVERSITY OF NEW SOUTH WALES

1976 SYMPOSIUM ON PRIVACY

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# PRIVACY AND THE LAW

Hon Justice M D Kirby

November 1976

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

Q. How would you sum up the campaign? What have been the important themes?

A. ...There ought to be additional openness in Government. Strip away secrecy. Have a greater respect for personal privacy.
Mr. Jimmy Carter, *Time*, 8 Nov.1976.

This Symposium comes at a critical time for the consideration of privacy in Australia. During the 1975 General Election, the Prime Minister undertook that if returned to government, the Law Reform Commission would be asked to suggest laws for the protection of individual privacy.[1] The Government's legislative programme, announced on 17 February 1976 included the commitment that "after consideration of the Commission's report the Government will introduce appropriate legislation".[2] A Reference in the widest possible terms was signed by the Commonwealth Attorney-General, Mr. Ellicott on 9 April 1976.[3]

In a federation, it is not possible for us to approach the protection of privacy in a total or encyclopaedic way. The Commonwealth has limited powers only. Suggestions at the Standing Committee of Commonwealth and State Attorneys-General that privacy protection required a national approach, were not favoured.[4] This said, the Reference given by Mr. Ellicott evidences an attempt to exhaust such Commonwealth power as exists to protect and advance privacy within its domain. The equivalent enquiry into privacy in the United Kingdom by the Younger Committee thrice sought an extension of its Terms of Reference to embrace governmental intrusions into privacy.[5] Thrice, successive Home Secretaries refused the extension. Mr. Ellicott's Terms of Reference, on the contrary, lay emphasis upon the need to protect the citizen against the encroachments of modern government into his privacy. The exercise is therefore a major one.

Debates about privacy protection are not new in Australia. A seminal report was prepared by Professor W.L. Morison in February 1973 and it led to the *Privacy Committee Act 1975* of New South Wales.[6] The report did not favour the creation of a general wrong, actionable in the courts, for invasion of privacy. A contrary view is demonstrated in the South Australian and Tasmanian *Privacy Bills*.[7] Each proposed the creation of a statutory tort of privacy, by which the courts could intervene to protect against and provide remedies for intrusions into privacy. Neither Bill has yet passed into law.

On 23 June 1976, Mr. Ellicott signed a further Reference to the Commission requiring it to review the law of Defamation.[8] Defamation actions provide one of the current means of protecting aspects of privacy. The Reference of this complementary subject will allow a fresh look at the invasions of privacy by the media, freed from the handicap of blinkers imposed by categories of legal redress established in earlier times.

In every sense, then, we are at the crossroads. Speaking generally, two approaches have been proposed for the protection of privacy in Australia. Professor Morison suggested (and secured) the establishment of a watchdog committee. Mr. Justice King, then Attorney-General for South Australia, suggested a general remedy of privacy, actionable in the courts, to activate the judiciary to a new role in this area. There have been major developments in international law and overseas to set the pace. Now, the National Law Commission has a comprehensive Reference backed by a government commitment which would appear to have the support, as well, of the Federal Opposition.[9] The recent controversies involving the census, credit bureaux and criminal records demonstrate that the community is alert to the issue. It would be premature to propose conclusions. It would be impossible, in the short time available, to do more than paint, with a broad brush, what the law is and how it can be used to cultivate and nourish privacy.

## THE NEED FOR A NEW ARMOURY

Why is there so much fuss about protecting privacy? What is the rationale for this enterprise? Put briefly it is the growing conviction that intrusions into that segment of the individual's life which is "his own" have increased, are increasing and will continue to increase unless society, through Parliaments, calls a halt. There is also the conviction that present legal redress is disparate and, in some respects, inadequate to do battle with the challenges to the ultimate right to be "let alone" in some aspects of human existence. I do not, in the time available, trouble to trace the anthropological or philosophical or psychological basis for the demand we sum up under the name of privacy. Nor do I wish to become embroiled in an argument about definitions. I recognize that there are many who would have us grapple with a multitude of social ills under the umbrella of privacy protection. Abortion, the "victimless crimes", mental health and other lobbyists see legal intrusions into their lives

as interferences with their "privacy". It will suffice, for today's exercise, to confine debate to informational aspects of privacy, although I fully realize that the concept has wider connotations. Within these confines, it can be asserted with confidence that there are significant new challenges to privacy which the law, as it currently stands, is inadequate to repel and redress.

