"THE PROTECTION OF PERSONAL INFORMATION - PRIVACY LAWS AND OECD GUIDELINES"

Department of Justice, Canada: National Forum on Access to Information and Privacy
Ottawa 7 March 1986

"PRIVACY PROTECTION IN AUSTRALIA: AN UPDATE"

Privacy protection in Australia: an update

The Hon. Justice M D Kirby, CMG considers the protection of personal information through privacy laws and OECD guidelines

Existing and prospective Federal and State legislation on privacy protection is discussed. The work of the Australian Law Reform Commission in this field is described. Provisions of the Freedom of Information Acts, the influence of the OECD Guidelines and the proposed national information policy, 'Australia Card' and Bill of Rights are dealt with and some general conclusions are drawn.

Keywords: privacy, data protection, freedom of information, human rights, legislation, Australia

CURRENT LAW

In describing the legal system in Australia, close parallels can be drawn with that in Canada. Each country is a Federation, dividing legislative responsibility between the Federal legislature and legislatures of the States or Provinces. Each country enjoys consitutional independence, responsible government and a legal system profoundly influenced by the common law of England. Although similarities exist between the laws for the protection of personal information in Australia and Canada, the basic similarities between the legal systems of the two countries make generalities about privacy laws misleading. To deal simply with the Federal laws is to ignore a significant framework of common law and State legislation which exists, relevant to the protection of privacy generally and personal information in particular.

Before technological developments led to moves internationally, and in Australia, for the better protection of personal information, legislation had been enacted or common law declared that impinged on privacy protection. Even a sketch outline of such laws would be a major task. It would also be tedious. A report of the Australian Law Reform Commission on privacy collected the relevant law in a major review[1]. Just a few relevant laws may be instanced. On the collection of personal information regard might be had to the Racial Discrimination Act 1975 (Aust) and various State anti-discrimination laws. Such legislation tends to limit the collection and recording of personal data. On the other hand, a vast collection of laws, Federal and State, provide for compulsory reporting of diseases and conduct stigmatized as antisocial (such as child abuse). As an example, one such law recently enacted in New South Wales requires reporting of diagnosed cases of AIDS[2]. The passage of the law was accompanied by protests based on grounds of privacy and suggested ineffectiveness.

Apart from Federal and State legislation, the common law provides certain protection against the disclosure of personal information. Although there is no tort of privacy, as such, known to the common law in Australia[3], numerous remedies are available that relate to the misuse of personal information. They include the torts of defamation, passing off and breach of confidence. Privacy protection may also sometimes be secured by the laws of contract and copyright.

It has long been recognized in informed quarters in Australia that the failure of the common law to develop a coherent approach to privacy protection requires legislative intervention to remedy the defect. Australia has no relevant constitutional guarantees that promise

New South Wales Court of Appeal, PO Box 3, Supreme Court, Sydney, NSW 2000, Australia

This paper was presented at a meeting of the National Forum on Access to Information and Privacy on 'The protection of personal information — privacy laws and OECD guidelines', Ottawa, Canada, 7 March 1986

 0261-4103/86/040200-05 $03.00

the development of a constitutional law of privacy. There is no charter of rights and freedoms incorporated in the Australian Constitution. Although legislation to enact a Federal Bill of Rights is before the current session of the Australian Federal Parliament, this measure is not assured of passage through the Senate, is currently limited to application to Federal laws, provides a 'shield', not a 'sword', for the enforcement of rights and falls a long way short of the potential to fill the vacuum in privacy protection by judge-made law[4]. Recent decisions of the High Court of Australia, including one of February 1986, suggest a disinclination by that court to use the tools of the judicial technique to enhance and develop the common law in ways likely to provide a partly adequate response to the enormous changes in the modern technology of information[5]. The protection of personal information, if it is to come, will depend in Australia upon the legislatures rather than the courts.

Only one State of Australia has already enacted a general law for the protection of privacy. In 1975 the New South Wales Parliament established a State Privacy Committee[6]. That Committee is empowered to receive and investigate complaints of privacy invasion. It has a significant workload of complaints, upon which it reports to the State Parliament. It also aggregates its experience and proposes guidelines on particular privacy practices. For example, guidelines have been produced on the protection of personal information. These are not legally enforceable. But breach of them attracts the mediating intervention of the Committee, with powers to investigate, recommend remedies and report to Parliament.

