THE SECOND SYMPOSIUM ON LAW AND JUSTICE

IN THE AUSTRALIAN CAPITAL TERRITORY

SATURDAY, 26 MARCH 1977

FREEDOM OF INFORMATION Vs. PRIVACY

Hon Justice M D Kirby

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ABSTRACT

The Law Reform Commission has received a comprehensive Reference from the Commonwealth Attorney-General to propose laws, at a Commonwealth level, for the protection of privacy. At the same time, the Attorney-General has announced the intention to introduce legislation to provide a statutory right of access to Government information. He has also announced an intention to establish a Human Rights Commission.

This paper evaluates these important Australian developments against the background of earlier enactments in this country, notably the Ombudsman Act and the Administrative Appeals Tribunal Act. It also scrutinizes them against overseas moves for privacy protection and for freedom of information. Legislation or proposed legislation in the United States, the United Kingdom, Canada and New Zealand is examined.

Because neither privacy nor freedom of information are absolute values and because one man's desire for information may impinge upon another's desire for privacy, some mechanism for resolving differences is needed. The paper argues that the demand for access to information about oneself held by Government is a privacy concern. The demand for information relevant to the general workings of Government is the proper concern of freedom of information principles.

Various possibilities for evaluating conflicting claims are explored. The paper argues strongly for a uniform, simple and if possible single authority to determine privacy issues, so that a consistent approach can be taken to the protection of privacy in the Commonwealth. It argues against the development of a separate approach to privacy in the Government sector and urges that both privacy and freedom of information should be seen in the context of the wider movement for the protection of human rights in Australia.

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

"Confusion is frequently effected by the use of the label of privacy to cover the oppositive of secrecy, the movement for "freedom of information". There is a relationship between privacy and freedom of information but ... there is certainly no identity. The essence of the one is publicity, which is anathema to the other ... Freedom of information relates to governmental actions. Here the invasion if any is not of privacy but solely of secrecy".

P.B. Kurland, *The Private I*

A NEW DEBATE

We stand, in Australia, at the threshold of major developments in the protection of human rights. These are part of an international movement which gained momentum after the last War and from which Australia will not be quarantined. The movement is also, no doubt, a reaction to local developments. These include higher standards of education, improved means of mass communication and a growing feeling of alienation from society on the part of the individual. Happily, the developments have a substantially bipartisan quality. This promises their continuance. The *Law Reform Commission Act 1973* and the *Administrative Appeals Tribunal Act, 1975* were passed during the Labor Government. The *Ombudsman Act 1976* was substantially the provision proposed by that Government. New, major initiatives of the present Government are about to face Parliamentary and public scrutiny. Sometimes, approaches differ. The *Human Rights Bill 1973* is not to be proceeded with. Instead a Human Rights Commission is to be established.[1] It will provide local machinery for the protection of certain human rights. The precise organization and functions of the Commission have not yet been spelt out. But prompt legislation is promised.[2]

Laws are also foreshadowed which will be designed to improve and control fair procedures in Administrative Tribunals and to simplify judicial review of administrative decisions.[3] These developments represent major reforms. They will affect particularly the citizen's relationships with Government and authority and assume great significance as the role of Government and authority increases.

Experience teaches that human rights sometimes conflict. This is particularly so where the values involved are ill-defined or disparate. It is especially so where the concepts to be protected are evaluative[4] i.e. involve a weighing of interests. The battle between the claim for legal protection of privacy and for legally enforceable freedom of information from Government illustrates the problem acutely. The interface of these values poses, what one American author frankly describes as "the civil libertarian's dilemma".[5] This is not a contest between good and evil. It is a contest between competing "goods". Machinery must be provided to resolve the contest. The issue cannot be long delayed in Australia. One of the most important initiatives promised by the Government is the introduction of legislation on privacy protection.[6] It has also undertaken to introduce legislation providing for freedom of information, i.e. the supply, where requested, of information in the possession of the Government and its agencies.

The Law Reform Commission has been assigned an important role to assist the Parliament in suggesting laws for the protection of privacy in Australia.[7] This exercise runs parallel to the Government's promise of legislation on access to Government information. It is therefore most timely to review the debate on these issues. Only some of the issues can be raised. No final views can be stated. The opinions expressed are my own.

AUSTRALIA'S FREEDOM OF INFORMATION DEBATE

The First Interdepartmental Committee

The traditional British way of doing the business of Government was inherited in Australia. It was, essentially, a somewhat "secretive", authoritative, elitist way.[8] Protected by this tradition and by legislation guarding "official secrets", information when requested by a person could be refused.[9] It might be supplied. But there was generally speaking no statutory duty to give it nor any "right" to enforce supply of it where the Executive declined to hand it over.[10]

No country gives a total right of access to all Government documents. But there has been a growing realisation in the last decade that the free flow of information from a Government to its citizens is "the life blood of democracy".[11] The recent Royal Commission on Australian Government Administration said that openness of access to information "promotes an aware and participatory democracy".[12] Much the same assertion had been made at the birth of the American Republic. James Madison who introduced the first amendment to the United States Constitution put it this way -

> "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And the people who mean to be their own governors, must arm themselves with the power, which knowledge gives".[13]

In January 1973 following the change of Government the new Commonwealth Attorney-General, Senator Murphy, announced that the Cabinet had authorised him to prepare legislation to provide public access to documents in the possession of Government.[14] As a result of this Cabinet decision, an Interdepartmental Committee was established. Its purpose was to report on any modifications that should be made to the United States system, developed for this purpose. The result of the Committee's work is to be found in a report which was tabled in the Parliament in September 1974. No legislation was ever presented to enact the proposals contained in the report.

The report noted that there were special features of the Australian constitutional and administrative structure that distinguished it significantly from its United States counterparts. In particular, emphasis was laid upon Cabinet Government, the need to protect Cabinet discussions and to maintain the authority of Ministers over the departments for which they are constitutionally responsible.

