THE NATIONAL PRESS CLUB, CANBERRA

WEDNESDAY, 11 JUNE 1980, 1 P.M.

NEW PROTECTIONS FOR PRIVACY IN AUSTRALIA

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

June 1980

THE NATIONAL PRESS CLUB CANBERRA

WEDNESDAY, 11 JUNE 1980, 1 P.M.

NEW PROTECTIONS FOR PRIVACY IN AUSTRALIA

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

PRIVACY PROPOSALS

Individual privacy is at risk in modern Australia. Today, the Australian Law Reform Commission publishes two discussion papers suggesting ways in which our lawmakers can develop practical, accessible and effective remedies to prevent undue invasions of privacy from happening and, where they happen, to provide sanctions and redress to the individual.

The first discussion paper Privacy and Intrusions deals with the right of the individual to respect of his person and surrounding territory. It examines such matters as:

* the entry search and seizure powers of Federal officials;
* secret surveillance of the mail and telecommunications; and
* intrusions and harassment by private business concerns.

It proposes specific laws to tighten up controls over non-consensual intrusive acts by public officials and private business. It foreshadows 'low key' administrative remedies of conciliation and, ultimately, the right of the individual to go to the courts to recover damages for loss, damage, embarrassment, annoyance or distress caused by unlawful intrusion, harassment or secret surveillance.

The second discussion paper Privacy and Personal Information deals with the right of the individual to data protection and data security. This is a thoroughly new phenomenon. But it is one being addressed in all Western countries as they come to recognise the dangers to liberty that can arise from the development particularly of computerised information systems with 'data profiles' of the individual citizen, over which he has no control and to which he may have no access.

Together these two discussion papers suggest a more coherent and modern approach to the protection of individual privacy in our society. Until now, privacy has been a special feature of our form of society. An absolute right of privacy is neither possible nor desirable in an interdependent modern community. Until now, there has been no coherent legal protection for privacy as such. The legal remedies are shown to be piecemeal and scattered. A number of considerations have convinced the Law Reform Commission that the time has come to suggest new Federal legal machinery to arrest the pressures that will otherwise erode individual privacy in our country. We are not alone in this realisation. Every Western country is examining its laws because of the realisation of the dangers for individual liberty that exist in the coalescence for the modern passion for the collection of personal information and the unprecedented capacity of technology to feed that passion.

IS THERE A NEED?

The short lesson to be drawn from the Law Reform Commission's two discussion papers is, I believe a simple but sobering one. It is that intrusions into individual privacy are on the increase and new legislation is needed to turn the tide.

* In part, the increase arises from the larger powers claimed by public officials, including powers of entry, search, seizure, summons and surveillance. As society becomes more interdependent and as the role and expectations of government expand, these claims of intrusion increase.

* In part, the increase is the product of new and more intrusive methods of business activity, such as credit bureaux, door-to-door sales, unsolicited mail, telephone advertising and so on.

* But it is the new technology, especially, which enhances and precipitates unsuspected intrusions into the intimate life of the individual and collections of personal data profiles upon the basis of which decisions, increasing in number and importance, are constantly being made.

The discussion papers list the new technology which confronts the privacy of the individual in Australia today.

* Telephone tapping permits the monitoring of electronic telecommunications.

* Optical surveillance permits the observance of personal conduct, thought to be private.

* Scanning devices permit the examination of the contents of unopened mail.

Listening devices permit far away conversations to be overheard without the consent of one or even any of the participants.

* Electronic tracking devices or 'beepers' can be used as locators and directional finders.

* Covert photography can be used in circumstances not previously possible.

* Above all, computerised data bases can collect vast matters of personal information, sorting, exchanging and aggregating many files into an individual dossier by which the whole person, the data subject, will be seen by others.

In the dazzling advances of science, lie many advantages for mankind. The computerisation of personal information, properly arranged, can actually defend and enhance individual privacy. In the train of these advances, there are also dangers. A world in which telephones are regularly tapped, individuals are the subject of electronic eavesdropping, optical surveillance at work and elsewhere, traced by their 'credit trail' in a virtually cashless society and photographed, tracked and otherwise monitored when officialdom wants it, seems fantastic. So does the society in which information of such invasive scrutiny is constantly fed into computerised data bases accessible to a few, able to retrieve in a flash the most intimate details of the life of the individual. This seems in today's Australia to be a fantasy world of Orwellian imagination. But the point that has to be made is that, technologically, such a world is now (or shortly will be) perfectly possible. The technology is with us. In Australia, the defences against such developments need to be enhanced and supplemented. Present laws provide puny defences.

