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MELBOURNE, 16 MARCH 1978, 1 P.M.

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

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INTRODUCTION

It is an honour to be invited to address the Constitutional Club. It is particularly apt, if I might say so, that I should talk to you about "the invasion of personal privacy in today's society". One of your distinguished past Presidents, Mr. Storey, initiated the debate which is now flourishing throughout Australia by a seminal paper which he delivered to the 17th Australian Legal Convention on. *Infringement of Privacy and Its Remedies*. Other past Presidents of the Club have taken a leading part in the public debates which are necessary if we are to keep our sights fixed steadily on the individual freedoms and liberties which we inherited in this country from Britain.

It is also apt that I should come to you at this time, for the events of recent weeks demonstrate, to my mind, the justification for doing something about privacy protection in the law. I shall endeavour in this address to say why and to suggest the courses that may be open to us in Australian society, if we are serious about protecting privacy as an attribute of individualism.

THE LAW REFORM COMMISSION AND THE PRIVACY REFERENCE

I come before you as Chairman of the national Law Commission. This body was established, with the unanimous

support of the Commonwealth Parliament in 1973. The first members were appointed in 1975. It is an independent authority of the Commonwealth. It numbers 30 person in all. Of them, 10 are Commissioners. Of the 10 Commissioners, 3 only are full-time. Part-time Commissioners include Mr. Brian Shaw Q.C. of the Melbourne Bar. Until recently Sir Zelman Cowen, whom I am sure you would claim as a Victorian, was a part-time member of the Commission. He himself contributed to the national debate on privacy in his Boyer Lectures, *The Private Man*. His resignation is a sore deprivation, but plainly the nation's gain.

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In the last days of the Whitlam Administration, it was announced that one of the first projects to be given to the Commission would be the overhaul of Australia's defamation laws, with a view to securing uniformity of those laws. Following the change of administration, a reference was given to the Commission on defamation reform. The Commission works upon references received from the Commonwealth Attorney-General and reports to him, and, through him, to the Parliament.

During the election campaign of late 1975, the Prime Minister undertook that if the Coalition Parties were returned a reference would be given to the Law Reform Commission to suggest new laws, at a Commonwealth level, for the protection of individual privacy in Australia. A motive force for the referenc was the concern of the late Senator Greenwood that present laws for the protection of privacy were inadequate to guard this value in modern Australian society. Following the election, a reference, under the hand of Attorney-General Ellicott, was delivered to the Commission. It is in the most comprehensive terms possible. It supplements the Commission's exercise on defamation reform. It requires a new and thorough examination not only of present laws and practices but also of social attitudes in Australia and the developments of science and technology which threaten privacy.

WHAT IS PRIVACY?

I will not dally to define precisely what privacy is. Mr. Storey put it this way :

> "Every person feels at times the need to be alone, to enjoy solitude and to be undisturbed. Every person has intimate possessions and personal thoughts which he wishes to share only with those of his choice. Every person wishes to control the nature and extent of the image of himself that is revealed to the rest of the community. Privacy serves these needs. It provides persons with moments of calm in which to be themselves."

Nobody in today's interdependent society has an absolute right to be "let alone". Simplistic claims of an absolute kind must clearly be rejected. We have no right to be let alone from the taxation inspector. We have no absolute claim to immunity from the census, since we are all, to some extent, dependent upon government.

Many writers point out that privacy is a nebulous concept because it has many attributes. For example, the claim to privacy includes, on occasions, the claim to intimacy, anonymity, solitude and reserve. A committee set up in England under the late Sir Kenneth Younger suggested that privacy meant two things : first, freedom from intrusion upon one's self, one's family and close relatives; secondly the right to determine how much information others could have about you.

It has been traditional in British societies to protect a person's physical environment. The laws of trespass were developed to do this. The law of defamation was developed to protect the reputation of the individual. This is not the occasion to go into the source of our desire for privacy. Some say it must be found in anthropological and zoological studies, bound up with the "territorial imperative" i.e. the desire of each person to control a little bit of territory which is *his*. Others ascribe it to the culture of individualism which is still a force in modern western society. A comparison between Soviet and American children disclosed much more concern for privacy amongst the latter, more aggression, inventiveness and

consciousness of rights. Soviet children were less concerned about privacy, less assertive and inventive but perhaps kinder and more tolerant of each other. Perhaps Australian society lies on the happy mean between the two value systems.

