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THE ROYAL INSTITUTE OF PUBLIC ADMINISTRATION

A.C.T. GROUP

CANBERRA, 28 APRIL 1976

LAW REFORM, PRIVACY AND PUBLIC ADMINISTRATION

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

THE LAW REFORM COMMISSION

1. I want to start by thanking Members of the A.C.T. Group for this invitation to address you at an important time in the life of the Law Reform Commission. We are concerned about similar problems. The reference on privacy which the Commission has just received throws us into closer contact. I propose to take the opportunity to tell you something about the Law Reform Commission of Australia, its work and the reference we have now received. I then propose to discuss with you some of the special implications of the reference that may be of particular interest to Members of the Group.

2. The Law Reform Commission Act was passed in 1973. The Bill was introduced into the Senate by the then Attorney-General, Senator Murphy. It established a Law Reform Commission for the Commonwealth for the first time. There had been numerous State commissions and even a commission in this Territory before 1973. Calls had been made, over the past decade especially, for a federal commission. Attempts were made by Senator Murphy to establish a commission in which the States would participate. For one reason or another, this proved impossible. Accordingly the Australian Commission was founded with responsibility to review laws within the competence of the Commonwealth Parliament. This included territorial laws. The attention of the Commission is drawn by the Act to the need to consider proposals for uniformity between the laws of the Territories and laws of the States.

An interesting provision was inserted in the Law Reform Commission Bill on the motion of Senator Greenwood. It is now s.7 of the Act. By this 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 Covenent on Civil and Political Rights. These are interesting and unusual provision for a Commonwealth statute. They provide a guiding principle which is always before the Commission, not least in the current exercise concerning privacy.

The Commission has been taking an active part in bringing together the fourteen law reform agencies in this part of the world. But this is a subsidiary function of the Commission and not its main task. Tl main 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 issue working papers, we hold public sittings and finally we report to Parliament

3. The basic rationale for Law Reform Commissions is that Parliamen are intensely busy and need assistance in matters that are either too techn: 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 majo exercise in the reform of defamation laws. The change of Government produc 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 questio

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 promis 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, upo

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 decisions

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, notedly 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.

(e) 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;

(f) 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 withi 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 this 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 ir 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 just a job for lawyers. Some of the consultants will be sociologists. Some will be computer scientists. I have already seen Professor Sol Encel, Professor of Sociology at the University of New South Wales. Yesterday I began my foray into the world of computers with a long conference with Dr. V.X. Gledhill, Head of the School of Computing Science at the Sydney Institute of Technology. We have written to experts and special interest groups in all parts of the country to enlist their personnel, ideas and suggestions. I have already sent copy of the terms of reference to all Permanent Heads in the Commonwealth Service and we are in the process of circulating the reference to Statutory Authorities, to secure their participation and help.

17. The point I wish to make is that we are conscious in the Law Reform Commission of the need to go out to the community to procure its ideas. There are, of course, problems in doing this. The problems are those of economy, the universality of the issue, the personnel available and the urgency of the task. We recognised that it will not be good enough just to enlist the "experts". Although their skills will be needed to understand the issues raised, experts and special interest groups do not have a mortgage on omniscience. Nor can we simply wait for neatly typed submissions from all parts of the community. Especially in a task such as this, going as it does to the nature of the future of Australian society, it is encumbent on the Law Reform Commission to procure the public's reaction and ideas. This requires the generation of debate upon the issue and the widest possible consultation in all parts of the Commonwealth. I recognize the obligation that rests upon us to extract ideas appropriate for the suggestion of an indigenous Australian solution to this multi-faceted problem.

18. The Commission's establishment at the moment is small. There are four busy part-time Commissioners. I am the only full-time Commissioner. The urgent need is for the appointment of full-time Commissioners to

assist me in this exercise, and to give drive and direction to the project. Such appointments are presently under consideration. The research staff of the Commission has already begun the task of accumulating material and points of contact in the multiple areas under reference. In advance of the formal document, I had written to Australian Embassies overseas. We are beginning to secure a great quantity of primary statutory and other material. The task of privacy protection has already begun in earnest in a number of countries. As I have said, we lag seriously behind in Australia. The object of the present exercise before the Commission will be to redress this balance. Depending upon the assistance which the Commission can procure from the community and the resources which the Government ascribes to the task, through the vehicle of the Commission, it would be my hope that we could report to the present, Thirtieth, Federal Parliament. I hold to the view that in an exercise such as this, the Commission should seek to fulfil the reference during the life of the Government which initiated it. I would also hope that we can report upon the exercise in stages so that the momentum of public interest and contribution to the exercise can be sustained.

