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AUSTRALIAN PSYCHOLOGICAL SOCIETY

SYDNEY BRANCH

5 MAY 1976

LAW REFORM, PRIVACY AND PSYCHOLOGY

The Hon. Mr. Justice M. D. Kirby

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

THE LAW REFORM COMMISSION

1. I want to start by thanking members of the Sydney Branch of the Australian Psychological Society for this invitation to address you at an important time in the life of the Law Reform Commission. The reference which the Commission has received on privacy will undoubtedly throw the Commission and Members of the Society together. Privacy is not just a matter of computers and Government machinery. It is, however elusive, a concept relevant to the psychology of man. The Commission will therefore be looking to you for assistance as it grasps the reference now given by the Attorney-General.

I propose to take this opportunity to tell you something about the Law Reform Commission of Australia, its work and the privacy reference. I then propose to discuss with you some of the special implications that may be of particular interest to Members of the Society.

2. The Law Reform Commission Act was passed in 1973. The Bill was introduced into the Senate by the then Attorney-General, Senator Murphy. I· 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 especiall: for a federal commission. Attempts were made by Senator Murphy to establisl a commission in which the States would participate. For one reason or anotl this proved impossible. Accordingly the Australian Commission was founded with responsibility to review laws within the competence of the Commonwealtl Parliament. This included territorial laws. The attention of the Commissi(is drawn by the Act to the need to consider proposals for uniformity betweei the laws of the Territories and laws of the States.

An interesting provision was inserted in the Law Reform Commiss: Bill on the motion of Senator Greenwood. It is now s.7 of the Act. By thi: 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

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. The 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 Parliaments are intensely busy and need assistance in matters that are either too technica 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 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 bee 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 beyon

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 Communicatio (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, 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 made it clear that this exercise will not be conducted "in a back room". If we have made any special contribution to law reform technique in Australia, it is in our clear endeavour to secure public participation in our work. The Commission has sat in all parts of Australia and will do so in this Reference. We propose to secure consultants from all parts of the Commonwealth to take part in this national exercise. Plainly it is not a job for lawyers only. Some of the consultants will be sociologists. Some will be computer scientists. Others will be political scientists. I hope to attract psychologists and psychiatrists to assist us. We have written to experts and special interest groups in all parts of the country to enlist their personnel, ideas and suggestions. Copy of the Terms of Reference has been sent to appropriate officers throughout the Commonwealth Public Service. In short, we start the exercise seeking the help of all.

17. There are problems in going out to the community to procure its ideas on an issue such as this. The problems include those of economy, the elusiveness of the issue, the personnel available and the urgency of the task. Neither experts nor special interest groups have a mortgage on omniscience in this area. Nor can the Law Reform Commission simply wait for neatly presented submissions. The obligation clearly falls upon us to elicit opinion and evidence from all parts of the Australian community. This requires the generation of debate upon the issue. There will be no escaping controversy and strong feelings.

PRIVACY AND PSYCHOLOGY

Westin's Categories:

18. There have been numerous attempts to define privacy. In the nineteenth century, it was enough for Judge Cooley to call it the "right to be let alone". Obviously, this is too sweeping a statement, at least for our modern society. The concept must be refined and particular attributes discerned, if definitions are to be of any use. Professor A.F. Westin, analysing the need felt by man for privacy, found it possible to identify four distinct facets:

Solitude: Necessary to permit a man to reflect upon his experience.

Intimacy: Relationships with family and friends necessary to permit deeper and more meaningful relationships.

Anonymity: Necessary to permit a man to exist outside the bounds of his historical developments, a sort of "retreat."

Reserve: Necessary to permit a man to withdraw from communication, when he feels the need to do so.

A recent Canadian study identified anonymity as the aspect of privacy most seriously threatened by the collection and storage of information. Other aspects are undermined by everyday features of modern social life. Even architecture and living arrangements are such that it becomes increasingly difficult for people to find privacy for solitude or intimacy.