It was against this background, sketched here with necessary brevity, that the Federal Government asked the Australian Law Reform Commission (ALRC) to report on the recommendations which should be made for a new approach to privacy protection in the Federal sphere in Australia. It was hoped that, in accordance with the statute of the Law Reform Commission, the report would provide a basis for Federal initiatives, legislative and otherwise, and a model for State initiatives to improve privacy protection in Australia.

ALRC REPORTS ON PRIVACY

For convenience, the Law Reform Commission divided its work on privacy protection into three projects. One of these dealt with specific problems in the national census — the universal collection of personal information. Many of the recommendations were specialized and a large number have been adopted, many of them administratively[7].

A second project concerned the publication of private information. An attempt was made by the Commission to develop a new concept of 'unfair publication' as an aspect of endeavours to reform defamation law in Australia. In half the States, some protection for the privacy of personal information is afforded by the dual requirements (for the defence of justification) that the defendant prove not only the truth of the defamatory statement but also that it was published 'for the public benefit' or 'in the public interest'. In the hope of securing a uniform law, proposals were made for a defined zone of 'private facts'. The report was discussed for some years in the Standing Committee of Australian Attorneys-General. Ultimately, the present Federal Attorney-General announced that the attempt to secure agreement between the Federal authorities and the States and Territories had broken down. The hope of a uniform defamation law with specific protections for privacy has apparently been shelved.

That leaves the major report of the Law Reform Commission on privacy protection. By any standard the report is a large document. It was published at the end of 1983. It contained a review of relevant laws of privacy protection in the Federal sphere and in the Australian Capital Territory for which there is Federal responsibility. It deals with numerous privacy issues and makes a large number of recommendations on such topics as the powers of Federal and Territory officials to intrude on the person and property of the individual, body cavity searches, the seizure of records, listening devices and telecommunications, intrusions into the mail, intrusions by private police and agents and telephonic interception.

In addition to these and other topics, the report recommends the adoption of 'information privacy principles' derived from the OECD Guidelines on Transborder Data Flows and the Protection of Privacy[8]. The Commission recommended that the Australian Federal Parliament should declare that these privacy principles were the basis for the legal protection of privacy in information processing. It recommended the appointment of a Privacy Commissioner with functions to investigate privacy complaints in the Federal and Territory spheres. It was suggested that the Privacy Commissioner should be a member of the Australian Human Rights Commission. It was also suggested that there should be cooperation between the Privacy Commissioner and the Federal Ombudsman, who already receives numerous complaints about privacy concerns.

The Law Reform Commission proposed that the Privacy Commissioner should have the function of ensuring access by record subjects to records of personal information. The records to which such access should be given were those in the Federal and Territory administrations and in the private sector in the Territories still under Federal control. The prospect of later, specific extension of enforceable rights of records of personal information in areas subject to

Federal regulation (such as banking and insurance) was held out by the Commission. Numerous legislative exemptions were proposed along the lines of exemptions already provided under the Freedom of Information Act 1982 (Aust).

Specific attention was given to such topical issues as licensing of computers, computer matching, logging of disclosures of personal information, intermediary access and the provision of charges for access to personal records. Specifically, it was proposed that the Privacy Commissioner should be empowered to direct a record keeper to give access to or amend the record concerned, save for cases where the records were exempt. It was proposed that there should be a power by the record keeper to seek review of the direction to give access in the Administrative Appeals Tribunal. This is a general Federal tribunal, headed by judges of the Federal Court of Australia, which has a wide administrative law jurisdiction and is already developing relevant expertise under the Freedom of Information Act 1982.

FREEDOM OF INFORMATION LAWS

Shortly before the report of the Australian Law Reform Commission was made public, the Federal Parliament enacted the Freedom of Information Act (1982) (FOI Act). An Act of the same year and title was also enacted by the Victoria Parliament, although the provisions are somewhat different. So far, there is no counterpart legislation in any of the other Australian States or Territories, although the Governments of New South Wales and South Australia have taken certain steps towards proposing counterpart legislation and in New South Wales a private measure was introduced.