The report came in for much criticism. Senator Missen described it as "hopeless".[15] In particular, he criticised its failure to acknowledge important amendments to the United States legislation which had significantly improved the operation of the United States Act. Generally speaking the criticism stressed the tendency of the report to allow wide categories of exemption from supply of requested information.

Following the 1975 election, in March 1976 the Prime Minister, in answer to a parliamentary question, stressed the importance which his Government attached to freedom of information. In April 1976 the Attorney-

eral, at the request of the Prime Minister, convened a new Inter-departmental Committee to revive the 1974 report and to report again to the Parliament on this question.

The Second Interdepartmental Committee

The stated function of the 1976 Committee was to study and report to the Attorney-General on policy proposals for freedom of information legislation. It was to take into account the first report, the implications of amendments to the United States *Freedom of Information Act* not dealt with in that report and other matters deemed relevant. One matter which the Committee did take into account was a Bill attached to a minority report of the Royal Commission on Australian Government Administration.[16] That Bill did not secure the endorsement or recommendation of the majority of that Royal Commission. Nevertheless, the majority urged "greater openness and freedom of access to information about governmental processes".

Not surprisingly, the Committee perceived its task to be one of balancing competing public interests, as the Committee saw them. It noted the public interest in openness. But it pointed out that this particular interest is sometimes outweighed by other public interests. Specific examples were cited. Eleven categories of exclusion were spelt out. One of them[17] is especially relevant to this paper. It was:-

> "10. Documents the disclosure of which would -
>
> (a) Constitute an unreasonable invasion of personal privacy".[18]

This exclusion repeated, in terms, an exclusion that had been proposed in the 1974 report.[19] It reflected no idiosyncratic aberration on the part of the Committee. The United States Senate Committee on the Judiciary had pointed to the necessity for Government, whilst promoting the value of access to government information, to also:-

> "protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records".[20]

Because, normally speaking, a person cannot have "privacy" protection against himself, the exemption proposed by the I.D.C. was recognized as one which would not of itself prevent a person from obtaining access to a file having information about himself. That could not amount to "an unreasonable invasion of personal privacy". Nevertheless, the report suggested that access to such personal, private information might nevertheless be excluded by another head of exemption. It also proposed that, to cover the possible damage that could be done by access to a person's

a file in respect of information of a medical nature, a discretion should be allowed to make medical or "psychiatric information" concerning a person available only to a medical practitioner nominated by him and not directly to the person himself.[21] This was advanced as an "interim measure"[22] pending the report of the Law Reform Commission on the protection of privacy. It was based on the premise that in some cases harm to the person might properly override the interest in access to information. It was not based on protection of privacy.

The Promise of Legislation

The Commonwealth Attorney-General, Mr. Ellicott, tabled this 1976 report in the House of Representatives on 9 December 1976. He stated that the Government had authorised him to prepare legislation for freedom of information.[23] He said that a Bill would be introduced in the autumn sittings of the Parliament in 1977. It would not necessarily reflect the proposals put forward in the report. The intention of the Government would be that the Bill would lie on the table for a reasonable period to secure public comment before the final shape of the legislation was settled. The Attorney-General repeated the importance attached to freedom of information in democracy. It is a vital element in making governments accountable to the electorate. Nevertheless, he recognized that there would be a need to balance this value against the protection of other values, where appropriate.[24] One such other value is clearly the protection of personal privacy.

There has not as yet been a great deal of public discussion of the 1976 report. One sceptical columnist reviewed the "melancholy" history of the Australian quest for a freedom of information Act. He criticised the wide categories of exemption proposed and concluded pungently -

> "Reason tells one that to invite a bunch of public servants to review the secrecy surrounding their own service is tantamount to asking a gang of poachers to re-write the game keeping laws".[25]

PRIVACY IN AUSTRALIA

Present Protections

Given that the introduction of freedom of information legislation will pose occasional threats to individual privacy unless restrained in some way, it is necessary to consider what machinery exists or should exist, to exert this restraint. There is no general right to privacy recognized as such by Australian law. No constitutional cases assert such a right. Furthermore the High Court of Australia rejected an attempt to

develop a tort of privacy along United States lines.[26] There are of course particular torts which are relevant. These include trespass, defamation, nuisance and so on. Equity can intervene to restrain certain breaches of confidence and the use of material obtained thereby. Specific legislation exists prohibiting telephone interceptions.[27] Legislation exists in a number of States to prohibit or control the use of listening devices.[28] The only comprehensive legislation to protect privacy is the *Privacy Committee Act, 1975* (N.S.W.) which sets up a Statutory Committee with functions including the function to receive and investigate complaints concerning invasions of privacy. The Committee's jurisdiction is limited to New South Wales. It has no coercive powers.

The *Human Rights Bill 1973* sought to secure Parliamentary approval for the ratification by Australia of the International Covenant on Civil and Political Rights. Article 17 of that Covenant prohibits "arbitrary or unlawful interference with ... privacy". The Bill repeated this prohibition in clause 19(1). It provided certain machinery for enforcement. Principally an Australian Human Rights Commissioner was provided for.[29] The Bill was never passed. No Commissioner has been appointed. There is as yet no comprehensive protection for privacy in the Commonwealth's sphere, beyond certain limited specific legislation and the self-discipline of "good manners" or "fair play". Though important in practice, considerations such as these are not legally enforceable when a dispute arises.