Rationale:

19. In his essay "Some Psychological Aspects of Privacy" , Sidney Jourard explains that "...... the state of privacy is related to the act of concealment. Privacy is an 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".

20. I was told at a recent conference that privacy was simply the product of a double standard society. Remove hypocracy and there would be no need for privacy. It is my feeling that this superficially attractive assertion ignores recurrent and strongly felt human needs for retreat of the kind mentioned above. People do want to control the way in which others see them. They also often seek to control their own self-perception, not least to bring the latter into conformity with the standards of society and the law of the land.

21. It is in part because of the importance attached to perceptions of the "self-concealing person" that the developments of data banks, surveillance devices and like scientific machinery of intrusion, concern people. Perhaps we ought not to be concerned about other people seeing us "as we are". The fact remains, that nearly all members of society are so concerned. This fact creates, in modern society, the need for legal guidance and redress where the intrusion goes too far. That is in part what the Reference to the Law Reform Commission is about.

Problems:

22. I have already mentioned the intrusions into privacy by data banks, scientific development and so on. I have referred to the mere architecture of modern living. Although this may render intimacy and solitude less possible, perhaps anonymity is easier to secure in a modern metropolis than in a tribal village. These perceptions of the problem only begin to scratch the surface. Many will urge upon us a broader definition of "privacy" which go beyond information collection. In his recent paper "Privacy and the Therapeutic State : Beyond Bugging and Bedrooms", Dr. P.R. Wilson suggests that the debate has been too narrowly focused. He suggests that -

> "Privacy of information about oneself while terribly important, is less important than privacy of thought and privacy of action. If I cannot think what I wish to think and do what I wish to do, it is not very important that someone knows my credit history. Privacy of information may be a prerequisite to privacy of thought and action but for me, they do not determine the whole of privacy or even most of it. Privacy [is] inextricably bound up with concepts like autonomy, freedom and individualism".

23. From this base, Dr. Wilson attacks the therapeutic state with its increasing concern to control the private thoughts and conduct of individuals. Dr. Wilson's criticism of the Queensland Mental Health Act, 1974, is wellknown. Although it will be necessary to put a limit on the concept, and to concentrate upon the focus which the terms of reference give us, essays such as this do call our attention to wider implications of privacy protection than the control of computers and government files.

Practical Implications

24. A number of scattered implications for psychologists in the privacy debate may be mentioned. It has been pointed out, especially in the United States, that tender concern for privacy can inhibit research. It may be impossible to follow up research material because of embargos imposed by hospital, medical ethics and the like. Indeed, recent material even suggests that the strict application of rules to protect privacy

can limit what may be written down by a Consultant faced with a "disturbed" person. The law, which has always been rather generous in the protection it affords to its own practitioners, has never extended the same privacy to the communications between doctors and patients, confessor and congregation, and so on. The records of the medical and paramedical profession are always at risk to subpoena. But they are also under the threat of other intrusion. More and more, insurers seek and are given access to medical records, usually with the"permission"of the patient, without which "permission" claims will not be processed. The establishment of Medibank in Australia obviously poses the potential for further intrusion here. No doubt this is why the terms of reference cast a speicific obligation upon the Commission to examine this area of possible future privacy intrusion. I recognise that psychologists are concerned about the need for confidentiality and "private places". Jourard puts it well -

> "It appears that privacy is essential for the disclosure which illuminates a man's being-for-himself, changes his being-for-others and potentiates desirable growth of his personality. Since such healing encounters redound ultimately to the benefit of society at large, it is obvious that their privacy should be guaranteed. Hence, personal counsellors and psychotherapists should enjoy legally guaranteed "privileged communication" so that they might be safely trusted by those who need to disclose themselves for the sake of their health".