The Federal FOI Act contains provisions relevant to one of the central measures common to most international and national statements of information privacy principles. This is the so-called 'individual participation principle', by which, to enhance the exercise of a measure of control over information about himself or herself, a record subject is guaranteed the right to have access to the records and, consequently, to correct them so far as they are inaccurate, misleading, out-of-date, incomplete or irrelevant to the legitimate purposes for which they are kept. This provision of the right of access is variously described, but it is central to most statements of principle in the field of information privacy and to legislation providing for its protection.

Under the Federal FOI Act it is declared that every person has a legally enforceable right to obtain access to (Federal) documents other than exempt documents[9]. By the generality of this provision, access is given to personal records in Federal agencies or with Federal ministers. However, particular provisions are enacted in respect of protecting the privacy of others and providing for the amendment of personal records of the record subject. The latter provisions are contained in Part V of the Act. They are limited to applications by Australian citizens and permanent residents. Where such persons claim that a document to which access has been provided is incomplete, incorrect, out-of-date or misleading and has been used or is available for use for a (Federal) administrative purpose, the person may request the agency or minister to amend the record[10]. The agency or minister may alter the record, add an appropriate notation or refuse to comply with the request[11]. The applicant must be informed as soon as practicable, but in any case not less than 30 days after the request, of the official action on it.

Provision is made for internal review. An appeal lies to the Administrative Appeals Tribunal. A claimant may also complain to the Ombudsman or seek judicial review[12]. These provisions relating to personal records constituted a 'significant addition' to the original FOI Bill. The FOI scheme had been recommended by a Senate Committee. It was generally envisaged that these provisions would be removed from the FOI Act if a comprehensive Privacy Act were later to be enacted by the Australian Federal Parliament[13].

The latest report on the operations of the Federal FOI Act discloses that the usage rate of the right to correction 'remains substantially below expectations'. Fewer than 1% of all FOI applicants have sought to exercise the amendment rights, once access has been given. However, there has been a recent increase in the number of such applications. In the last year, the number increased by 70%. Since the Act came into operation on 1 December 1982, only 453 requests for the amendment of personal records had been received to the middle of 1985. The bulk of the applications for amendment of personal records were in respect of records held by agencies having service rather than central government functions. Thus the agencies leading the list were the Departments of Social Security, Transport, Defence and Veterans' Affairs.

The relatively low usage of the facility for amendment correction and annotation may understate the extent to which the Federal FOI Act has been used as a vehicle for privacy protection. The 'individual participation principle' envisages amendment etc., but the essence of the principle is the right to see the data profile upon the basis of which decisions are made affecting the data subject. If attention is paid to the agencies of the Federal administration to whom requests are made under the FOI Act, a pattern emerges. The agencies having the highest rate of requests are those that hold identifiable personal information. Thus, of the top 20 agencies to whom applications were made in the period under report to mid-1985, by far the largest 'high-volume' agency was the Department of Veterans' Affairs. That Department also had a very high level of affirmative decisions.

some 9006 applications being granted in full (98.5%) and 65 in part (0.7%), and only 72 (0.8%) refused.

In descending order, the other relevant Departments among the high-volume agencies were the Commissioner of Taxation, Department of Social Security, Department of Defence, Department of Immigration and Ethnic Affairs, Attorney-General, Department of Health and Australian Federal Police. These figures bear out the suggestion made in some commentaries that a reason for the comparatively high level of usage of the Australian FOI Act compared with the Canadian equivalent is that, for default of any general Federal privacy legislation in Australia, the FOI Act has been serving the purpose of providing a partial Federal privacy law.

Comparing the 1983–4 and 1984–5 statistics, the total applications under the Federal FOI Act rose from 19 227 to 32 956 in the past year. The total costs rose from A$17.6 million to A$19.2 million. Costs remain a major source of concern[14].

The Victorian State Freedom of Information Act 1982 also contains in Part V provisions for the amendment of personal records. The provisions follow generally the Federal legislative approach. Unfortunately, the amount of data on the operation of the Victorian Act is not comparable in quantity or analysis with that provided under the Federal Act. The Federal authorities disclose that there are regular meetings with Victorian Government officers to discuss policy, legal and administrative developments and to exchange ideas in relation to the operation of the two Acts. Both the Victorian and Federal FOI laws are currently under review[15].

OECD GUIDELINES

Australia, like Canada, took a significant part in the preparation of the OECD Guidelines. Notably, this was done through the Group of Experts convened by the OECD to report on, *inter alia*, the basic privacy principles relevant to information flows. The objectives of the Group were several, including the following.