Whether originating deep in our human nature or stemming from our inherited British culture where "every man's home is his castle", the fact is that most Australians would assert a "right" to privacy. Plainly views would differ about its content. Plainly it would change over time. Plainly it is not an absolute value. Though privacy is an individual concern, it can clearly not be protected by law according to the individual's judgment of what is "private". A community standard, varying over time, must be fixed.

WHAT IS THE PROBLEM

Though a *right* to privacy would be asserted by most Australians, and though some scattered legal protections (such as the law of trespass) do exist, the fact is that our legal system has not developed any general approach to privacy or its protection. The problem for privacy in today's Australian society can be summarised thus. Most people believe there is a private realm, which is valuable to them and should be protected. Some protections do exist. They are few and disparate. There is no general legal protection. Against this situation is pitted the thirst of government, business and the media for information. This passion for information is fuelled by developmen of science and technology which increase radically and in kind the distribution of information upon individuals. Against the passion for information and the machinery for assuaging it, Australian law is a puny weapon. That is why the Commonwealth Attorney-General has given his reference to the Law Reform Commission. This reference merely reflects a national concern at all levels of government in Australia. In N.S.W. a Privacy Committee has been set up and it is busily at work investigating and reporting upon complaints of privacy intrusion. In this State the Statute Law Revision Committee has been asked to inquire into privacy. Submissions are now being received and I am told an interim report is expected for the Spring Sitting of the Victorian Parliament in 1978. A Parliamentary Committee

is also looking into the subject in Tasmania. In Queensland and Western Australia, the State Law Reform Commissions have references to report upon privacy protection. In South Australia a Bill to establish a general right of privacy enforceable in the courts was introduced but held over by the Upper House. The Government is pledged to press on with it. In short the concern with privacy is a truly national and bipartisan one.

The desire by government and business for more information about all of us is inevitable as the interdependence of citizens in a sophisticated economy increases. It promotes the efficient use of resources and informed decision making.

The media have developed, of late, a style of reporting which personalises (and sometimes trivialises) information. Radio, and even more particularly, television, have a tendency to focus on individuals. This, in turn, leads to the inquisitiveness which only gossip can slake.

Now, the modern mass media are not the only vehicles for increasing the distribution of information. They are simply the most visible. Other developments of science and technology must be mentioned. Surveillance devices and telephone tapping permit highly intrusive invasions of privacy by the determined invader. Laws of the Commonwealth and in many of the States control such invasions, though there is a never ending series of demands for expanding the power to tap telephones or permit the use of surveillance devices. If taken too far, the very existence of such practices on a widespread level could have a "chilling effect" on notions of privacy.

The most important and dramatic development which is relevant to privacy in today's society is the development of computing. From a single mechanical instrument in 1890 we now have more than 100,000 computers in the world. With the development of miniature and micro computers, this proliferation will not abate but will continue apace. Computers expand enormously the power to store and retrieve vast quantities of information about all of us : cradle to the grave. They collect

in quantity much more than could be stored in manual files. They retrieve it with lightning speed. They do this at ever diminishing cost. They transfer and combine unit parts of information into a whole which is greater than the parts. They are usually unintelligible (and even unavailable) to all but the trained technician. They are very well adapted to centralisation of control. There is no inbuilt inefficiency which moderates and humanises administration today. The computer never forgets.

Computerists ask me, why are you so concerned with computers? The answer is found in the nature of invasions of privacy in today's society. Our privacy is no longer invaded simply by the intruder coming on to our land (for which the law of trespass was developed) or people peering at us through keyholes. Today's privacy is lost by our losing control over information which circulates about us. In government and business this means the loss of privacy inherent in the way people can see us through information banks to which we have no access. We have no access to check their accuracy and completeness, their timeliness and fairness. We may not even know that a file is kept about us. In this way the modern right to solitude is lost.

In the media, the right to privacy is lost by the tendency of some sections of the press, radio and television (and all of them from time to time) to intrude into the private world of individuals, exposing them to a vast public audience. If such information goes forward with the consent of the subject or for reasons that are plainly of public relevance (such as his fitness for public office) there can be no justifiable complaint. If, however, it goes forward simply to seize today's headline and to sell a few newspapers, the time may have come for the law to step in.

WHAT IS THE LAW REFORM COMMISSION DOING?