References to the Law Reform Commission

During the 1975 election, the Prime Minister announced that if the present Government was returned, the Law Reform Commission would be asked to suggest laws for the protection of individual privacy in Australia.[30] In announcing the Government's legislative programme in 1976, the Governor-General indicated that the Reference would be given to the Commission and that, upon receipt of the Commission's report, the Government would introduce "appropriate legislation" to protect privacy. On 9 April 1976, the Commonwealth Attorney-General gave the Commission a Reference concerning privacy. It is expressed in the widestpossible terms. The Commission is asked to enquire into and report upon the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of the Commonwealth or the Territories. In making its enquiry and report, the Commission is specifically directed to address its attention to the subject of this paper. The Terms of Reference require the Commission to:-

> "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".

The Commission subsequently[31] received a Reference from the Attorney-General for a comprehensive review of defamation law and practice. Work on these two References is proceeding. A Working Paper and Discussion Paper on Defamation have been produced. These foreshadow specific, separate treatment for privacy. A paper outlining the issues for the protection of privacy is shortly to be published.

The coincidence of these developments is a happy one because, whilst freedom of information pulls in the direction of openness and access to Government material, privacy protection may require limits to be placed upon access to and supply of such information. The values may be in competition. The competing claims will not simply go away. Some people will claim access to information, in the name of that "freedom". Others will object to supply it in the name of "privacy". Machinery will be needed to define each "right", to weigh the competing claims and to determine them, with authority.

THE AREAS OF CONFLICT AND COMPETITION

Freedom of Information v. Privacy

If, as it seems to me, "privacy" is not an absolute but a qualified "right" bearing a connection with being an individual, a person not an object or "an aspect of being human",[32] a different interest is involved than in the claim for freedom of information. It is a value which is sought for the achievement of other ends. These ends are essentially bound up, as has been said, in the efficient operation of the democratic process. The two values may coalesce. On occasions they may compete. Governments may have an interest in openness and in giving access to information. By way of contrast, individuals may have an interest in maintaining their privacy. Governments may in some cases wish individuals not to have access to some information. In some cases the interest in openness and access will be superseded by the Government's interest in secrecy. Reports on the subject including the Australian reports seek to delineate the proper areas of this secrecy. The common factor is the concern to protect Government or Government organs. The exclusion for privacy is different in kind. Its concern is principally with the individual in society. The privacy of an individual affects him directly as a person and only secondarily does it affect society as a whole. Privacy is relevant in a number of ways to the practical operation of any freedom of information legislation. This will be true whatever form such legislation may take. Some privacy considerations are clear. For example a claim by one person to access to Government information which contains highly private and personal material about another person clearly raises a conflict of values. Other cases are not so clear but may raise considerations of privacy that have to be accommodated if freedom

information legislation is introduced. Recognition of this dual aspect of privacy is vital for designing the machinery to protect it.

Access to Information Relating to Third Persons

At least until now, Governments have not organized their collection of information neatly into files dealing with, and only with, each individual in society. It is difficult to imagine that any such arrangement of material would ever be feasible. Much information contained about individuals is held in files that refer to other persons. Sometimes such information may be of a highly personal or "private" character. For this reason, it may be thoroughly undesirable to grant indiscriminate access to an entire file, simply because it contains information that another person wants to see. This may even be so if it also contains matter that is relevant to or concerns the applicant. To do so may be to invade the privacy of another. There may well be instances arising in the context of freedom of information where A will seek access to documents relating to himself. He may be denied access because to grant it, would involve an unwarranted invasion of the privacy of B. In some cases it may be perfectly feasible to sort out the discrete areas and supply them separately. In other cases this will not be possible. This may be because B could be easily identified or because the cost of removing highly private references may be prohibitive. It may be proper to deny access, in such a case, especially without the consent of B. Clearly, a mechanism will be needed so that decisions concerning the content of privacy, the discrimination of material and the conflict of claims can be settled. The economics of any such scheme will plainly need to be investigated. A large staff might be necessary to expunge names, examine and differentiate material and judge every claim for access made in the name of freedom of information. From the point of view of society idle curiosity may be out-weighed by the competing public interest in efficiency and a fair use of resources.[33] On the other hand, one would not want to see the movement to greater openness in government and access to information impeded, simply because a person's name appeared in a government file and his privacy was remotely impinged on by allowing access to it.

Access to Information Relating to Oneself

"Privacy" has positive and negative aspects. Put negatively, it has been characterized, very broadly, as the "right to be let alone".[34] Protecting it may involve preventing intrusions, whether physical or electronic upon the person or property of the subject.

In the age of data banks, computers and the passion for information, privacy takes on what I would characterize as a more positive aspect. This is the desire of an individual to control information that is compiled

out him and to have access to that information and some say in its dissemination. In his essay *Some Psychological Aspects of Privacy*, Sidney Jourard explains how one particular "freedom of information" right, i.e. access to government-held information about oneself is in truth a privacy right:-

> "...the state of privacy is related to the act of concealment. Privacy is the 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.*[35]

In times gone by, the threats to privacy arose from frank physical intrusions. Such invasions of privacy still exist. But nowadays, the greater threat to privacy is the accumulation of information about people, available to others to which the subject may have no right of access. It is on this basis that freedom of information, meaning access to information, may overlap the positive aspect of privacy protection. If you can have access to information about yourself, check it, remove it in some cases and correct it when it is wrong, you have a most powerful weapon to protect your privacy. This is privacy not used as a shield, to protect another from the inquisitiveness of the applicant for government-held information. It is privacy used as a sword by which the applicant may seek to protect and assert his own personal interests from the inquisitiveness of government and of others alike.

Of course views will differ about how these different aspects of privacy should be protected. Some would say that the latter kind of privacy "control" should be included in freedom of information legislation: i.e. freedom of access to information about oneself. But I should prefer to see this aspect of privacy protection to be dealt with as part and parcel of general privacy protection legislation. There should not be different approaches to protecting an applicant's own privacy and protecting the privacy of third parties against an applicant's inquiry. Most of those who write about protecting privacy stress the need to fashion sensitive not clumsy or ill-focussed protections. A common doctrine (and, if possible, common machinery) should be developed. This is the way the matter has been approached in the United States. The *Freedom of Information Act* has its focus on the government's interests in providing access or denying it for reasons of secrecy. The *Privacy Act* has its focus on the rights of

individuals to control information held by government about them. Clearly this class is a very large and important area of the matter now before the Law Reform Commission. An examination of the contents and operation of the United States' *Privacy Act* reveals just how important the class is.