- The study of 'basic rules' that had already been developed and identified by other international agencies, some of which do not cover Australia and Canada, such as the Nordic Council, the Council of Europe, the European Parliament and the Commission of the European Communities.
- The provision of 'basic rules' that could help reduce the risk of incompatibility in the fast-developing legislation of OECD members, given that such legislation frequently has to operate upon instantaneous and transborder data flows.
- The promotion of common approaches to legislation which, while respecting the right of countries to reflect their own legal cultures in the mechanisms established, would reduce inefficiencies that would otherwise arise from the adoption of inconsistent or incompatible core principles.

The OECD Guidelines were plainly highly influential in the thinking of the Australian Law Reform Commission. The scheme for the legislation proposed by the Commission included the proposal that, as a schedule to the draft Privacy Act, there should be included certain 'information privacy principles'[16]. With some reworking, principally for stylistic purposes, these principles represent the proposed incorporation into Australian law of the OECD Guidelines. They would become the criteria by which relevant complaints of privacy 'invasion' would be determined by the Privacy Commissioner, having the powers already outlined.

The Law Reform Commission proposed that Australia should accede to the OECD Guidelines. There was a significant delay before this accession was announced. The delay was occasioned while Federal authorities consulted the Australian States. This course was adopted because of the perceived importance of State responsibilities in relevant areas of the law. However, in December 1984 the then Federal Attorney-General (Senator Evans) announced Australian adherence to the OECD Guidelines. Acceptance by Australia of the principles in the OECD Guidelines has cleared the way to the follow-up. The most significant form of follow-up is the proposal to enact Federal privacy legislation along the lines of the Law Reform Commission report[17].

NATIONAL INFORMATION POLICY

In December 1985, coinciding with the moves towards relevant Federal legislation, the Australian Federal Department of Science issued a discussion paper containing proposals for A National Information Policy for Australia. The discussion paper was under development for two years. It followed the inclusion of the proposal for a national information policy in the Australian Labour Party policy platform during the past two national elections. A decision by the Party Caucus in 1983 to implement the policy, and the enthusiasm of Federal Science Minister Barry Jones, produced the discussion paper. The aim is stated to be to provoke discussion of the social, economic and legal implications of what is described as the 'information society'. The opposition of a number of Federal agencies to some of the proposals, for territorial reasons, is predicted[18].

The discussion paper covers a wide range of issues that go beyond the concerns of this review. However, it includes a section on privacy and confidentiality. It accepts the right to personal autonomy and privacy as an important right of citizens in a free and democratic

society. However, it also accepts that the right to privacy is not absolute. It may be curtailed or limited by legitimate requirements of the community at large. It records the significance of the developments of technology and the dangers consequently posed to the privacy of personal information. It refers to the OECD Guidelines and the report of the Australian Law Reform Commission. It states that the proposals for Federal legislation relating to personal privacy are 'under consideration by the Commonwealth' and that '[v]arious State governments are considering the need for legislation in their jurisdictions'.

The discussion paper concludes:

> The ALP Policy calls for legislation to define and codify the right of access, where this is in the public interest, of individuals or public or private bodies to relevant non-government information resources. To be effective, any legislation would have to be enacted by the Commonwealth and States in concert, and presumably after considerable negotiation and discussion with business and industry. The adoption by the private sector of voluntary codes of conduct or guidelines for release of such information might be an alternative means of achieving a similar end. For example, following development of a voluntary code of conduct in consultation with the NSW Privacy Committee credit organisations in NSW have [for] a number of years provided access to records of personal information[19].

The discussion on the proposals in this paper is continuing.

AUSTRALIA CARD

Concern about tax evasion and avoidance in Australia has led to a number of recent initiatives designed to reduce the incidence of the inequity that may follow such practices. Although during World War II Australians were required to carry an identity card, and although that card was necessary for certain employment, food, clothing, travel, marriage and other rights, use of the card was discontinued after the war. Its reintroduction has been rejected by Governments of both political persuasions[20]. In September 1985, as part of the suggested response to tax evasion and avoidance, the Federal Treasurer announced the intention of the Australian Federal Government to proceed to establish a national identification system. The system was to be part of a 'package' of tax avoidance reform[21]. An interdepartmental committee was established to develop the concept. News of the considerations of the Committee was leaked to the media.

