AUSTRALIAN PSYCHOLOGICAL SOCIETY

VICTORIAN BRANCH

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LAW REFORM AND MENTAL HEALTH

The Hon. Mr. Justice M.D. Kirby

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

LAW REFORM AND THE LAW REFORM COMMISSION

1. I want to start by thanking the Victorian Branch of the Australian Psychological Society for having invited me to address you briefly. Our meeting together comes at an important time. It coincides with increasing concern in the community that we should get right our approaches to the legal position of small and sometimes unpopular minorities who live amongst us. It is important in all things, not least in law reform, to keep one's balance. However, it is also important, in an age that has seen so many scientific miracles, that we retain a healthy scepticism about the possibilities of psychology and psychiatry. It is vital that the law retains a capacity to assert and protect the rights of individuals even against those whom, in the name of "treatment" and with the best of motives would impose limitations on the rights of fellow citizens.

2. The national Law Reform Commission, of which I am the Chairman, has received an important Reference from the Federal Government. It relates to the suggestion of new laws for the protection of privacy in Australia. Privacy is not just a matter of computers, surveillance devices and Government machinery. It is an elusive concept which is relevant to the psychology of man and to his assertion of individualism. The Commission is looking to members of the Australian Psychological Society, including those members in this Branch, who can assist it to grasp the Reference now given to it by the Attorney-General and to report in a practical fashion to the Federal Parliament.

3. 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 the A.C.T. 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 the 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 Covenant on Civil and Political Rights. These are interesting and unusual provisions 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.

THE PRIVACY REFERENCE

4. As I have said, the new Government's major reference to the Commission concerns privacy protection. All political parties in Australia are concerned at the growing intrusion into our lives of Government, business and others and the need to draw new lines appropriate for the modern age. It is heartening that such unanimity exists between the political parties in Australia on this question.

5. During the election campaign in 1975, the Prime Minister promised 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 repeated by the Governor-General who said that it was the intention of the Government upon receiving the Commission's report, to introduce appropriate legislation. A more specific commitment one could scarcely wish for.

6. The Reference was announced on 9 April 1976. Put broadly it requires the Commission to do two things. Our first task is to examine the Commonwealth Statute Book and ensure that present laws of the Commonwealth and of the Territories adequately accord with modern principles of privacy protection and respect. The second task, within the power given by the Constitution to the Commonwealth Parliament, will be to suggest appropriate changes in the law where undue intrusions into or interferences with privacy arise. One relationship specifically identified by the Attorney-General (in a Territorial context) is the confidential relationship between doctor and patient. The Commonwealth does not, of course, have general constitutional power to deal with this problem on a national basis. Each State has, as you will know, its own Mental Health law. Although the Commonwealth does have certain powers in relation to Social Security, its own plenary powers in respect of psychiatry and mental health are to be found in the Territories only.

THE PROBLEM AND POSSIBLE SOLUTIONS

7. This lack of general constitutional power to grasp the whole issue of privacy rights and privacy protection presents, of course, a formidable barrier against a total approach to the problem in this country. A second problem, the immediate cause of the Reference, is the inadequacy of present legal protection. There is, it is generally accepted, no general tort of privacy which can be enforced in the courts of Australia. There are specific Commonwealth and State Acts which give certain rights but no general protection is afforded in round terms. When to these problems and inadequacies are added the growing intrusive capacities of computers and the other devices of modern science, the need to wrench the law into the 20th Century can be plainly seen. 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.

8. 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 by the Upper House in each State.

(b) a watchdog committee remedy along the lines of the N.S.W. Privacy Committee : perhaps with more "teeth". Possibly one of the members of the proposed Federal Human Rights Commission should be a Privacy Commissioner with specific power to deal with complaints about intrusion into privacy at a federal level.

(c) specific legislation to cope with particular problems such as intrusions by the electronic media, telephone tapping, enforced medical treatment 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.

THE PROGRAMME

9. The Commission is at the moment engaged in the widest possible consultation about its terms of reference. In a sense that is why I am here tonight. An Issues Paper is being prepared which sets out the problems and some tentative solutions. After this has been widely distributed, public sittings will be held. We prefer to take this course after we have honed and fashioned some ideas of our own that can be tested against public and expert opinion.