Ultimately, technology exists to serve humanity. It is for humanity to state the terms upon which technology may be used in society. A modern French philosopher, having experienced the wartime German occupation said wrily:

> The mere fact that it is a dictatorship of dossiers and not a dictatorship of hobnail boots does not make it any less a dictatorship.

In this truism, felt more keenly by those in Europe who have been through the misuse of personal information surveillance and government intrusions there is a warning for us in Australia. The warning relates to the dangers to individual freedom which may arise if we do nothing. Our legal response should not be seen as simply the provision of machinery to ensure that intrusions and information systems are relevant and efficient. There is something more at stake. What is at stake is the role of the individual in the Australian society of the future.

II MEASURE OF THE PROBLEM

In the nature of things, it is impossible to put an accurate quantification on invasions of privacy in Australia. Many intrusions do not come to light. In default of effective redress many do not come to official notice. It has to be frankly acknowledged that the law can provide only a partial response to invasions of privcacy. The determined intruder, using modern technology of ever-increasing sophistication, will often escape detection or be detected only after the privacy of the individual has been lost. These are not reasons for apathetically doing nothing to provide guidance for society and redress where a proved invasion of privacy occurs.

In one State, New South Wales, a specialist body has been established to investigate privacy invasions. I refer to the Privacy Committee of New South Wales. Since its establishment, every year it has had a sharp increase in the number of complaints made to it about privacy invasions, most of them relating to misuse of personal information.

Annual Complaints to the N.S.W. Privacy Committee

1975	327
1976	882
1977	1316
1978	1858
1979	3097

Of the 7 480 complaints received from early 1975 to the end of last year, only 212 were considered not to raise privacy issues. A great proportion of the remainder, after investigation, were held to be justified. There is no reason to believe that New South Wales is unique in the incidence of privacy invasion in Australia. On the contrary, the existence of the Privacy Committee has probably contributed to the diminution or prevention of invasions of privacy. The growing number of complaints evidences a legitimate community concern for the defence of privacy. This concern exists, largely unanswered, in all parts of Australia. A legislative answer is now proposed, in the Federal sphere.

There are many forces at work, principally economic, for the spread of new intrusive technology and the growth of public and private intrusions upon the individual. So far, the law has provided no coherent response on a national level in Australia. The aim of the Law Reform Commission's discussion papers is to fill this void. The papers cite cases that have already come to notice illustrating omissions, defects and weaknesses in current Federal laws. They cite instances where:

misrecorded credit information has resulted in blacklisting;

* incomplete criminal records resulted in refusal of employment;
* poor records security resulted in crime intelligence data turning up on the local garbage dump;
* the quandary of access to confidential government records in posed to trace an absconding spouse who has taken the children or a pensioner who has threatened suicide on 'open line' radio;
* the persistence of general search warrants in some Federal cases, without an appropriate judicial authorisation;
* the survival of outdated provisions of entry and search by Federal officials;
* the absence of any rules governing the use of optical surveillance;
* the absence of any effective law on data protection and data security.

The danger to individual liberties in Australia today lies not in a frontal assault by forces inimical to freedom. Rather, it lies in the steady erosion of rights and privileges until now long accepted. In a world of fast-moving science and technology, slow-moving legal institutions find it difficult to cope. Many invasions of privacy will not be susceptible to legal redress. But we should certainly be doing more than we are for those that come to notice.

THE SPECIAL DANGERS OF COMPUTERS

No-one doubts the great advantages which computers, linked to telecommunications, will provide for Australian society. We can safely leave it to market forces to argue the case for computers. But already several of the consequences of the computerisation of society (and indeed of the world) cause legitimate concern. I will not list them all but the chief and most obvious concerns are:

* the effect of the new technology on employment;
* the greater vulnerability of computerised society to terrorism and crime;
* the impact of the new technology on national security, defence and national identity; and
* the consequences for individual liberties, including individual privacy.

The first inquiries which looked at computerisation of personal data did not consider that any new or special problems arose requiring legal attention. Even today, it is pointed out that damaging personal data can be kept in a notebook or in the bottom drawer. If used at a critical time, it can do great harm to the individual. Conceding the dangers of old information practices, it is now generally recognised that the new technology results in special features which endanger individual privacy and therefore warrant legal responses, of one kind or another, to protect the individual. What are these features?

Amount of Information. Computers can store vastly increased amounts of personal information and can do so virtually indefinitely. In the past the sheer bulk of manual files ensured some protection.

* Speed. Recent technology has vastly increased the speed and ease of retrieval of information, so that material which was once virtually inaccessible because it would be just too difficult to get at is now, technologically, instantaneously at one's finger tips.

* Cost. The substantial reduction in the cost of handling and retrieving personal information has made it a completely viable proposition to store vast amounts of information of a personal kind indefinitely. 'Living it down' becomes more difficult. Updating accessible old records becomes more important.