MACHINERY FOR RESOLUTION OF THE CONFLICTING VALUES:

The United States

The United States *Freedom of Information Act* developed from the *Administrative Procedures Act* 1946. Freedom of information legislation came into being in 1966. It was amended in 1967 to ensure that access to Government information was a person's prima facie right. Before this amendment, it was necessary for an individual to show a special interest in obtaining information from an agency. Since 1967 there have been two series of amendments. The latest amendments will not take effect until 30 March 1977.[36] Put broadly, the United States *Freedom of Information Act* gives an individual a right to have access to Government documents except those falling within nine categories of exemption that are specified in the legislation.[37]

In 1974, the United States Congress passed the *Privacy Act, 1974*. This Act provides the minimum standards for the collection of processing of personal information by federal agencies. Under the Act, federal agencies are required to permit an individual to examine records pertaining to him and to correct or amend those records. This can be done through the mail. Agencies are required to respond to an enquiry within 30 days in some cases. Agencies are under a general duty to ensure accuracy, up to dateness and security of records. They are also to limit record keeping activities to "necessary" and "lawful" purposes.[38] They are subject to civil suits for wilful or intentional violations of an individual's rights under the *Privacy Act*.

Personal records may be used for all purposes compatible with the purpose for which the records were originally collected. Access to personal records can be granted to other agencies, in connection with law enforcement and like activity under prescribed conditions. Access may be permitted to individuals where the health and safety of an individual is involved. Otherwise, unless an individual gives his consent, agencies may not disclose personal records to any one other than officers within the agency that collected them. Personal information may be released for statistical purposes, provided the individual's identity is not disclosed.

Each agency is required to keep a log of all access to personal information. This record is to be made available to the individual when his records have been disclosed. In addition, if a correction has been

made to a record after it has been released, the agency must notify the person to whom the uncorrected record was released. When individual's are asked to provide personal information, they must be informed of the authority supporting the request, the purpose for collecting the information, the uses to which the information will be put and the legal implications, if any, of not providing the requested information.

It is worthy of note that the United States legislation on freedom of information and on privacy draws the distinction mentioned above:-

(a) Access to information about the subject himself is a privacy right, dealt with under the *Privacy Act*;

(b) Access to other information in the hands of government is a freedom of information right, dealt with under the *Freedom of Information Act*.

How do these two Acts work together? The *Freedom of Information Act* provides a special privacy exemption from disclosure requirements, namely (b) (6). This protects information, the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy". A provision in the *Privacy Act* exempts agencies which are asked to disclose information under the *Freedom of Information Act*, from the obligation to obtain the written consent of the subject of the data, prior to dissemination. The aim of this is to prevent frustration of legitimate requests under the *Freedom of Information Act*. The absence of a requirement to seek the individual's consent has attracted some criticism on the basis that it affords too little protection for privacy.[39] The fear is stated that for reasons of indifference, expense and inconvenience, Government agencies cannot be depended upon to assert individual privacy interests vigorously enough. Applications under the *Freedom of Information Act* are also exempted by the *Privacy Act* from the requirement to keep an account of movements of the file. There are other exemptions from the *Privacy Act* requirements for those applications for access to Government information which come under the *Freedom of Information Act*.

These examples are plainly motivated by the desire to prevent circumvention of the *Freedom of Information Act* by excessive or spurious claims made on behalf of the privacy of individuals. Nevertheless, the fear has been widely voiced in the United States that the balance in the relationship between the two Acts has been struck too much in favour of freedom of information, with too little protection for individual privacy. Although the *Privacy Act* provides that exemptions under the *Freedom of Information Act* should not be used to block access to information under the former Act, there are instances where the Government may rely upon exemptions to deny

access, not because of privacy but in the interests of Government secrecy.

Put broadly, the exemptions under the *Freedom of Information Act* suggest that in the balancing process in the United States, the scales are weighed in favour of freedom of information, at the expense of legislative privacy protection. It must be remembered however that both Acts are superimposed upon constitutional, common law and attitudinal protections for privacy which have a long tradition in the United States, but not in Australia. The legislative machinery provided includes criminal fines and civil damages as well as injunctive relief. The federal district courts provide the venue for evaluating competing claims. Although it was proposed in Congress that a Federal Privacy Board should be established, this idea was not incorporated in the legislation. Instead a Privacy Protection Study Commission was set up, empowered to study agency information practices and to recommend changes in the *Privacy Act*. Some authors have regretted the failure to establish an administrative board:-

> "A Federal Privacy Board has definite advantages, for it could reduce the case-load burden on the District Courts, promote uniformity by promulgating regulations implementing the Act for all agencies and reduce the possibility of infractions of the *Privacy Act* by conducting on-site audits of agency information systems and files. The Board also could be charged with the administration of the *Freedom of Information Act* thereby providing oversight of the interaction between the *Privacy Act* and the *Freedom of Information Act*".[40]

The only explanation for the failure to set up the Board was a reluctance to establish "yet another federal bureaucracy" and the grounds of cost.[41]

Great Britain

As in Australia, there is no general right of privacy in Britain. Nor is there any right of access to Government information. The *Official Secrets Act, 1911* provides in s. 2 that an offence is committed by a person who:-

> "Having in his possession any information which he has obtained owing to his position as a person who holds office under Her Majesty or under a contract on behalf of Her Majesty, communicates the information to any person other than a person to whom he is authorized to communicate it".[42]