Subsequently, responsibility for the proposal for a national identity card (to be called the Australia Card) was passed to the Federal Department of Health. The Federal Health Minister, Dr Neal Blewett, justified the card principally on the basis of the need to meet the exploitation of the tax and welfare systems[22]. An estimate was given that the Australia Card would save 'more than $758 million a year once fully operational'[23].

Misgivings were expressed in a number of quarters in Australia concerning the proposal for a national identification system and specifically because of the perceived potential for unreasonable invasions of personal privacy. As a consequence, when legislation was enacted in the 1985 budget sittings of the Australian Federal Parliament, containing provisions to allow planning to begin for the establishment of a national identification system, a Joint Select Committee of the Federal Parliament was established in December 1985. Its mandate is to investigate and report on the proposal for the Australia Card by 31 March 1986[22]. The Committee has been receiving submissions from Departments and interested bodies and individuals throughout Australia. A major submission to the Committee has been prepared by the Federal Department of Health, entitled Towards Fairness and Equity: The Australia Card Program.

The proposal has been criticized by civil liberties groups. The title of Australia Card has been denounced as evidence of 'pantomime nationalism'[24]. However, Dr Blewett has referred to the 'constantly high' public support for the proposal. He has cited an opinion poll showing that 69% of Australians favour the Australia Card, with only 25% opposed. On the subject of data protection, access privacy and human rights, the submission of the Department of Health rejects the inclusion of policing of the privacy issues raised by the Australia Card through the general protection of privacy proposed by the Law Reform Commission. Media reports suggest that this followed differences of opinion within the Federal administration concerning the proposals for an effective and cost-efficient system of protection that would command public support and at the same time be seen as sufficiently independent not to invite the criticism that it is a 'captive' of the agency that it was established to police.

The Department of Health has proposed the creation of a data protection agency (DPA) specifically to ensure that human rights and individual privacy are 'quite clearly to be protected and strengthened in the Australia Card context'. The proposal envisages that the DPA will provide advice and formulate policy on issues that arise; undertake watchdog monitoring functions; and provide coordinated, expeditious, informal and inexpensive external review of privacy complaints connected with the national identifier system.

The proposal suggests that the DPA would comprise a President and five members and would comply with the information privacy principles as set out in the 'proposed privacy legislation'[25]. It suggests that once a year every individual should have a right to receive free

of charge the record of information relating to him or her and that at other times such information would be provided, but at a basic administrative charge, reviewed annually[26]. The submission of the Department of Health deals with problems such as data linkage and computer matching.

Although reference is made to the proposed privacy legislation and to the relevant functions of the Federal Ombudsman, the precise interrelation between the operations of the DPA and the proposed Privacy Commissioner and other agencies is not made clear. Presumably, it is intended that the 'in-house' but independent DPA would have exclusive power to police privacy concerns in relation to the Australia Card and arrangements would be made to refer any privacy complaints or enquiries received by another agency to the DPA. What is left unclear (because the contents of the privacy legislation are not yet known) is the precise relation of the proposal for a national identity card to the proposed privacy laws. Both are still a gleam in the eye of the politicians and bureaucrats urging their adoption. But the gleam of the Australia Card seems presently to be more dazzling to the administrators. Much will depend upon the recommendations of the Parliamentary Joint Select Committee and the approach taken in the Senate, where the Government does not hold a majority.

BILL OF RIGHTS

Similarly critical to the passage of legislation is the attitude of the Senate to the Australian Bill of Rights Bill 1985. That Bill proposes the adoption (by the Federal Parliament) of an Australian Bill of Rights. The measure is presented as a step which Australia accepted by ratification of the International Covenant on Civil and Political Rights. If enacted, the Bill will be available, in certain circumstances, as a guide to the construction and interpretation of Federal laws. After five years of commencement, the Bill of Rights will be available to be called in aid to override inconsistent Federal laws. It will also provide a criterion for the review of Federal and State laws and practices and for investigations of such laws and practices by the Human Rights and Equal Opportunities Commission. This is not the place to review the details of the measure, the prospects and operation of which remain uncertain. However, it is appropriate to note that Article 12 in Division 4 of the Bill of Rights dealing with 'Privacy and Family Rights' draws on the International Covenant. It declares:

> 12.1 Every person has the right to —
> (a) protection of privacy, family, home and correspondence from arbitrary or unlawful interference; and
> (b) protection from unlawful attacks on honour and reputation.