What are the challenges? I would identify two. The first is the passion for information. The second is the capacity of modern science to feed that passion.

The desire for information is not an eccentric personal whim of the bureaucrat or company executive. Our economy grows in its specialization. The services demanded of governments increase every year. The sheer requirement of efficiently organizing business and government in modern times plainly requires far greater information about all of us than was necessary in days gone by. There is no use harking back to the old days when Judge Cooley defined privacy as "the right to be let alone". The census form, the taxation return and the credit bureau file are not the creation of bureaucrats and business executives whose only desire is to pry into our private lives. They are the necessary consequences of living in a highly interdependent community. No doubt occasionally information is accumulated for information's sake. This is not often the case, for reasons of sheer economics. But it is because the symptoms of "info-mania" have been detected that we are now in the process of identifying and isolating the strain. There are, by common agreement, some areas of a man's life that are his business alone. The readiness of the law to protect this area will reflect the growing sophistication of the law in protecting intangibles.

There are certain developments of science which the law does not, yet fully take into account. I refer to the availability of increasingly sophisticated surveillance devices which enlarge the potential for intrusions by the media and others. Although these devices are not confined to the pages of detective stories, they present nothing like the potential threat to privacy that exists in the enormously expanded use in our society of computers. Computers have a potential for privacy intrusion because of the

amount of material they can readily amass, the ease and speed with which such material can be retrieved and the facility with which it can be transferred, analyzed and combined.[11] Add to this the fact that so much of this accumulated information is unintelligible to all but the trained eye and you have a classic peril. It is that of a small group of experts (what I once described as a potential "priestly caste") who would command the control of information about many aspects of our lives. The dangers for the present boundaries of privacy are plain to see. Now, the remedy for all this is clearly not going to be a new Luddite revolution in which we smash the computers and ban absolutely bugging and other surveillance devices. But it would be equally dangerous for us to do nothing because, although citizens may have a fair conception of that part of their lives which is no business of others (except perhaps their families) the law in Australia does not provide many tools for coping with intrusions. In this, Australia lags seriously behind international moves designed to protect privacy. That is why the Reference to the Law Reform Commission, the public debate and this Symposium are timely.

A GENERAL RIGHT OF PRIVACY

If you asked the man in the street, he would assert that he does have a "right of privacy". He would quite readily identify some part of his life which he considered to be peculiarly his own and for which he would claim the right to be free from outside interference or unwanted publicity.[12] In one sense, such a claim would not be entirely misconceived. In British societies, without a modern, written Bill of Rights, it is customary for us to assert that freedom of action exists, except to the extent that it is impinged upon by statute or common law.[13] There are, however, three difficulties at least that must be mentioned here. The first is the growing mass of statute law which characteristically includes provisions that intrude upon the individual's freedom of conduct and sphere of private activity. The second is the development of practices and methods, serviced by new inventions, upon which the law is perfectly silent. Computers represent the most important case in point but modern bureaucratic procedures, forms to be filled in and files to be accumulated all erode the seclusion of the individual.

The third consideration is the failure of the common law of England and Australia to develop a general right of privacy, enforceable in the courts. In *Victoria Racing & Recreation Grounds Co. Limited v Taylor*,[14] the High Court of Australia held by majority that -

"However desirable some limitation upon invasions of privacy

might be, no authority was cited which shows that any general right of privacy exists".[15]

Thus, although a general residuum of privacy might exist in the theory of British constitutional freedoms, when it comes to the crunch, there is no mechanism available generally to initiate redress from the traditional quarter, namely the courts. The *Victoria Park* decision is a disappointing one.[16] The judges who built the remedies of the common law in previous centuries fashioned tools to meet contemporary problems. Even today, such inventiveness survives, on occasions. In the United States, a general remedy for invasion of privacy was developed by the courts within the common law.[17] But for Australia, this avenue of redress was stillborn. If remedies are to be found, they must be fashioned elsewhere.

Now, the demand for more systematic attention to the protection of privacy has been growing throughout the world since the end of the Second World War. In the United States, it has received recent impetus from the Vietnam War with its consequent tension and strife and Watergate with its attendant concern with the perils of government gone wrong.[18]

Article 12 of the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations in 1948 stated that -

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour and reputation".

