AUSTRALIAN COMPUTER SOCIETY INCORPORATED

N.S.W. BRANCH

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

THE LAW REFORM COMMISSION

History. The Australian Law Reform Commission was established in 1975 to review, modernise and simplify the laws of the Commonwealth. It is not the first law reform body. Suggestions for law reform commissions go back to the time when the Medes and the Persians agreed that law must keep pace with changing society. Rapidly developing science and technology is one of the chief causes for law reform. A State law reform commission was established in 1965. There are now 11 law reform bodies in all parts of Australia and overseas.

Organisation. The Australian Commission is set up in Sydney. There are ten Commissioners and nineteen staff. All but one of the Commissioners is a lawyer. A notable former Commissioner is Sir Zelman Cowen, now Governor-General. The Commission receives references from the Commonwealth Attorney-General. It then sets about the processes of consultation which lead to a report. The report must be tabled in Federal Parliament and becomes a public document. Though the Commission seeks to be a scholarly body, it is not an academic institution. It is established to assist Parliament to deal with some of the "hot potatoes" which might otherwise get overlooked or some of the more difficult legal issues where the need for consultation with the "experts" is paramount.

Methods. Unlike the Departments of State, the Commission operates in a more open way. Consultants are appointed with the approval of the Attorney-General to assist the Commissioners in working out reform proposals. One consultant appointed in the Privacy Reference is Mr. Ashley Goldsworthy, a past President of the Society. Another is Miss Ann Leach, a Sydney computerist. The Commission uses the media, consultative papers, public sittings and public seminars to canvass ideas in the forum of the Australian community.

THE PRIVACY REFERENCE

Privacy and Defamation. The Privacy Reference was received in April 1976. It coincides with another reference which is connected. This relates to the task given to the Law Reform Commission to suggest uniform defamation laws in Australia. Part of the Privacy Reference is being dealt with in that context. It has led the Commission to suggest a new notion, namely "unfair publication". Publication is "unfair" if it is false and damages a person's reputation. But it is also "unfair" if it involves putting about private facts which are of no proper public concern. Some of the newspapers are not attracted by this notion. We cannot expect that people who are presently undisciplined by the law will welcome unreservedly the imposition of legal regulation. But laws speak to us of society's standards. Where there is considerable power, it is usual in our kind of society to control it by the law.

Why Privacy Laws? The basic need for new laws for privacy stems from two facts. The first is that though privacy is a value which most members of Australian society would assert, it is not, generally, protected by the law. The High Court of Australia in the 1937 case, *Victoria Park Racing & Recreation Grounds Co. Limited v. Taylor* (1937) 58 *C.L.R.* 479 held that however desirable it might be that there should be legal protections for privacy or a "right to privacy" no such protections had been developed by the common law. If they were to be developed, they have to be developed by Parliament.

The second fact is the increasing importance of information in modern Australian society and the growing ability

of science and technology to supply increasing information about all of us. The proportion of the community engaged in the information sector is fast growing to be the largest in our community. Government and business seek more and more information. Surveillance devices and other techniques assist in procuring information. But the greatest development relevant to the information society is plainly the development of computing.

Divisions of the Reference. The Commission has divided its reference into a number of projects. We will first seek to clarify the nature of privacy. It is not easy of definition and it varies over time. The difficulty of definition arises in part from the multiple nature of the concept. It includes, under the one name, notions such as the desire for intimacy, reserve, anonymity and solitude. Privacy is not an absolute right. Though an individual demand, it cannot be protected at the level each individual would want. The level of protection must be society's level. However, it is normal where an important value of society is under threat for the law to step in and provide, in appropriate circumstances, legal protection.

Computing, data bases and information generally are but one element of our exercise. At the same time we are looking into a number of specific issues relevant to modern privacy protection.

* Credit Bureaux
* Employment Records
* Criminal Records
* Medical Records
* Social Security Records
* Surveillance Devices
* Intrusions
* Statistics
* Archives
* Taxation Records
* Education Records
* Credit Cards
* Medibank
* Confidential Relationships
* Corporate Privacy
* Research
* Trans Border Data Flows

What's So Wrong About Computers? The special attributes of computing relevant to privacy have been catalogued many times. They include :

* The *amount* of information that can be stored, which far outstripped manual methods.
* The *speed* with which information can be retrieved, increasing a thousand times in the past 25 years.
* The *cost* of retrieving information, which continues rapidly to fall.
* The *power to combine* information so that the whole is greater than the unit parts.
* The *centralisation of control* to which computing is susceptible.
* The *unintelligibility* of much computerised information, except to the initiated technologists.