But this is only one aspect of the law's relationship with psychotherapy. Perhaps more troubling are the limits to be placed upon the duty of those treating "mentally disturbed" persons or otherwise helping them with their problems. The Tarasoff case in the California Supreme Court raised for decision the duty cast upon a doctor or psychotherapist to inform relatives, friends or the authorities if he has reason to believe that the patient may injure or kill another. The Chief Justice of California, Tobrinear C.J. said this -

> "A patient with a severe mental illness and dangerous proclivities may, in a given case, present a danger as serious as foreseeable as does the carrier of contageous disease or the driver whose condition or medication affects his ability to drive safely. ...

> Our current crowded and computerised society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of a therapist that his patient was lethal".

The court therefore held that the obligation existed to warn. Obviously this obligation is inconsistent with the privacy of the relationship. Such intrusions into the private relationship of therapist and patient already exists in statutes. They are, however, rare. Normally they are well defined and attached to particular diseases. The problem in the Tarasoff case is, shortly, two-fold. In the first place, the conditions giving rise to the obligation to impinge upon the patient's privacy are normally not so well defined nor as predictable as say, the existence of a venereal disease. One writer has called the Tarasoff obligation an exercise in the "foresight saga". The other problem posed by the Tarasoff ruling is that foreshadowed by Jourard. Unless patients can come to a "private place" where they can with impunity disclose their "concealed self" the chances of securing information necessary for therapy and assistance are diminished significantly. This fact is of increasing relevance in a society which seeks to put labels on condition and to reduce psychology and psychiatry to the same certainty and precision as the physician's art. No doubt it is the tendency of some psychiatrists and psychologists to adopt this mode that lead writers such as Jourard to talk of their functioning in the ..."commissar-like fashion". Paul Wilson said much the same thing. The point for present purposes is that the same precision and accuracy and foresight may not be possible in this area. To expect it is not only to undermine the chances of successful therapy. It is also to sacrifice the privacy of patients for little sure gain.

The Nature of Society

25. This brings me to my final observation. Dr. Wilson, in the same paper, drew attention to Bronfenbrenner's classic comparison of child rearing practices in America and in the Soviety Union. His book is "Two Worlds of Childhood". He found that Soviet society was strong on state paternalism and social control. But privacy was not cherished as keenly as in the United States. It was seen as a "bourgeois" custom that

could interfere with collective solidarity. It was part of the cult of individualism. American society, on the other hand, was relatively libertarian, with a high value on individual achievement and competition. Privacy was seen as a basic right of citizens.

26. Bronfenbrenner's findings suggested that children raised in Soviet society were much more considerate, showed more sympathy and concern for their fellows than their American equivalents. Conversely, children raised in American society were much less considerate and concerned and a lot more violent than their Soviet counterparts. However, they were more inquisitive and likely to challenge the system they were being raised in.

27. The Law Reform Commission does not overlook the implications of privacy for the nature and future of our society. There are, of course, social implications in this exercise which border on the political. Those who would support a society in which a premium was placed upon individualism and inventiveness, will no doubt put more store on individual privacy. Those who seek a planned and possibly less inventive society, will put less store on this value. We have, in Australia, a situation which is, hopefully, somewhere between the social consciousness of Bronfenbrenner's Soviet society and the unbridled freedom of his American society. It would, as Dr. Wilson says, be good if we in Australia could have and preserve "the best of both worlds". Obviously it will be important for the Commission to know just where the valuation of privacy is to be found in the Australian scale of values. Although it is unlikely that we will pursue a comprehensive survey modelled on the line of the Younger Committee's enquiry in England, we will need the assistance of psychologists and others in the social sciences to help us fix the mechanism of balance at a level appropriate to that desired for the Australian community. The strong reaction induced recently by the so-called "dole cheats" indicates that the tolerance to the privacy of "dropout" is not so well developed in this country as in the United States. What we in the Law Reform Commission will have to do in the present exercise is to discover just what Australians feel _is_ the value to be put on their privacy : in its multiple facets. When we discover this, we will be in a position to suggest reforms of the law to promote and protect that concept of privacy. It is my hope that in this investigation we can look to the Australian Psychological Society and its Members for constructive and imaginative assistance.

Articles

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