The Franks Committee recommended that information, the disclosure of which would cause exceptionally grave damage or serious injury to the interests of the nation should be protected by the criminal law. Information whose disclosure was merely prejudicial or undesirable did not need such criminal sanctions. The Committee, however, felt that the general subject of "open Government" was beyond its Terms of Reference.[43]

In October 1974, the manifesto of the Labor Government in Britain promised to "replace the *Official Secrets Act* by a measure to put the burden on public authorities to justify withholding information". The unsatisfactory state of the present law and practice was thrown up by the Crossman Diaries episode and the persistent leakage of Government information which is endemic nowadays in a system where official secrecy is the rule rather than the exception.[44] There is, as yet, neither freedom of information legislation nor privacy legislation in Britain. Recently, the relevant United Kingdom Minister, Mr. Rees, announced the Government's intention to amend the *Official Secrets Act*.[45] The proposed amendments have excited comment in the United Kingdom but not, as yet, legislation.

Parallel to these developments was the report of the Younger Committee on privacy. The Committee recommended against the creation of a general tort of privacy that could be enforced in the courts.[46] Meanwhile, an All Party Committee on Freedom of Information was set up by the House of Commons. The Committee prepared a Bill which seeks to confer six major civil rights upon citizens and persons resident in the United Kingdom. Freedom of information or "the right to know" is a value which it describes as a "basic civil right".[47] Dealing with privacy, it is recognized that this should be an exception to the general rule concerning access:-

> "One of the most major exceptions to freedom of information is the concept of privacy. Individual privacy is one of our most cherished British possessions. An Englishman's home is his castle. The traditional response to a question that infringes on personal privacy is "mind your own business". This principle echoes throughout our civil way of life. We are not obliged of give our life histories to anyone. We are only obliged at present to give information to another that is the legitimate business of the recipient. ... The right of privacy, which is assumed to exist is in fact being rapidly eroded. ... If the ten principles of privacy established by the Younger Committee are accepted as applying to all governmental information (and possibly certain categories of private information)".48

In the Bill drawn by the Committee information may be withheld by an Organ of Public Administration if it is:-

> (c) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
>
> (d) The medical records of a patient which shall not be made available to any patient except through the agency of the patient's own medical practitioner ..."[49]

The Bill suggests that where an individual is denied access to information he shall "have a right of action in the High Court against the Organ of Public Administration and the officers ... involved".[50] The interesting features of the Bill are two. First, that it "incorporates both freedom of information legislation and privacy legislation in the same package". This the Committee justifies as follows:-

> "it is relevant in the interests of legislative economy, and in clarity of legislative intention, that the two concepts, freedom of information and privacy, should be dealt with in the one blow".[51] ... They are two sides of the one coin".[52]

The second feature worthy of note is that the Committee proposes that the courts, rather than administrative machinery, should provide (as in the United States) the forum for the evaluation of competing claims, where they are raised. The Bill has not yet passed into law. Information about its progress has been sought but not yet supplied. In the United Kingdom, as in Australia, there is still no legally enforceable right to information or right of privacy.

Canada

The contiguity of Canada and the United States has underlined the differing approaches there to privacy and "the right to know". One editor put it this way:-

> "[It is] not of course, because Government is any more honest in Washington than in Ottawa but because the attitude of the two capitals towards information is different. Broadly speaking, American Government must show cause why information cannot be disclosed in the public interest, while in Canada the citizen requesting it must show cause why he should have it. The situation will be improved if the Trudeau Government intends

> to frame a satisfactory freedom-of-information law which, up to now, it has resisted".[53]

It is not as if nothing has been done. In March 1973 the Government tabled in Parliament Guidelines relating to the production of papers in the Parliament, pursuant to notice of motion. A wider right, conferred on citizens, was proposed by an Opposition Bill for a *Right to Information Act*.[54] This was introduced in October 1974. Like the Guidelines, it was referred to a Parliamentary Committee which has not yet reported. In September 1974 the Annual Meeting of the Canadian Bar Association produced resolutions calling upon Parliament and all Legislatures to enact freedom of information legislation. The resolution suggested a general statutory right to access to information held by Governments or their agencies. A refusal to provide information should be subject to review by the courts. The onus should be upon the Government to prove that the information should be withheld.[55]

In November 1976 the Government introduced Bill C-25 or the *Canadian Human Rights Act*. The Bill was given its first reading on 29 November 1976. Its general purpose is for:-

> "An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals".[56]

The general purpose of the Act is stated in clause 2 of the Bill to give effect to the following principles:-

> "(b) The privacy of individuals should be protected to the greatest extent consistent with public order and well being".[57]

Part II of the Bill creates a Canadian Human Rights Commission. Part III provides for the appointment of conciliators and of a Human Rights Tribunal separate from the Commission. Part IV deals with the protection of personal information. It applies to all federal information banks. Each responsible Minister is required to publish on a periodic basis, not less frequently than annually, a report setting forth the name or identification of each store of records under his control, the type of records stored and other information as prescribed in the regulations. The index to this information is to be available throughout Canada in such a manner that every individual is given reasonable access to it.

The Bill states the general principle that every individual is entitled to ascertain what records concerning him are contained in such Government information. He is entitled to find the uses to which the records have been put, to examine each record or copy thereof, to request correction and require notation of any requested correction not agreed to.[58]

The Bill also states the general principle that:-

"52(2) Every individual is entitled to be consulted and must consent before personal information concerning that individual that was provided by that individual to a Government institution for a particular purpose is used or made available for use for any non-derivative use for an administrative purpose unless the use of that information for that non-derivative use is authorized by or pursuant to law".

Certain exemptions are provided relating to security, criminal investigation, defence and so on.[59] But the appropriate Minister is also empowered to exempt a record where:-

"In the opinion of the Minister knowledge of the existence of the record or of information contained therein ...