The influence of the War and the scourge of totalitarian regimes was clearly in the forefront of the draftsman's mind. But the same principle is expressed in Article 17 of the United Nations *Covenant on Civil and Political Rights*. This *Covenant*, made in December 1966 provided -

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation";
>
> and
>
> "Everyone has the right to the protection of law against such interference or attacks".

Australia signed the *Covenant* in December 1972. It came into force, with the deposit of sufficient ratifications on 23 March 1976. It is now part of international law. It has not yet been ratified by Australia.[19]

The principal purpose of the ill-starred *Human Rights Bill 1973*, was stated in the preamble to be "to implement the International Covenant on Civil and Political Rights". Clause 6, in terms, gave parliamentary approval for the ratification by Australia of the *Covenant*. Clause 19 of the Bill repeated, in terms, the provisions in the *Covenant* dealing with privacy. The Bill contained certain provisions for the enforcement of rights. It did not pass the Senate. The *Covenant* is not, as such, part of the domestic law of Australia. In fact, the only mention of the *Covenant* is to be found in the *Law Reform Commission Act 1973*. By an amendment moved in the Senate by the late Senator Greenwood, the Law Reform Commission is required in the performanc of its functions to ensure that, as far as practicable, the laws and proposals it puts forward "are consistent with the Articles of the International Covenant on Civil and Political Rights".[20]

What is the point we have reached? Citizens would claim an area of privacy. International law, in terms, asserts the right but it is not, as such, part of the domestic law of Australia. Constitutional guarantees of privacy exist in many countries. There is no entrenched constitutional guarantee of privacy in this country. The pressures upon the private component of the individual's life increase apace. The common law has denied a general remedy. Should a general statutory remedy be superimposed which the courts, in appropriate cases, could develop in accordance with the needs of the time?

Professor Morison in his Report concluded against such a general remedy -

> "My conclusion on the tort aspect is that I could not.... recommend the establishment of a general tort of infringement of privacy remedied by damages and...I should not expect... that if a tort were established at the present time the difficulties...would be ironed out by judicial experience in any short space of time. On the other hand I see greater merit in the establishment of a right of privacy, actual or threatened infringement of which would be remedied by proceeding for declaration of the plaintiff's rights and, at the court's discretion, an injunction to restrain future infringements. I do not recommend this, however, as of the present time because I consider that it would be more appropriate at this stage to establish a more informal body with investigatory and limited remedial powers...".[21]

A different view is expressed by the Tasmanian and South Australian *Privacy Bills*. These would create a statutory civil action along the lines of previous Bills introduced in the Westminster Parliament and legislation passed in a number of the Canadian Provinces.[22] Each of these Bills has ground to a halt in the State Parliaments. Each of them has come under assault from a variety of quarters. Media and press interests contend that, without a constitutional guarantee of freedom of speech, an enforceable right of privacy would put one more nail in the coffin of free speech in Australia. Some civil liberties organizations have supported this view.[23]

OTHER REMEDIES

Although no general remedy exists, enforceable in the courts, to protect privacy as such, particular instruments have been developed which guard aspects of it. I will not catalogue the whole miscellany here. Suffice it to say that at common law there is the tort of defamation that I have already mentioned, the tort of nuisance, which will enable the occupier of land to protect his interests; the tort of passing off (which is limited to cases where statements are made for a business purpose) and the tort of trespass which was an entirely appropriate remedy to protect privacy in property terms: no trespass, no invasion. Not a very apt mechanism for dealing with wire taps, spike microphones, bugging devices and so on. Other remedies exist at common law. These include an action for breach of confidence and an action on the case for harm occasioned by intentional performance of an act forbidden by law. They are esoteric models not likely to be developed to meet the challenges I have outlined.

Important statutory developments have occurred which give relief of a particular order. For example, several statutes prohibit the disclosure of information coming to government officers in the course of their duties.[24] The interception of telephone and telecommunications messages is prohibited, except under stringent preconditions.[25] Copyright protection and rules governing the security of the census and departmental practices all provide some protection for privacy at the Commonwealth level.

In the States of Australia, legislation has, until recently, been approached on a piecemeal basis. In all but two States, the use of listening devices has been made, in certain circumstances, a statutory offence.[26] In two

States the activities of credit reporting agencies have been controlled by statute so that consumers are given a right of access to their files.[27]

But the most daring attempt to deal with the problem in a general way has been the establishment of the New South Wales Privacy Committee. This was the product of Professor Morison's Report. Instead of leaving it to the courts to deal with privacy intrusion, the Committee has been established by Act comprising thirteen members whose functions are four:[28]

*Research:*

To research and develop a general policy towards privacy.

