

NATIONAL CONVENTION OF COUNCILS FOR CIVIL

LIBERTIES IN AUSTRALIA

ADELAIDE 24 APRIL 1976

THE LAW REFORM COMMISSION, LAW REFORM AND PRIVACY

Hon Justice M D Kirby

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Mr Justice M.D. Kirby, B.A., LL.M., B.Ec.,  
Chairman of the Law Reform Commission and  
Deputy President of the Australian Conciliation  
and Arbitration Commission

LAW REFORM COMMISSION

1. I want to start by thanking participants for the courtesy of this invitation for me to address the National Convention. The invitation comes at an important time for the progress of civil liberties in Australia. The Law Reform Commission of Australia has links with the civil liberties movement in two respects that will be known to you. The first relates to the provision inserted in the Law Reform Commission Act, 1973, Section 7 by which we are commanded to ensure that the laws proposed by us -

"... 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."

We are also required by the same section to ensure that such proposals are, as far as practicable, consistent with the Articles of the International Covenant on Civil and Political Rights. This most interesting provision was inserted in our statute upon the suggestion of Senator the Hon. I.J. Greenwood, Q.C., then in Opposition. I do not believe that the contribution of Senator Greenwood to the provision of this challenging touch stone for our work, has been sufficiently recognised. In fact, the Law Reform Commission Bill received the support of all parties in the Parliament. The then Attorney-General accepted Senator Greenwood's proposed amendment and it passed into the Act. It is a guiding principle which is always before the Commission and it is appropriate that Civil Liberties organisations should know of it and of how it came into law. The Commission is also associated with Civil Liberties in Australia in the personnel who have been attracted to assist us. Some of the Commissioners have themselves played a part in Civil Liberties organisations. Others, including some attending the Conference, were consultants to the Commission in the exercise in 1975 relating to Criminal Investigation Procedures. Of course, we also secured participation

at our table of police representatives and others having no association with civil liberties, one way or the other. It is appropriate, nevertheless, especially at the moment, to enlist the support and assistance of Civil Liberties organisations. I value this invitation to participate.

2. The Law Reform Commission's task is, within References received from the Attorney-General, to assist Parliament by proposing legislation for the reform, modernisation and simplification of the law. We follow well-worn methods. We may suggest references, another provision inserted in the Act on the motion of Senator Greenwood; we issue working papers, we hold public sittings and finally we report to Parliament.

3. The basic rationale for Law Reform Commissions is that Parliaments are intensely busy and need assistance in matters that are either too technical or insufficiently interesting or extremely complex. Where the public input into the reform of the law is apt, it is appropriate that the Law Reform Commission should be enlisted to assist Parliament.

#### THE PRIVACY REFERENCE

4. The former Government proposed to refer to the Commission a major exercise in the reform of defamation laws. The change of Government produced a change of focus. The new Government's major Reference to the Commission lies in the area of privacy protection. However, this difference is one of focus only. All political parties are concerned at the growing intrusion into our lives of government and business and the need to draw new lines appropriate for the modern age. It is a heartening consideration that such unanimity exists between the political parties in Australia on this question.

5. During the election campaign, the Prime Minister told us that if returned the Government would refer to the Commission the recommendation of new laws for the protection of individual privacy in Australia. This promise was taken up by the Governor-General in outlining the Government's programme. The Governor-General stated that it was the intention of the Government, upon

receiving the Commission's Reference, to introduce appropriate legislation. A more specific commitment one could scarcely wish for.

6. The Reference was carefully discussed between officers of the Attorney-General's Department and myself. It was discussed between the Attorney-General of the Commonwealth and me. It was distributed to State Attorneys-General in the hope of procuring suggestions for co-operation or for the work of the Commission. Such suggestions were made. Many of them found their way into the Reference. The Reference was announced on 9 April 1976. I attach copy of it to this paper for distribution.

7. Put broadly, the Reference requires the Commission to do two things. Our first task, once the principles of privacy and privacy protection have been clarified, will be to suggest new laws and practices for the protection of privacy in Commonwealth Departments and agencies and in organisations, bodies and persons who come under the authority of the Commonwealth. The Commonwealth Territories afford the Commission the window into the general area of privacy protection. Whilst this Reference calls our attention to a large number of specific considerations, tasks and relationships, I do want to emphasise how general is the Reference. The Attorney-General's approach to the issue was to set forth the particular areas for specific attention but to underline the fact that these were illustrations only. Within constitutional power, the Reference is a comprehensive one excluding only matters of national security and defence.

8. The second task under the Reference will be to cull through the present laws of the Commonwealth and of the Territories and propose changes where such laws do not adequately accord with modern principles of privacy protection and respect. This is a daunting task. Perhaps it is ironic that the Commission will enlist the aid of computers to assist in this exercise. It is clear from the Reference that what we are commanded to do is nothing less than a comprehensive review of laws of the Commonwealth and Territories but also a comprehensive report upon the standards appropriate for privacy protection in Australia in the last quarter of the twentieth century and beyond.