(e) might reveal personal information concerning another individual".[60]

Relative to the issue of cost mentioned above is the provision of clause 55:-

"55(1) The appropriate Minister... may, by order, provide that [right of access] does not apply in respect of the information bank where, in the opinion of the Minister, the public benefit to be derived from the application of that sub-section ... is outweighed by the costs that would be incurred in applying that sub-section or those provisions thereto".[61]

The Bill establishes a Privacy Commissioner[62] who is to be a member of the Canadian Human Rights Commission. His role is to:-

"Receive, investigate and report on complaints from individuals who allege that they are not being accorded the rights to which they are entitled under this Part in relation to personal information concerning them that is recorded in a federal information bank".[63]

The Privacy Commissioner is to conduct his investigations in private and has wide powers concerning the way he goes about his investigation. His

report is to the appropriate Minister and he is entitled to request that within a specified time notice be given of action to be taken upon his recommendations.[64] Reports of the Privacy Commissioner are to be made to the Parliament[65] and in reporting he is to "take every reasonable precaution" to avoid revealing personal information or information prejudicial to the State. He is also empowered to carry out general enquiries on reference from the Minister of Justice.[66]

An unsatisfactory feature of the Bill is that it commits to regulations a large number of matters, essential for the scheme. The procedure to be followed in permitting an individual to examine personal information concerning him, the procedure for requesting correction of information or for restricting examination of medical and other records and the provision of a fee are all matters left to be dealt with by regulation.[67]

At last report, the Bill was still before the Parliament. Recent information from Canada suggests that it has been subject to criticism both within and outside the Parliament. The model of an Ombudsman-like Commissioner, who is also a member of the Human Rights Commission and whose sanction is persuasion and report, is nevertheless one that will have to be considered in the Australian context. For present purposes, it is important to note that the access to and use of Government records about individuals is seen, in the Canadian context, not as a "freedom of information" right. No such right has yet been created in Canada. It is rather seen as a privacy right, to be understood in the context of protecting individual human rights. Other sections of the Bill deal with other individual rights relating to freedom from discrimination.[68]

New Zealand

Before the change of Government in New Zealand in December 1975, a number of Bills were introduced to protect privacy. One of these, the *Wanganui Computer Centre Bill* passed into law. It was designed to ensure that no unwarranted intrusion upon the privacy of individuals was made by the computer based information system established by various Government departments. Another Bill, titled *The Privacy Commissioner Bill, 1975* did not pass into law. But its substance has now been incorporated by the new Government in a *Human Rights Commission Bill, 1976*. That Bill, which was introduced at the close of the Parliamentary session in 1976 establishes a Human Rights Commission for New Zealand. Part V of the Bill confers on the Commission general powers to enquire into any matter, including laws practices or procedure "or any technical development" if it appears to the Commission that the privacy of an individual is being unduly infringed.[69]

The Commission is empowered to report to the Prime Minister from time to time on the need for action to protect privacy or on any other matter that should be drawn to his attention and to make suggestions to any person in relation to action by that person "in the interests of the privacy of the individual". It may gather information, receive representations and make public statements and shall report to the Prime Minister when requested to do so.

None of these powers entitle the Commission to investigate particular complaints by a person that his privacy has been intruded upon. However, the mere fact that such a complaint initiates an enquiry does not limit the Commission's power to carry out the general enquiry envisaged by the Bill. In short, no power of investigation or determination of the merits of individual cases is envisaged: simply general enquiry, the collection of information and views, the suggestion of action and the making of reports to the Parliament. New Zealand does not have freedom of information legislation, nor does the *Human Rights Commission Bill 1976* provide for a right of access to Government information. Its other parts deal with unlawful discriminations, unequal opportunity and unfair conduct on the part of industrial unions and like associations. The closest New Zealand gets to freedom of information legislation is the *Wanganui Computer Centre Act 1976* which authorizes a person to apply to a Commissioner for copy of all or part of the information recorded on the computer system about him, other than information held under classifications relating to the criminal justice system.[70] Because of the absence of a general right to access to Government information and a general, enforceable right of privacy, no present machinery is needed or provided to balance the occasions of conflict between these rights.

CONCLUSION

Freedom of information, the protection of privacy and the advancement of human rights generally are world wide developments. This paper sketches only some of these developments. The time has now come to draw conclusions for the Australian scene.

Three announcements by the Government are of critical importance. I deal with them in chronological order:

(a) The Reference of an inquiry to the Law Reform Commission for report upon laws to protect privacy in the Commonwealth's sphere and the undertaking, upon receipt of the Commission's report, to introduce appropriate legislation.[71]

(b) The Attorney-General's announcement that the

Government has authorised him to prepare legislation for freedom of information.[72]

(c) The announcement in December 1976 of the intention to establish a Human Rights Commission for Australia and the Attorney-General's commitment to vigorously pursue "a policy of protection of individual rights and freedoms" so far as the Commonwealth has power to do so".[73]

These developments must be seen against the backdrop of important legislation which has already been passed to provide machinery for the protection of citizens who feel disaffected by the actions or failings of Government. I refer especially to the *Administrative Appeals Tribunal Act, 1975* and the *Ombudsman Act, 1976*. Each of these Acts provide machinery to redress grievances concerning administrative actions of Government. The Commonwealth now stands on the threshold of the provision of machinery to uphold and defend new values which, at the moment, are inadequately protected by our legal system. What lessons can be drawn from overseas experience and from the nature of the values at stake?