PUBLIC ADMINISTRATION AND PRIVACY

19. Standing as I do, at the threshold of this exercise, it is neither proper nor desirable that I should attempt a rigorous consideration of the impact this reference will have on public administration in Australia. However, there should be no doubt about it : one purpose of the Commission's inquiry will be to change public service methods and attitudes. I agree with the view stated by Mr. A.W. Goldsworthy, now President of the Australian Computer Society, in his article "The Invasion of Privacy - Its Administrative Impact" (1974) 33 Public Administration p.19

> "The lack of discussion at the official level and the lack of initiative from the ministerial benches might ... be taken as evidence of a singular lack of appreciation on the part of Government advisers of the importance, and indeed even the existence, of the [problem of privacy and control of databanks]. Government officials should recognise the impact of these developments on their Departments and should be initiating appropriate action to deal with them. This must be preceded by adequate legislative provisions, as the controls required can only

20. Mr. Goldsworthy discerned a number of particular issues. They are inter-related. They raise questions concerning the conduct and organisation of Government Departments and their officers. They require consideration of machinery necessary to protect, enforce and even advance privacy in appropriate areas. Confidentiality of information is a matter of far greater concern today than it was in the day when the ignorant, uneducated citizen felt himself the helpless victim of the machinery of government. I believe citizens do care about the material held upon them. I believe they certainly should care about the use to which such material is put. Limitations on the use of material supplied to government may well be appropriate. The Census and Statistics Act already recognises this consideration. Former practice elsewhere in the Service plainly did not show such a tender concern. The access formerly allowed to the files of one Department only, the Department of Social Security, produced by the then Minister to the House of Representatives in November 1973, caused widespread and justifiable concern. Access had been granted for purposes including debt collection, police invesitgation and taxation inquiries. It is fair to say that following the revelation and in tune with the times, Governments generally and their departmental officers specifically, adopted a more sensitive stance. An inquiry was set up in connection with the Medibank computer. A Bill was introduced into the Parliament.

21. I am fully alive to the arguments that are put concerning the need for the free flow of information to assist governments in the task of ordering and organising an increasingly complex and interdependent society. The terms of reference require the Commission to strike a balance between protection of privacy and the community's interest in the development of knowledge and information. I know how frustrating it must be for well-meaning public servants to have the cry of privacy raised where all they seek is efficiency and the promotion of the Government's policy. I am afraid that the next few years, during this inquiry, will be trying times for public officers. This is the definition of the problems we face. It is not a simple problem. We are not doing battle with a plain evil. We are seeking to give efficient, enthusiastic public servants and others practical guidance about the extent to which their enthusiasm and efficiency can take them in intruding upon individual privacy. If we were dealing with men of ill-will, how much easier the task would be.

Views will differ about where the line may be drawn. What the Law Reform Commission is charged to do is to propose laws and other means to provide guidance and machinery to protect and reinforce the barriers drawn. As I have said before, on many occasions, the urgency of the problem is created in part by the enthusiasm for information and in part by the scientific developments which make intrusive enquiries and the collection of information so much easier than was formerly the case.

22. Although the Commission's brief is a wide one, there is two areas, related to the inquiry before it, that are not included. The first is the vital and difficult question of access to Government information The inter-relationship of the Privacy Act and the Freedom of Information Act in the United States promotes special problems for administrators. On 16 March 1976, the Prime Minister told the House of Representatives that the Government recognised the importance of freedom of access to information. He said "I believe that information ought to be accessible to the public to the greatest possible extent". In addition to giving directions to Ministers, the Interdepartmental Committee on this subject has been revived. Clearly there will be a need for the closest possible contact between this Committee and the Law Reform Commission.

23. The area of national security (and of Defence) has been excluded from the reference. The Government is at this time waiting for the report of Mr. Justice Hope. I recognise, of course, the validity of Mr. Goldsworthy's assertion that -

> "One of the most difficult aspects is to determine what files will be prescribed for reasons of national security. Care should be taken that this very legitimate reason is not taken as an excuse to spread a veil of secrecy over areas which could only reasonably be regarded as peripheral to national security". (ibid. 19)

Although the Commission is excluded from this area by the reference, it will be vital to delineate what <u>is</u> and what <u>is not</u> "a matter relating to national security" and into which we are excluded from enquiry. I am not ignorant of the concern voiced in some quarters, notably in the Public Service, about this subject. No doubt the Commission and the Australian community will receive guidance on this issue from Mr. Justice Hope's report.

24. This reference is a timely challenge. The challenge is there not only for the Law Reform Commission. Those engaged in public

administration in this country must contribute to the ideas that will resolve the tensions inherent in the reference. Where are the lines to be drawn? Where is the balance struck between protection of privacy and the spread of knowledge and information? Where are the barriers drawn between the citizen's privacy and law enforcement? It used to be said the Englishman's home is his castle. What is the Australian's metaphorical "home"? It is my hope that many of you here and administrators generally will come to our table and assist us to answer in a thoroughly practical and balanced way these questions which go to the nature of our society.