10. The Commission has made it clear that this exercise will not be conducted "in the 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. Copies of the terms of reference have been sent to appropriate officers throughout the Commonwealth Public Service. In short, we conduct our exercise, seeking the help of all.

11. 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.

12. If we look at privacy and the law historically a picture of expanding concerns emerges. Originally the law of trespass was constructed to protect the privacy of the person and his property against uninvited invasion. Invasions by a neighbour gave rise to an action of nuisance. Then the law developed protections of a more subtle kind to safeguard reputation by actions on the case. Confidential information was afforded some protection by the common law. In this Century specific statutes have been developed to protect man's privacy from the new invasions of the telephone, surveillance devices, listening devices and so on. The information explosion and the computer dimension add a new urgency to the need to protect the circle of integrity around the private area of man. What is this area? How far should the Law Reform Commission push its legal boundaries?

PRIVACY AND PSYCHOLOGY

Westin's Categories

13. 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 the 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

14. 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".

15. I was told at a Civil Liberties Conference last year that privacy was simply the product of a double standard society. Remove hypocrisy 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.

16. It is in part because of the importance attached to perceptions of the "self-concealing person" that the developments of data banks, surveillan 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 redres where the intrusion goes too far. That is in part what the Reference to the Law Reform Commission is about.

Problems

17. I have already mentioned the intrusions into privacy by data banks, scientific developments 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".

18. 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 well known. 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.

19. Dr. Wilson's concept of privacy is such that he would clearly intend the Commission to embrace, under its banner, many important issues of mental health reform. He would broaden the perspective of "the right to be let alone" to the much broader "right ... to go to hell in your own way provided other people or their property are not hurt in the process". He suggest that the right to one's own thought processes, no matter how unusual, may also be protected by the right of privacy.

In his paper, Dr. Wilson draws attention to the well known distinction between treatment that is "desirable for the individual's self realisatic and treatment "which is considered necessary (either rightly or wrongly) for the preservation of conformity and social order". He asserts that this

distinction may have a profound influence upon the privacy of the individual. The problem he foresees in the efforts of the therapeutic state, he illustrates by research concerning the prediction of violence in children by means of psychological and psychiatric tests. For every accurat psychiatric prediction of violence, he says, there are between a hundred and two hundred incorrect ones.

We hear much nowadays about the "right to life". Dr. Paul Wilson calls attention to the obverse, the so called right to end one's life which he asserts to be a privacy value.

If Dr. Wilson's approach to "privacy" is correct, then its borders are almost limitless and certainly embrace many aspects of mental health reform. He particularly draws attention to the case of elderly people who are denied their "privacy" by being locked away, because of "quaint but socially harmless behaviour". He refers to the large numbers of our citizens who are compulsorily committed to mental institutions because they hold "private thoughts and ideas about the world, at variance with what are defined as "normal" thoughts". He would group juvenile delinquents, public drunks and many others labelled as "deviant" as a class of our citizens who are "denied privacy of thought and action and due process of law because of the intervention of the agencies of the therapeutic state".

Now, many (even if they do not accept all of Dr. Wilson's claims) will have some sympathy for his approach. But is this really a "privacy" question? Admittedly any categorization of social problems is bound to involve artificiality and inconsistencies. Nevertheless, there may be very good practical reasons for avoiding the danger of making "privacy" a trendy band wagon upon which we can all ride to the solution of every conceived social ill. It seems to me, and it has seemed to the Commission that however important may be the reform of laws relating to mental health and the rights of the so called mentally disturbed, these are discreet issues which require special attention. They ought not to be swept along in the periphery of an exercise which has another focus.

MENTAL HEALTH LAW REFORM

20. In considering the broad domain of mental health, Eric Fromm provides criteria for the discussion of issues of mental health law reform.

> "The criterion of mental health is not one of individual adjustment to a given social order, but a universal one, valid for all men, of giving a satisfactory answer to the problem of human existence".

There have been many inquiries in this country and overseas which have addressed themselves to suggesting "satisfactory answers". A major

inquiry is, as I have said, current in South Australia. What is the dimension of the problem in Australia?