*Complaints:*

To receive investigate and mediate in complaints by any person of unjustifiable invasions of privacy.

*Public Education:*

To stimulate informed public debate on and research into privacy issues.

*Law Reform:*

To recommend law reform and changes in administrative and business practices.

The Committee has no power to enforce its decisions in a legally binding way, nor has it power to grant damages as a means of redress. Nonethe-less, it has been able to sort out, by conciliation, the great bulk of the complaints coming to it.[29] It has also made notable achievements of a general kind dealing with credit bureaux records and criminal data. It is at the moment in full flight upon an exercise to consider governmental intrusions into the privacy of citizens.

## THE AVAILABLE MODELS

This then is the state of the poll. The indigenous models so far developed in Australia for the protection of privacy are four:

*The Statutory Tort:*

The South Australian and Tasmanian Bills would create a tort of infringement of privacy. *Pace* Professor Morison and the Younger Commitee, this approach would leave it to the traditional protectors of citizen's rights, the judges, to provide redress in the case of unreasonable and serious interference in the affairs of others.

*A Watchdog Committee:*

The success of the New South Wales Committee has led to suggestions that the Commonwealth should establish its own privacy committee or commission. A national commission is established in the United States by the *Privacy Act 1974*. An issue to be resolved would be whether the powers of such a body should be confined to conciliation and mediation, as in the New South Wales case, or whether it should have coercive power to enforce its decisions. The very success of the New South Wales Committee is attributed by some to the co-operation secured from those who face no legal sanctions. As against this, the actual remedies available are few if an intransigent invader of privacy "digs his heels in". Furthermore, it has been suggested that a body without ultimate power of enforcing the community's will may succumb to a tendency to trim its sails to achieve the *possible* instead of the *desirable*.

*Specific Legislation:*

This approach would provide particular legislation to deal with specific areas of unjustified intrusion. Thus, in the same way as Acts have been passed to deal with listening devices, Acts, with a particular focus, would be passed to deal with intrusion as they arise. This approach contemplates particular legislation to deal with the credit reference system, with debt collectors, with security guards, collectors, canvassers and salesmen, with employment agencies and other bodies (including the media) that have a tendency or capacity to intrude into privacy. More specific drafting would reduce the uncertainty inherent in general remedies but would diminish the possibility of flexible, comprehensive approaches that can meet particular situations as they arise.

*Informal Techniques:*

Last, but not to be underestimated is an approach of a more informal kind. Good manners and sensitivity are not easily inculcated by statutes. They arise from community attitudes and can be fostered by education. As well, administrative practices may be more susceptible to informal directions that are grounded in a common agreement about what is right and fair. Self discipline ought not to be underestimated either in the government's sphere or in private enterprise. For example, some assert that we must ultimately look to the computer operators

themselves to agree upon and enforce their own code of ethics. A recent British study suggests that we have now passed the time when the law can "opt out" of discipline.[30] Just the same, there can scarcely be a doubt that self-control based upon shared social values is an effective way of preventing intrusion before they occur.

CONCLUSIONS: FUSING THE MODELS?

The protection of privacy involves resolution of tensions. The principal tension is between the desire of the individual for solitude, a retreat, anonymity, an area of intimacy which is his own *and* the legitimate desire of society for information about its members. The need to strike a new balance arises from the inadequacy of present legal protections trying to cope with growing demands for information about each of us, serviced by scientific and technological developments that can satisfy those demands. The law is an instrument by which society educates its members, states its standards and, in the end, enforces its will. At the moment, society's voice is muted.

It has been suggested that the dangers are such that we must encourage the use of every one of the approaches listed above.[31] Clearly public education, administrative and other practices and self discipline have a major role in protecting privacy. But more is needed. Specific legislation can certainly grapple with particular problems. However, the Privacy Committee of New South Wales has already shown what even a small body of dedicated "watchdogs" can do. So far in Australia, there has been a certain polarization between the supporters of the committee and the supporters of the tort approach. But would it not be possible to create (with appropriate safeguards for freedom of speech and other matters of public interest) a general statutory tort of privacy which could be available, in suitable circumstances, to arm the watchdogs with teeth? It will be remembered that Professor Morison foresaw the possible advantages of providing the Committee with access to courts that could enforce decisions in certain cases. The major criticism of the tort approach has been the expense, delay and technicality inherent in doing things through courts and the fear apprehended in some circles that time will run out before judges can fashion appropriate principles to guide the community. But if a privacy commission were given, in addition to the tasks presently set for the N.S.W. Committee, a statutory function of asserting the rights of individuals to

be free of unreasonable and serious interference in privacy, from whatever source, would it not then be possible for the judges to develop with speed and flexibility the answers that must be found to the questions inherent in privacy protection?