If the Bill is enacted, there is no doubt that, particularly in default of any more specific applicable legislation, appeals would be made to this article as a touchstone for the examination of legislation and administrative practices where these are alleged to derogate from the guaranteed right to the 'protection of privacy'.

FEDERAL PRIVACY LEGISLATION

The foregoing brings this review to the final issue, namely the introduction of legislation to implement the proposal of the Australian Law Reform Commission. The promise of such legislation is noted in many places, including the report on the Freedom of Information Act, the discussion paper on a national information policy and various speeches of the Federal Attorney-General, Mr Bowen. It is understood that a Federal Privacy Bill is drafted and that it is currently proposed that it be introduced in the current (autumn 1986) sittings of the Australian Federal Parliament. The precise design of the legislation is unknown, because of the confidentiality that surrounds legislative proposals before their introduction into Parliament. However, from the above sources it would appear plain that the legislation will incorporate the information privacy principles derived by the Law Reform Commission from the OECD Guidelines. It is understood that there will be some further revision of the language of those principles. It will be important to compare the principles as introduced with their ultimate source.

It is the present author's understanding that the Federal Privacy Bill will deal with the protection of privacy in the public sector and will provide certain rights in respect of the private sector, the latter limited to the Australian Capital Territory. No doubt one matter which is causing delay in the introduction of the legislation is the necessity to integrate it with any legislation to establish a specialized data protection agency for the particular purposes of settling privacy concerns surrounding the proposed national identity card.

STATE PRIVACY LAWS

No legislation for the protection of privacy of personal information in the State spheres has been announced. A 1984 proposal for the establishment of a privacy committee in Queensland, similar to that established by legislation in New South Wales, has not proceeded. If the response of the Australian States to the enactment of the Federal FOI Act is any guide, the introduction of general privacy (data protection/data security) legislation in the Australian States would seem to be many years off. However, the first step is plainly the enactment of Federal legislation. It may be hoped that

such legislation will be introduced in 1986. In default of State initiatives as deemed necessary or appropriate by Federal authorities, it is possible that, in the future, a Federal Government and Parliament in Australia may look to available heads of Federal constitutional power to support national legislation on data protection and data security in those fields which are susceptible to Federal law making relevant to privacy protection.

CONCLUSIONS

The following general conclusions can be derived from the Australian position on the protection of information privacy:

- The threats to individual privacy are increasing more rapidly than the law is providing effective protections. Some erosion of privacy appears inevitable from current technological developments. But, in comparison with other like countries, Australia is lagging in legislative and judicial responses to protect information privacy. Public apathy reinforces legislative and administrative indifference to, and tardiness in the provision of, effective legal responses. A question is raised whether late twentieth century man and woman, lulled by information technology itself, conspire with the technology in the erosion of their own individual freedoms in the name of efficiency. Freedom is often inefficient.
- Some legislation has been enacted in Australia, including the creation of a Privacy Committee in one State (NSW) and the provision of specific information privacy rights e.g. in respect of credit reference systems in a number of States. In the Federal sphere, and in one State (Victoria), freedom-of-information laws have become a major instrument for securing the 'individual participation principle' in public sector information. Clearly, the major usage of FOI laws has been to vindicate privacy interests of individuals. The use of provisions designed to afford correction and annotation rights, on the other hand, has been disappointingly low.
- Major proposals for Federal laws relevant to the protection of individual privacy are either before the Australian Parliament or likely shortly to be introduced. A Bill of Rights at present before Parliament envisages protection for privacy in general terms, but only for limited purposes. If the national identity card proposal proceeds, the introduction of a specialized data protection agency seems likely. A draft Privacy Bill is said to be prepared, based generally on the Law Reform Commission's major report on privacy protection in the Federal sphere. This bill will contain information privacy principles, themselves derived from the OECD Guidelines on Privacy. It is unlikely that, save for rights of access and correction, the Guidelines will be specifically enforceable as such in the coming legislation. Instead it seems likely that, as proposed by the Law Reform Commission, they will provide criteria for evaluating complaints on privacy grounds.
- Australia has adhered to the OECD Guidelines and is likely to take an active part in the new initiatives of Unesco addressed to the policy implications of informatics. There is an increasing Australian realization of the importance of transborder data flows[27] and a realization of the policy implications of international developments in information technology, including protection of privacy and confidentiality.
- A basic institutional problem is posed in Australia, as in Canada. It is whether, in the face of rapid advances in technology, slow-moving lawmaking institutions (made up of lay people and subject to multiple pressures) can provide legal protections quickly enough and adequate to the challenges which the technology poses. The institutional question is one of paramount importance for Parliamentary democracies faced with the need to respond to technological change. And in Federations, where power is divided, the problems are multiplied.