This, then, is the problem before the Law Reform Commission. It is *par excellence* a problem of today's society. It reflects a certain failure in our legal system to develop general protections

for individual privacy and new pressures that make such protections urgent, if we are not to see the value of privacy completely eroded.

What is to be done about it? An easy solution is the passage of a Bill, in short form, to create a general right to privacy enforceable in the courts. That is what was proposed in South Australia and Tasmania. It has been accomplished in some of the Provinces of Canada. It seeks, by a simple law, to catch up with a century of legal development in the United States. Canadian experience suggests that, as an effective remedy for privacy, it is mere tokenism. Since general rights of privacy were introduced in Canada, the numbers of actions for invasions of privacy can be counted on the fingers of a hand.

Another approach, now adopted in New South Wales, is to set up a statutory but non-coercive body which can conciliate and report to Parliament upon claims of privacy invasion. There is no doubt that the Privacy Committee of New South Wales has done a great deal of good work. It deals informally with large numbers of civilian complaints and can generally persuade the alleged intruder to alter his practices. It has the advantage of acting informally and in private. It cannot, however, award compensation or grant an injunction or enforce its will against a determined privacy invader. Some critics of this conciliation model suggest that there are cases where arbitration and determination become ultimately necessary. Cases where the privacy invader is extremely powerful, may be cases in point. The fear is expressed that a body with conciliation powers only is always subject to the temptation to trim its sails to achieve the *achievable* rather than the *desirable*.

A third possibility has lately been adopted in Canada and is proposed for New Zealand. The establishment of Human Rights Commissions in those two countries provides a new vehicle for weighing and determining claims for privacy. The advantage of setting privacy protection in the context of other human rights is that it emphasises the relative nature of the

privacy value. It is not an absolute value. It must be weighed against other values, including such values as the right to information and the right of free speech and a free press. One of the two full-time Commissioners of the Canadian Human Rights Commission is Miss Inger Hansen Q.C. She has been specifically designated the Privacy Commissioner. She will have responsibility to ensure the privacy of citizens in Canadian Governmental files. I gather that a similar proposal may be suggested in New Zealand. These developments have obvious implications for Australia at a Commonwealth level. The Attorney-General has announced his intention to introduce legislation to establish a Human Rights Commission in the present sittings of the Commonwealth Parliament. One of the possibilites for providing new privacy protection in the Commonwealth's sphere is through the vehicle of this new Commission.

[illegible], now adopted in New South Wales.

There are other possibilities which time will not permit me to canvass. They are all being studied. Upon one aspect of the Commissior privacy reference, we have expressed a tentative public view. Th relates to the protection of privacy in the context of the media and publication. In the view of some (with privacy in computers) this is the most urgent issue facing the law, if it is to give practical protection to individual privacy in today's society.

Put shortly, the Commission rejected the approach of a general right to privacy. Not only did the Canadian precedent give no cause for optimism. There is probably not time now to develop, in the courts, the sensitive balances which have been struck in the United States, against the background of their Bill of Rights. Accordingly we have sought to tread the middle path. In the context of our reference on defamation, we have developed certain notions which seek to release Australia from the limitations imposed by English legal history. In the course of doing this, we have sought to develop a new notion, not defamation nor rights to privacy, as such. The new notion involves remedies against "unfair publication". When is it unfair to publish matter about a person? Clearly it is unfair when one publishes matter that is false and damages his reputation. This is the wrong which the law of defamation

currently protects. But surely it is equally unfair to publish facts abroad which are private to the person. This is a wrong which, currently, no law adequately protects. To the first, publication of information which damages a person's reputation, truth is properly a defence. To the second, truth may be entirely beside the point. The complaint made is not that the material published was untrue. Rather it is that the material published is of no legitimate public concern.

To overcome the criticism which was levelled by the press at the South Australian and Tasmanian general rights to privacy, the Commission took 12 months of painstaking research, talking to journalists and others in all parts of this country. Our principal endeavour was to secure a new uniform defamation law but one which would deal with the expanded notion of "unfair publication" and do so in a way that was relevant to the challenges to privacy in Australia's society.

In the result, based to a significant degree upon the common agreement of journalists as to the definition of the "private realm" we have advanced specific and limited protections for privacy in the context of publication. These protections will not be available to privacy at large but only to publication of certain specific private facts :

* Matters relating to the health, private behaviour, home life or personal or family relationships of a person
* Photographs taken of a person in a private place
* Spent criminal records
* Confidential information protected by statute

Even such private matter could be published freely with the consent, express or implied of the subject, pursuant to legal authority or where the publication is "on a topic of public interest".