I find it difficult to accept that there is no role for the courts in privacy protection. They have been the traditional protectors of our liberties for eight centuries and more. I should be sorry to think that they are now to be hived off to old-fashioned remedies of historical interest only. Might it not be possible to combine in an effective way judicial and administrative remedies so that our society can respond adequately to this prime problem of the twentieth century?

FOOTNOTES

1. J.M. Fraser, *Liberal Party Policy Speech* 27 November 1976, p.11.

2. The Governor-General's speech, *Commonwealth Parliamentary Debates, the Senate,* 17 February 1976, p.11.

3. Appendix A.

4. (1974) 48 *A.L.J.* 115.

5. *Report of the Committee on Privacy,* Chairman, K. Younger, Cmnd. 5012, London, 1972.

6. W.L. Morison, *Report on the Law of Privacy,* Sydney, 1973.

7. *Privacy Bill,* 1974 (South Australia); *Privacy Bill,* 1974 (Tasmania).

8. Appendix B.

9. *Cf.* Senator J.R. McClelland, *Privacy and the Law,* Speech at the Australian National University, Canberra, 20 July, 1976, *mimeo.* p.1.

10. T.M. Cooley, *Treatise on Torts,* 1879.

11. Report of the Home Office, *Computers and Privacy,* Cmnd. 6353, 1975, London, p.4.

12. *Cf.* L.J. King, *South Australian Parliamentary Debates, House of Assembly,* 10 September 1974, p.820.

13. Sir Owen Dixon, *Jesting Pilate and other Papers and Addresses,* Sydney, 196 p.153.

14. (1937) 58 *C.L.R.*479.

15. *ibid* p.496, Latham C.J.

16. But not an extraordinary or atypical, as Morison explains, para. 12.

17. American Law Institute, *Restatement of Torts,* S.867.

18. D.W. Metz, "Federal Leadership in Privacy Protection" (1975) 61 *American Bar Association Journal* 825.

19. G. Triggs, "Prisoner's Rights to Legal Advice and Access to the Courts: The Golder Decision by the European Court of Human Rights" (1976) 50 *A.L.J.* 229.

20. S.7 (b).

21. Morison, para. 32.

22. The history of attempted legislation in England is to be found in the Younger Report, pp.195ff. ; Privacy Acts have been passed in British Columbia (1968), Manitoba (1970) and Saskatchewan (1974).

23. E.g. *Monday Conference*, No. 121, 7 October 1974, Australian Broadcasting Commission, Mimeo p.24.

24. *Income Tax Assessment Act*, 1936 (Cth), S.16; *Health Insurance Act*, 1973 (Cth) S.130.

25. *Telephonic Communications (Interception) Act*, 1960 (Cth); *Telecommunicat Act*, 1975 (Cth). *C.f.* The Law Reform Commission *Criminal Investigation*, A.L.R.C.2, Canberra, 1975 pp. 98ff.

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. *Invasion of Privacy Act*, 1971 (Qld); *Fair Credit Reports Act*, 1974-1975. (S.A.).

28. *Privacy Committee Act*, 1975 (N.S.W.), s. 15(1).

29. Privacy Committee, *Annual Report 1975*, para. 4.5.

30. Report, n.11, pp.3,8.

31. *E.g.* This is the view stated by the City of Sydney Special Branch of the Liberal Party of Australia *Report on Privacy*, Sydney, 1975, *mimeo.*

APPENDIX "A"

The Law Reform Commission

# REFERENCE ON PRIVACY LAW

LAW REFORM COMMISSION ACT 1973

REFERENCE OF MATTERS TO THE LAW REFORM COMMISSION

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO -

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely -

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;

(b) the provisions of section 7 of the Act which provides that, in the performance of its functions, the Commission shall review laws to which the Act applies, and consider proposals, with a view to ensuring -

(i) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(ii) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights; and