THE PROBLEMS

9. The major problem confronting the Commission in its exercise is, the absence of comprehensive constitutional power to grasp privacy protection as a national task. The constitutional power of the Commonwealth is, of course, limited. Yet a dispassionate observer says that privacy protection par excellence requires a national approach. Otherwise it might be argued that information on a person could be collected in the State with the lowest barriers against intrusion. This consideration was in the forefront of the Attorney-General's mind when framing the Reference. It will be observed that the Reference calls the Commission's attention to the desirability of uniform laws. I have already mentioned consultation with the State Attorneys-General. I have also had correspondence with the State Law Reform bodies. I understand that the Law Reform Commission of Western Australia has proposed to its Minister consideration of a parallel reference to the Western Australian Commission. It is appropriate to mention that Law Reform bodies in South Australia, Tasmania and New Zealand have already done valuable work in the area of privacy protection. Perhaps it will be possible to take this co-operation between law reform agencies a step further. With the permission of the Attorney-General, the national Australian Commission will be keen to do this.

10. The second problem, which is the cause immediate of the Reference, is the inadequacy of present legal protection. There is, it is generally accepted, no general tort of privacy which could be enforced into the courts of Australia. This was suggested, if not set in terms, by the High Court of Australia in Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor and ors (1937) 58 C.L.R. 479. There are specific Commonwealth Acts relevant to privacy protection. A number of Acts require secrecy on the part of Commonwealth officers. Other Acts, such as the Telephonic Communication (Interception) Act, 1960 (Cwth) set down very strict procedures for so-called "telephone tapping". Many of the States have Listening Devices Acts. In South Australia and in Queensland there are specific Acts governing access to credit information. Only New South Wales has set up a comprehensive Privacy Committee. But even this Committee does not have power to enforce its decision

Nor does it have jurisdiction to pursue infringements in other States against the privacy of citizens in New South Wales. The present legal redress is piecemeal, old-fashioned, cumbersome to enforce and in need of renewal.

11. The inadequacies of the current law become important when the problems confronting privacy today are borne in mind. These include the growing passion for information about people. This passion in government and business circles is part and parcel of the complicated society. There is nothing particularly evil or reprehensible about it. It may become dangerous when fed by the devices of modern science. These include the computers, surveillance devices, video monitors and so on. These can accumulate, store transfer and retrieve information in enormous depth and detail. Frequently it will not be possible to programme a computer in such a way as to judge the relevancy of material, years later. Of course, computers never forget. They have poor judgment. They are not self-correcting. If information that is incorrect is fed in, information that is incorrect will be fed out.

#### POSSIBLE SOLUTIONS

12. We lag several years behind in Australia in seeking to come to grips with these problems. In the United States significant legislation has already been introduced. In the United Kingdom a number of Committees have reported, notably the younger committee which comprised some seventeen Commissioners and had a large budget.

13. The possibilities for privacy protection are numerous. They include
- (a) a tort remedy such as was suggested in South Australia and in Tasmania but rejected as unsatisfactory;
  - (b) a watchdog committee remedy along the lines of the N.S.W. Privacy Committee : perhaps with more "teeth";
  - (c) specific legislation to cope with particular problems such as intrusions by the electronic media, telephone tapping and the like;
  - (d) voluntary restraint organisations such as the Press Council, the A.M.A. and so on.

- (c) educative and social change programmes: to promote new attitudes for privacy respect especially in those organs that are able to and inclined to intrude into privacy;
- (1) constitutional amendments. These would plainly be the last resort when one remembers the history of constitutional proposals in this country.

14. In 1975, the special Sydney branch of the Liberal Party suggested that the problem of privacy intrusion was so great in the modern age that a multi-pronged attack on the problem was warranted. It was suggested that the tort remedy as well as watchdog committees and specific legislation should be available to provide protection of privacy. I cannot at this stage say what the Commission will conclude. Obviously, we will have to carefully research recent developments, including developments on the continent of Europe. Practices and procedures may sometime be just as important in this area as legislation. Obviously, it will be important to enlist the support and assistance, and I might say enthusiasm of government officers in the project. Likewise, it will be important for the Commission to go out to the business community and other organisations such as the Civil Liberties movement, to procure ideas, personnel and submissions.

#### THE PROGRAMME

15. The Commission is at the moment engaged in the widest possible distribution of the Terms of Reference. They are being distributed widely with government circles, to the Media, within the Territories, to Civil Liberties organisations, to any body or person that is thought to have an interest in the question. Later we will advertise the Terms of Reference throughout the Commonwealth. This is an expensive business. I should prefer to do this after we have honed and fashioned some ideas that can be tested against public reaction.

16. The Commission has already said that it will not conduct this exercise in a back room. If the Australian Law Reform Commission has made a special contribution to law reform technique in Australia it is in its clear endeavour to secure public participation in its work. We have sat in all parts of Australia and will do so in this Reference. We will secure consultants from around the Commonwealth to take part in this truly national exercise. It is not a job just for lawyers. Some of the consultants will be sociologists. I have already seen Professor Encel and others and I am glad to have the opportunity at this Conference to meet Dr Wilson and a number of other participants outside the legal disciplines. I am conscious of the need to go out to special interest groups and to procure from them their ideas about privacy protection. I am aware that we cannot just expect neatly typed submission from all parts of the community. An obligation rests upon us to extract ideas appropriate to suggest an indigenous solution to this multi-faceted problem in Australia.

17. The first need of the Commission is for the appointment of the full-time Commissioners to assist me in this exercise and to give drive and direction to the project. It is an urgent project. We should and will aim to report to the present 30th Federal Parliament. I would hope that we could report upon the exercise in stages so that the momentum of public interest in and contribution to the exercise can be sustained.

18. The protection of privacy in modern Australia is a great challenge. One leading newspaper said, I do not believe with hyperbole, "For Privacy read Freedom". Civil Liberties organisations should reflect upon that assertion. They should so organise themselves that they and their members can vigorously assist us in this task.