The aim of all this is to encourage the press in the publication of information and facts and to discourage the morbid, prurient or illegitimate publication of private information.

THE SPECIAL PROBLEM OF UNIFORMITY

We have in this country a special problem if we are ever to secure a uniform defamation law. It is that half the country opted for a defence of "truth" in a defamation action and half for a defence of "truth and public benefit" or "truth and public interest". Victoria inherited from New South Wales, in Colonial days, the defence of "truth and public benefit". It shortly returned to the simple defence of "truth" and this has been the position here for more than 100 years.

The Law Reform Commission has proposed the adoption of the Victorian standard i.e. the defence in defamation cases will be truth. But at the moment, in half of this country, the presence of the "public benefit" or "public interest" component represents a limitation upon publication which has the effect of protecting individual privacy. A publisher thinking of putting about private facts must not only be sure that they are true. He must be sure that it is for the public benefit that they should be circulated. Abandoning this component in the law of half the country, in our quest for a uniform Defamation Act, and putting nothing in its place, would put the cause of privacy protection backwards, at a time when one of the concerns of most modern Western societies is to advance practical protections for privacy, including in this field.

I do emphasise that the proposals put forward are tentative only. We are still studying views expressed, including those put forward at the recent International Press Institute meeting in Canberra. Perhaps I might be permitted to say that although the Press spent two weeks proclaiming abroad its belief in a free press and open debate -- and criticized roundly (and sometimes misconceived) the Law Reform Commission's proposals, no invitation was ever extended to the Commission to come into the Lion's Den and put its point of view. It is not, I believe, true to say, as Mr. Rupert Murdoch suggested, that invasions of privacy by the Australian Press are the exception which, like hard cases, make bad laws. One sees these invasions of privacy with apparently increasing frequency. The notion of providing legally enforceable protections for privacy is not terribly novel. It exists in Europe. In the Australian context, there is a special reason for providing protection, because of the division in the publication laws of this country. But our proposal for limited and specific privacy protection are not made solely as a sop to secure uniform publication laws. They are put forward because every citizen knows that invasions of privacy do occur in the media The law ought not to opt out of its vigilance on behalf of

citizens, simply because the defendants are powerful or even because their interest in a free press is legitimate.

We will have completed our *Unfair Publication* report by the middle of this year. We are presently working on the many other attributes of privacy which require protection in today's society. These include concern with :

* Credit bureaux
* Surveillance devices
* Criminal records
* Employment records
* Statistics
* Credit cards
* Medical records
* Medibank
* Educational records
* Confidential relationships
* Archive records
* Taxation records
* Social security records
* Privacy and computing.

Though we are working in the Commonwealth's domain we are co-operating closely with State bodies looking at the same proble I have appeared before the Victorian Statute Law Revision Committee and our two inquiries, though developing separately, keep contact with each other.

CONCLUSIONS

This then is the state of the debate. Privacy is under threat in modern Australian society. The threat comes basically from the desire and needs for information and the capacity of modern technology to provide it. Of course, our approach to privacy protection must be a balanced one. No one asserts that privacy is the supreme value. All of us recognise that, living together in society, we must all, to a greater or lesser extent, lose aspects of our privacy. Current Australian laws are inadequate to do battle for the value of privacy against the mass media, computers and the information revolution. Rememberin always that privacy is a relative value, that must often succumb to countervailing demand of society for information, new laws

must nevertheless be provided if we are not to see this value gradually eroded. The Australian Law Reform Commission has received its most important reference from the Commonwealth Attorney-General to suggest new laws. It is working closely with State bodies examining the same problem. It has proposed specific protections in the context of the publication of private facts. These proposals are not final. However, recent events suggest that they may be on the right track. We are seeking to develop here a new notion of when it is wrong to publish facts damaging to a person's reputation and intruding into his privacy. We are now seeking to develop new and flexible machinery that will deal with other invasions of privacy and provide practical, inexpensive and useful remedies for Australian citizens that will recommend themselves to the Parliament and the Australian community. We cannot necessarily expect that they will recommend themselves to everybody. Nor should we aim at that. It is entirely understandable that people who are not subject to laws now, will not welcome legal supervision in the name of society. Opposition of this interested kind is rarely persuasive.