On a very tentative basis, I would suggest the following:-

1. "Freedom of information" and "privacy" are not absolute value but relative.
2. They need not clash. Sometimes, access to Government information positively advances aspects of individual privacy.
3. However, occasionally, these values will clash, as for example where one person seeks information that contains highly personal information about another.
4. The resolution of such a conflict cannot depend exclusively upon the personal opinion of the parties involved. Although privacy is an individual value, no system of legal protection for privacy can repose the ultimate decision about the boundaries of each individual's privacy in that individual alone.
5. Accordingly, machinery will be required to judge between competing values. Such machinery will need to understand the proper scope of privacy and to weigh competing claims and determine them with the authority of law.
6. It is undesirable in principle that a multiplicity of Government authorities should be created to protect citizens' rights. All too frequently, this leads to the referral of citizens from one agency to another, causing

confusion and disenchantment. Confusion already exists in Australia because of the multiplicity of agencies and the division of responsibilities between Federal and State offices. To add further confusion and multiplicity must be avoided.

7. In this context, and against the background of overseas developments, it is both inevitable and proper that those who are drawing Australian legislation should consider the agencies that already exist to evaluate the claims between privacy and access to Government information where they come into competition. These agencies include the Courts, the Ombudsman, the Administrative Appeals Tribunal and the proposed Human Rights Commission. It is to be remembered under the former *Human Rights Bill, 1973* specific provision was made to protect privacy. The machinery for enforcement was the Human Rights Commissioner, who was to have access to the Courts. The Canadian and New Zealand Bills, in different ways, establish a Human Rights Commission and repose specific privacy obligations in the Commissioners. In Canada one of the Human Rights Commissioners has been specifically designated a Privacy Commissioner.

8. It would seem inappropriate to cast the obligation of evaluating privacy rights generally in the Ombudsman or the Administrative Appeals Tribunal. Privacy is threatened in our society as much by the non-Government sector as by the Government sector. It would be thoroughly undesirable to divide the standards and machinery of privacy protection in the Government sector from that enforced outside the Government circle. Given our special problems in Australia, it seems preferable to encourage a consistent approach to privacy by reposing decisions about it in the one authority. It is this notion that makes an adaptation of the Canadian and New Zealand legislation attractive. I imagine the confusion and resentment that would be caused if a different standard of privacy were upheld by the Ombudsman in respect of Government intrusions into privacy from that upheld elsewhere in respect of non-Government intrusions. Because the functions of the Commonwealth Ombudsman and the Administrative Appeals Tribunal are limited to the public sector and because privacy intrusion is not so limited, it seems unlikely that either of these important institutions can be developed to provide comprehensive protection for privacy in the Commonwealth's sphere.

9. Furthermore, an additional attraction of the Human Rights Commission as the machinery for doing the balance here is that, however important, privacy and freedom of information are not absolutes. They are important values that have to be weighed in the context of many other values of our society. The danger of dealing with either of them in isolation is the development of dogmatism or unreality. A Human Rights Commission with its eye on other competing human rights and the courts with their long tradition of protecting citizens' liberties may provide a more balanced viewpoint than bodies that have a focus of attention which is too narrow or specific.

10. Although it may be preferable to provide for freedom of information and the protection of privacy in the one piece of legislation, as suggested in the United Kingdom Bill, this is not necessary. The inability of the Commonwealth to legislate universally on either subject permits the enactment of separate legislation to deal with each. The likely legislative programme of the Government makes it clear that freedom of information legislation will precede legislation on privacy protection.

11. These developments pose two urgent requirements that will have to be resolved. The first is the proper sphere of a *Freedom of Information Act* and a *Privacy Act*. All overseas experience teaches the difficulty of dividing the two spheres. The experience of the United States, Canada and New Zealand at least suggests that access to one's own personal files in the hand of Government is a matter of privacy. Access to the information relevant to the general conduct of Government affairs is a matter of freedom of information. The former is the specific concern of an individual to control the perception others have of him. It is therefore a privacy right. The latter relates to the individual as a citizen and the supply to him of the information necessary to work the machinery of democracy.

12. The second decision that will have to be made relates to the instrument that should decide between competing claims. There are reasons why the instruments that are suitable for evaluating the claim for access to Government information and the refusal to give it on the ground of secrecy, may not be appropriate for evaluating privacy, and the weight to be given to it. If separate Acts are to be passed, specific provisions will

> have to be made, guiding those who are required to make decisions when a claim for information either conflicts with or asserts a right of privacy.

Our common law failed to develop either a right to privacy or a right of access to Government information. Neither right has been spelt out of our Constitution. Such legislation as has been passed to date has not dealt adequately with these issues either in the Commonwealth's domain or in the States. Each issue is now under the microscope. Legislation on each is now promised at the Commonwealth level. There will generally be no conflict between these rights. They will complement each other. It is to be hoped that they will be developed in the context of a comprehensive reconsideration of Australian human rights and that where they occasionally conflict, simple, uniform statutory machinery can be provided to resolve the conflict.

FREEDOM OF INFORMATION Vs. PRIVACY

FOOTNOTES

1. Announcement by the Commonwealth Attorney-General, Mr. Ellicott, on 26 December 1976, *mimeo*, 90/76, p.1.

2. *Ibid*, p.2.

3. R.J. Ellicott, speech at the first meeting of the Administrative Review Council (1976) 1 *Commonwealth Record* 1505.

4. S. Uniacke, *Privacy and the Right to Privacy*, paper for the Australian Society of Legal Philosophy, 1976/77, *mimeo*, p.7.

5. A. Reitman, "Freedom of Information and Privacy: The Civil Libertarian's Dilemma", 38 *American Archivist* 501 (1975).

6. Speech by the Governor-General on opening the 1st Session of the 30th Parliament, 17 February 1976, p.11.

7. The Reference was received on 9 April 1976. See (1976) 50 *A.L.J.* 208.

8. *Official Secrets Act, 1911 (U.K.). Cf.* The Report of the Departmental Committee on Section 2 of the *Official Secrets Act, 1911* (The Franks Report), Cmnd. 5104 (1972).