REFERENCES

1 **Australian Law Reform Commission** *Privacy* ALRD 22, Vol 1, Australian Government Printing Service (1983)

2 *Public Health (Proclaimed Diseases) Amendment Act* 1985 (NSW)

3 'Victoria Park Racing & Recreation Grounds Co. Limited v. Taylor & Ors' (1937) 58 *CLR* 479, 496; **Fleming,** *The Law of Torts* (6th ed.) Law Book Co (1983) p 568; **Storey, H** 'Infringement of privacy and its remedies' (1973) 47 *ALJ* 498, 503; **Swanton, J** 'Protection of privacy' (1974) 48 *ALJ* 91; **Auburn, F** 'Legal problems of electronic information storage' (1971–4) *Uni Tas L Rev* 86; **Skala, J** 'Is there a legal right to privacy'? (1977) 10 *U Qld LJ* 127, 133. See also ref. 1 Vol 1, pp 377ff.

4 Australian Bill of Rights Bill 1985, s 8 (Article 12)

5 'Public Service Board of New South Wales v. Osmond', unreported, High Court of Australia, 21 February 1986, reversing 'Osmond v. Public Service Board of New South Wales' [1984] 3 *NSWLR* 447, [1985] *LRC* (Const) 1041. The High Court of Australia affirmed that natural justice under the common law in Australia did not require the provision of reasons to those affected by the exercise of administrative discretions. Cf. 'Pure Spring Co Limited v. Minister of National Revenue' [1946] *CTC* 169; 'R. v. British Columbia Turkey Marketing Board, ex parte Rosenberg' 1967 61 *DLR* (2d) 447, 450

6 *Privacy Committee Act* 1975 (NSW)

7 See note on 'Privacy and the census' in Australian Law Reform Commission *Annual Report* (1985) pp 82ff.
8 Organisation for Economic Co-operation and Development *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* OECD. France (1981)
9 *Freedom of Information Act* 1982 (Aust) s 11.
10 Ref. 9. s 48
11 Ref. 9. s 50
12 Ref. 9. ss 51ff.
13 Bayne, P *Freedom of Information* Law Book Co. (1984) p 242
14 Australia, Attorney-General *Annual Report on the Freedom of Information Act 1984-85.* Australian Government Printing Service (1985) p 15. The reference to a comparison with Canadian statistics is in Relyea, H C 'A comparative look at freedom of information laws' *Transnat. Data Commun. Rep.* Vol 9 (1986) p 21
15 Ref. 14 (first item) p 152
16 Ref. 1, Vol 2, p 265
17 Evans, G J [Statement] *Commonwealth Parliamentary Record* Vol 9 (10 December 1984) p 2537
18 *Scitech* Vol 6 No 1 (1986) p 2
19 Australia, Department of Science *A National Information Policy for Australia* Canberra Publishing and Printing Co., Australia (1985) pp 42-43
20 Noted in Walker, G de Q 'Information as power: constitutional implications of the identity numbering and ID card proposal' unpublished paper (January 1986) p 1
21 See reports in *The Australian* (9 August 1985). There appear to have been two IDC reports, one in late July or early August 1985 and another in late August 1985. Each was leaked to the press and sections of each have been published.
22 Australia, Department of Health 'Towards fairness and equity: the Australia Card program' submission by the Government of Australia to the Joint Select Committee on an Australia Card (February 1986)
23 Blewett, N 'The Australian Card: towards fairness and equity' News release, Canberra (10 February 1986)
24 Colebatch, H 'Australia's human zoo' *Spectator* (21/28 December 1985) p 12
25 Ref. 22, p 179
26 Ref. 22, p 181
27 Australia, Department of Communications *Transborder Data Flow and International Trade in Electronic Information Services: An Australian Perspective* Australian Government Printing Service (1985)