(c) the provisions, in particular, of Article 17 of the Covenant which provides, inter alia, that 'no one shall be subjected to arbitrary or unlawful interference with his privacy':

HEREBY REFER the following matters to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO INQUIRE INTO AND REPORT UPON -

(1) the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of the Commonwealth Parliament or of the Territories, and the extent to which procedures adopted to give effect to those laws give rise to or permit such intrusions or interferences, with particular reference to but not confined to the following matters:

(a) the collection, recording or storage of information by Commonwealth or Territory Departments, authorities or corporations, or by persons or corporations licensed under those laws for purposes related to the collection, recording, storage or communication of information;

(b) the communication of the information referred to in sub-paragraph (a) to any Government Department, or to any authority, corporation or person;

(c) without limiting the operation of sub-paragraphs (a) and (b), the collection, recording, storage and communication of information obtained pursuant to the Health Insurance Act 1973-1975 and the Health Insurance Commission Act 1973;

(d) powers of entry on premises or search of persons or premises by police and other officials; and

(e) powers exercisable by persons or authorities other than courts to summon the attendance of persons to answer questions or produce documents;

(2) (a) what legislative or other measures are required to provide proper protection and redress in the cases referred to in paragraph (1);

(b) what changes are required in the law in force in the Territories to provide protection against, or redress for, undue intrusions into or interferences with privacy arising, inter alia, from the obtaining, recording, storage or communication of information in relation to individuals, or from entry onto private property with particular reference to, but not confined to, the following:

(i) data storage;
(ii) the credit reference system;
(iii) debt collectors;
(iv) medical, employment, banking and like records;
(v) listening, optical, photographic and other like devices;
(vi) security guards and private investigators;
(vii) entry onto private property by persons such as collectors, canvassers and salesmen;
(viii) employment agencies;
(ix) press, radio and television;
(x) confidential relationships such as lawyer and client and doctor and patient;

(3) any other related matter;

but excluding inquiries on matters falling within the Terms of Reference of the Royal Commission on Intelligence and Security or matters relating to national security or defence.

IN MAKING ITS INQUIRY AND REPORT the Commission will:

(a) have regard to its function in accordance with section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States; and

(b) 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.

DATED this ninth day of April 1976.

(Sgd) R.J. Ellicott, Q.C.,
Attorney-General

Correspondence or submissions concerning the above reference should be addressed to The Hon. Mr. Justice M.D. Kirby, Chairman, The Law Reform Commission, 7th Level, 99 Elizabeth Street, Sydney, 2000, N.S.W., Tel. (02) 231-1733.

The Law Reform Commission

# REFERENCE ON DEFAMATION

LAW REFORM COMMISSION ACT 1973

REFERENCE OF MATTERS TO THE LAW REFORM COMMISSION

I, ROBERT JAMES ELLICOTT, Attorney-General, HAVING REGARD TO -

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing laws to which the Law Reform Commission Act 1973 applies, namely -

(i) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

(ii) any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;

(b) the provisions of section 7 of the Act which provides that, in the performance of its functions, the Commission shall review laws to which the Act applies, and consider proposals, with a view to ensuring -

(i) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(ii) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights;

(c) the provisions of the Covenant, in particular -

(i) Article 19 which provides, inter alia, that subject to certain restrictions that may be provided by laws, including restrictions necessary for respect of the rights or reputation of others, everyone shall have the right to freedom of expression within the meaning of that term as used in Article 19; and

(ii) Article 17 which provides, inter alia, that everyone has the right to the protection of the law against unlawful attacks on his honour and reputation;

HEREBY REFER the following matter to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

TO REVIEW the law of defamation (both libel and slander) in the Territories and in relation to other areas of Commonwealth responsibility, including radio and television, (but excluding enquiries on matters falling within the reference made to the Commission on privacy)

AND TO REPORT on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation.

IN MAKING ITS INQUIRY AND REPORT the Commission will -

(a) have regard to its function in accordance with section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States; and

(b) note the need to strike a balance between the right to freedom of expression and the right of the person not to be exposed to unjustifiable attacks on his honour and reputation.

DATED this twenty-third day of June 1976

(Sgd) R.J. Ellicott, Q.C.,
Attorney-General

Correspondence or submissions concerning the above reference should be addressed to The Secretary, The Law Reform Commission, 7th Level, 99 Elizabeth Street, Sydney, 2000, N.S.W., Tel. (02) 231-1733.