9. *Ibid.*

10. Report of the Interdepartmental Committee, *Policy Proposals for Freedom of Information Legislation*, November 1976, p.13. (Hereafter called I.D.C. Report).

11. R. Nader, *Freedom from Information: The Act and the Agencies*, 5 *Harvard Civ. Rev. - Civ. Lib. L. Rev.* 1.

12. Royal Commission on Australian Government Administration, *Report*, para. 10·7·19. See I.D.C. Report p.13.

13. James Madison to W.T. Barry cited in M. Hulett, "Privacy and the Freedom of Information Act", 27 *Administrative L. Rev.* 275 at p.278 (1975).

14. I.D.R. Report, p.1.

15. As reported in the *Sydney Morning Herald*, 2 October 1976.

16. I.D. Report, p.1. The reference is to the minority report of Mr. Munro, one of the Royal Commissioners. See (1976) 5 *Rupert Newsletter*, p.8.

17. No. 10 (a). Exclusion 10 (b) relates to trade secrets. Exclusion 10 (c) relates to breach of confidence.

18. I.D.C. Report, p.7.

19. This was paragraph 9 (F) (a) of the 1974 Report.

20. United States Senate, 89th Congress, *Senate Report* No. 813 (1st Session) p.3. Cited I.D. Report, p.2. The same point was made by the Prime Minister, Mr. Fraser, in his address at the Anniversary Luncheon of the Canberra Times. (1976) 1 *Commonwealth Record* 738.

21. I.D.C. Report, p.55.

22. *Ibid* (para. 12-13).

23. R.J. Ellicott, *Cwth. Parliamentary Debates (House of Representatives)*, 9 December 1976, p.3577. See also (1976) 1 *Commonwealth Record* 1476.

24. *Ibid. Cf.* Mr. Fraser's speech, above, p.739-40.

25. B. Juddery, "The poachers indulge in a little shadow-boxing", *Canberra Times*, 15 December 1976, p.2. The writer suggested that "it might not be a bad idea" to send the issue to the Law Reform Commission.

26. *Victoria Park Racing and Recreation Grounds Co. Limited v. Taylor* (1937) 58 *C.L.R.* 479, esp. 496 (Latham CJ).

27. For example *Telephonic Communication (Interception) Act*, 1960 (Cwth.).

28. *Listening Devices Act*, 1969 (Vic.); *Listening Devices Act*, 1969 (N.S.W.); *Invasion of Privacy Act*, 1971 (Qld.); *Listening Devices Act*, 1972 (S.A.).

29. Clause 33.

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

31. The Reference was received on 23 June 1976. See (1976) 50 *A.L.J.* 541.

32. D.N. Weisstub and C.C. Gotleib, *The Nature of Privacy*, a study by the Privacy and Computer Task Force, Canada, 1975.

33. *Cf.* Bill C-25 *Canadian Human Rights Bill*, 1976, clause 55 (1). See "towards costing Government Information Services" (1976) 5 *Rupert Newsletter* 13.

34. Judge T.M. Cooley, *Treatise on Torts*, 1879.

35. S. Jourard, *Some Psychological Aspects of Privacy*

36. I.D.C. Second Report, p.12.

37. *Ibid*, p.12; Hulett, p.278; Project: Government Information and the Rights of Citizens, 73 *Michigan L.Rev.* 971 (1975).

38. A most comprehensive description of the operation of the *Freedom of Information Act* is to be found in the *Michigan L. Rev.* project referred to. See esp. pp.1022ff.

39. *Ibid*, p.1337.

40. *Ibid*, p.1332.

41. *Loc cit.*

42. See J. Jacob, "Discovery and Public Interest" [1976] *Public Law* 134 at p.135 for a discussion of this.

43. *Loc cit;* see also Franks Report paras. 85-87. *Cf.* J. Jacob, "Some Reflections on Governmental Secrecy" [1974] *Public Law* 25.

44. J. Bentham, "Official Secrets", *New Statesman,* 19 November 1976 p.707.

45. *London Times,* 22 September 1976, p.8; *ibid,* 25 October 1976, pp.1,12.

46. The Committee on Privacy, *Report* (Chairman, K.Younger), 1972, Cmnd. 5012, pp.9ff.

47. R. Boulding, *A Freedom of Information & Privacy Act for the United Kingdom,* published by the All Party Committee on Freedom of Information, London, 1975, p.1.

48. *Ibid,* p.2.

49 Draft Bill by the All Party Committee on Freedom of Information and Privacy, clause 16(c) and (d).

50. *Ibid,* clause 7(1).(c).

51. Boulding, p.5.

52. *Ibid,* p.7.

53. *Winnipeg Free Press,* 17 September 1976, p.2, "The Right to Know".

54. I.D.C. Report, p.12.

55. Canadian Bar Association *National,* September 1976, p.5.

56. Preamble to the *Canadian Human Rights Bill,* 1976 (Bill C-25).

57. *Ibid,* clause 2(b).

58. *Ibid,* clause 52 *Cf.* Bill C-72 (1974) titled "An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals".

59. *Canadian Human Rights Bill,* 1976, clause 53.

60. *Ibid,* clause 54(e).

61. *Ibid,* clause 55(1).

62. *Ibid,* clause 57.

63. *Ibid,* clause 58(1).

64. *Ibid,* clause 59(1) (b).

65. *Ibid,* clause 60.

66. *Ibid,* clause 61.

67. *Ibid,* clause 62.

68. Part I.

69. *Human Rights Commission Bill*, 1976 (New Zealand), clause 58(1) (a).

70. Section 14, *Wanganui Computer Centre Act*, 1976.

71. See n 30 above.

72. See n 23 above.

73. R.J. Ellicott, *Cwth. Parliamentary Debates (House of Representatives)*, 8 December 1976, p.3554.