There are many other relevant concerns including the international collection of information. All of these are features which have persuaded successive committees in a number of communities similar to ours that the attention of the law is necessary if we are not to see an important and valued right of privacy eroded by stealth or oversight.

WHAT CAN WE DO?

Do Nothing. There are some who say that we should just do nothing about this. But the development of computing will require the development of many new laws : laws to deal with computer theft, with copyright, patent law and so on. Weisenbaum has identified certain moral issues posed by the development of the computer. Should we, for example, permit the linking of computers to an animal's brain? Essentially what is at stake in the privacy debate is an attribute of individualism. Nowadays, a person does not lose his privacy by the peep-hole snoop. It is through our files and information stored on us that we are seen. Mistakes can occur. As you would know, the information given out is only as accurate and relevant as the information supplied in the first place. Mistakes do occur. In Queensland a person was repeatedly refused admission to the public service because he had a criminal conviction. What the computer failed

to reveal was that the conviction had been set aside on appeal. Most Western countries are doing something. What should we do?

Special Problems. There are several special problems that the Law Reform Commission must face up to :-

* The difficulty of designing simple, straightforward and uniform laws in a federation where the Commonwealth does not have plenary power to control privacy or computers as such.
* The difficulty of devising rules that are different for the government and private sectors.
* The question whether different principles should be adopted for manual and computerised information.
* The issue of what principle ought to govern the legislation.
* What methods should be adopted to implement the new laws.
* How is the balance to be struck between privacy and information and privacy protection and costs?

The Principles. Numerous reports, and the United States *Privacy Act* seek general principles to guide the computerist. Some of the principles suggested are as follows :

* *The Declaration Principle:*
  ** All data bases that exist should be declared i.e. there should be none the very existence of which are secret.
  ** The purposes of the collection should be declared as a basis against which wrongful or privacy intrusive collection can be measured.
* *The Limitation Principle:*
  ** Limits should be imposed on the use which others make of information supplied by a person.
  ** Limits should be imposed on the quantity of personal information stored.
  ** Limits should be imposed on the life of information so that when it is not timely, personal information is destroyed.

* *The Security Principle:*
  ** Information should be accurate.
  ** Information shoudl be relevant.
  ** Information should be complete.
  ** Information should be physically secured.
* *Statistics:*
  ** Statistical information should be separated from the personal material on which it is based.

The Machinery of Control. The design of the principles is only the beginning of the operation. What machinery should be provided to uphold the community's standards as stated in legislation? Various alternatives have been mentioned.

* *Self-Regulation.* Inevitably the ordinary computerist is in the front line and must make decisions relating to the storage of private information, its retrieval, the design of systems collecting such information and so on. The Australian Computer Society clearly has a role to play in voluntary self-control to uphold privacy. But given the organisation of the industry, the membership of the Society, the sanctions available to it and the relative weakness of the ordinary employee, more is probably needed.
* *Administrative Measures.* Various administrative measures are possible. They include the use of Ombudsmen, of licensing authorities, of the police or the use of a conciliating body such as the Privacy Committee of New South Wales. That Committee has had notable success in many of its operations. The Committee and the Law Reform Commission are working closely on privacy in information systems.
* *The Courts.* There are some who say that the tradition guardians of our society's values, the courts (judges and juries) should be brought in to strike the balance that is needed here. By the use either of the crimina law or of a civil right of action in privacy, by the use of injunctions and other remedies that are well adapted in the courts, privacy could be protected. This may be appropriate as a last resort but is it appropriate in the first instance? Will it work or

is it just too slow and expensive to protect the ordinary citizen's privacy? Is it equipped with the technological knowledge to do a real job or would it be another case of legal tokenism?

A PLEA FOR HELP

The Law Reform Commission is working on this reference in the open. It seeks the assistance of all citizens and especially those who have special expertise and who can help. Members of the Australian Computer Society and members of the computing industry must recognise that they are citizens first and computerists second. Privacy is a traditional value of our form of society. It is under threat because of the advances of technology. The beginning of wisdom is a recognition of the threat. The protection of this value will require the design of sensitive and balanced laws with a real input of technological information.

Members of the Society with comments, suggestions or criticisms should write to the Law Reform Commission. Members who wish to be put on the distribution list for the consultative documents should write to the Commission, Box 3708, G.P.O., Sydney, 2001.