> "About 68,000 people enter Australian mental hospitals every year. Legal protection for all of them is skimpy; and for 25 - 30% committed as involuntary patients, is negligible". E. Wynhausen "People With Few Rights" *National Times* April 19, 1976 p.34.

21. Why do we, who pride ourselves upon a criminal justice system that would rather have a hundred guilty men go free than one innocent convicted, tolerate such a state of affairs, with apparent resignation? One reason is that the procedure for processing the mentally disturbed is part of the civil process and not of the administration of criminal justice. Another reason is that the conduct of supervision is perceived as "treatment" by "experts" not punishment by authority. Although welfare officers and the police can initiate proceedings to have a person committed involuntarily to a mental institution, it is usually a medical practitioner who fills in the form that initiates the machinery. In New South Wales, the relevant certificate under the *Mental Health Act 1959* requires the conclusion that the subject is mentally ill i.e., "a person who owing to mental illness requires care, treatment or control for his own good or in the public interest and is for the time being incapable of managing himself or his affairs". As Professor K.O. Shatwell, past Dean of the Sydney Law School says, this definition is "so vague and inprecise as to reduce the grounds of committal to the level of a pure value judgment". We would not tolerate reposing such a discretion in the other instruments of authority in our community. Imagine the outcry if the criterion for police imprisonment was nothing more than a perceived need for incarceration of a subject "for his own good or in the public interest". Yet this criterion is meekly accepted in the area of mental health where the resulting loss of liberty is no less painful. The first priority in the reform of laws relating to mental health will clearly lie in re-examining the definition of "mental disorder" and the machinery to deal with its oppressive aspects.

A pilot scheme to safeguard the legal rights of involuntary mental patients was designed to commence at the Rozelle Hospital in Sydney in January 1977. The scheme will provide involuntary patients with free legal representation at the committal proceedings. Three people will be involved: a lawyer, social worker and office assistant. The hearings are to be held within a week of the patient's entering hospital. Safeguards of this kind need to be introduced into compulsory admission procedures.

22. If it is assumed that a patient is properly detained for his own safety or for the safety of the community, it does not necessarily follow

that he is unable to make valid judgments about the treatment that is suitable for him or acceptable to him. Safeguards must be imported to ensure that the patient, where appropriate, and his family, should be consulted about "treatment" particularly where this is controversial, painful or irreversible. Operations on the brain, sterilization, aversion and behaviour therapy and electro-compulsive treatment all involve controversy. Appropriate means of introducing community superintendence over these decisions must be found. It is surely not unreasonable to provide for independent consultation before hazardous, painful or irreversible treatment is given.

23. None of the proposals mentioned above is revolutionary. The law constantly faces situations of conflict where "safety checks" are constructed to provide limits of coercive authority, rights and privileges to individuals and those close to them and standards that will be a guide for all. In the Law Reform Commission's Working Paper on *Human Tissue Transplants* the Commission has been at pains to cope with the conflict situation that could arise between the interests of a doctor treating a potential transplant donor and the concerns of medical practitioners treating those who will live if they receive a vital organ. Likewise, decisions as to when a person is "dead" ought not, in the Commission's view, to be simply left at large for the judgment of a medical practitioner. Vital matters of life and death require clear guidance to the medical profession on the part of the law Anything less is unfair to the medical profession, indeed to all our citizens.

24. But liberty is another vital matter in which the law has traditionally concerned itself. The Law Reform Commission's report on *Criminal Investigation*, which is to be implemented this year, sought to chart a course between the needs of order and the supression of crime, on the one hand, and the rights of the individual, when accused on the other. Many of the procedures of balance suggested by the Commission could be relevant to the reform of mental health laws. True it is, that we have come a long way since the Lunacy Acts. But I believe we have only just begun the reform of mental health laws and that much remains to be done. The participation of the members of this Society in the promotion of ideas for reform, can be the starting point for a fresh look at the rights of the mentally ill. This is not a matter of tender concern for a troublesome, nuisance section of our society. It is a matter that goes to the nature of our society, its tolerance of individual difference and the answers it gives "to the problem of human existence". It is a matter that may come in time to the Law Reform Commission for its consideration.