* Linkages. The possibility of establishing cross-linkages between different information systems is readily feasible. The capacity of computers to 'search' for a particular name, or particular personal features and 'match' identified characteristics was simply not possible in the old manilla folder.

* Profiles. It is now perfectly possible, if access can be gained to numerous personal data bases, to build up a composite 'profile' which aggregates the information supplied by different sources. Yet, unless the data which is aggregated is uniformly up to date, fair and complete, injustice to the individual may result. If decisions are made on such data, they may be unfair or erroneous.

* New Profession. The new information technology is very largely in the hands of a new employment group not subject to the traditional constraints applicable to the established professions nor yet subject to an enforceable code of fair and honourable conduct.

* Accessibility. The very technology, and the language, codes and occasional encryption make unaided individual access to the data difficult if not impossible. In a sense the new technology can actually protect security and confidentiality. But privacy depends on who may have access to personal information.

* Centralisation. Although technologically, computerisation linked with telecommunications may facilitate decentralisation of information, it is prone, by linkages, to ultimate centralisation of control. Obviously, this has implications of a political kind. Technologically, there is little to prevent 'Big Brother' gaining access to intimate personal details of everyone in society. At present, our defence against this happening is political and traditional. There are few legal inhibitions.

International. The advent of rapid progress in international telecommunications, including satellites, and the exponential growth of trans border flows of data, including personal data, make it relatively simple to store intimate personal information on the citizens of one country in another country: not readily susceptible to protective laws yet instantaneously accessible by reason of the new technology.

The recognition of these features of computerisation of personal information has been the dynamic which has produced the development, during the last decade, of the laws protective of the individual and assertive of his rights in respect of personal information. These laws began in Germany and Sweden. They spread to North America and have now been developed in most European countries. The universal nature of the new information technology makes it important that we should seek, in Australia, to develop laws which are compatible and consistent with those developed in other countries with which we have numerous telecommunications links. Computers now speak to computers in different lands.

The legal machinery provided in the laws so far developed differ from country to country, in accordance with differing legal traditions. But at the heart of the national and international efforts to reassert the individual's rights in respect of personal data systems, is an idea which is essentially simple. It is an idea which has been adopted by the Australian Law Reform Commission. It is the central provision of the proposals on information privacy protection. It is that normally, with exceptions spelt out by law, the individual should have access to any personal information stored which concerns himself. Where such information, on access, is found to be false, out of date, incomplete or otherwise unfair, remedies should be readily available to permit the correction, deletion or annotation of the record. In the future, the individual will increasingly be 'seen' through his file. It is vital that legal machinery should be available to ensure that he is 'seen' accurately and fairly. It is also vital that the law should give guidance to those involved in the collection, use and dissemination of personal information.

NEW PROTECTIONS FOR PRIVACY

The machinery for privacy protection proposed by the Australian Law Reform Commission draws on overseas experience and also on the experience of the N.S.W. Privacy Committee. The discussion papers suggest a number of specific legislative provisions governing such matters as:

* entry and search by Federal officials;
* secret surveillance by Federal officers;
* intrusive business practices by private concerns;
* listing of individuals for credit and like purposes;
* matching of computer tapes for detection of fraud and evasion;
* logging, culling and destruction of personal information, where necessary to

In a context of information systems, the discussion paper adopts the principle of individual access which is already reflected, in part, in the Freedom of Information Bill, in the public sphere. Effective privacy legislation takes this principle further, to apply to information in the private sector as well as the public sector and to permit the individual to challenge information, upon specified grounds, in appropriate circumstances.

To give a new focus of attention to the defence of individual privacy, the Law Reform Commission has suggested the creation of three new protective bodies: a Privacy Commissioner, a Privacy Council and a Ministerial Council. The proposed administrative machinery need not be expensive. The Privacy Council and the Ministerial Council do not contemplate full-time members. A small secretariat would suffice for each. Nor need the Privacy Commissioner's Office be large. Ombudsmen and the Privacy Committee have shown that much can be achieved with a small, resourceful team.

* Privacy Commissioner. A new Federal officer who should handle complaints and conciliate grievances about invasions of privacy and fair personal information practices in the Federal sphere in Australia.

* Privacy Council. A new national body should be established with general responsibility for monitoring Federal laws on privacy protections and to develop detailed standards for personal information systems where these involve special dangers for privacy. The functions of setting standards and handling complaints should be separated. The Privacy Council should:

    * develop codes of practice
    * elaborate the standards to be observed
    * give advice on information practices
    * promote community awareness about the importance of respecting individual privacy; and
    * suggest reform of the law where this is indicated by advances in technology or by the accumulation of knowledge and experience

  The Privacy Commissioner should be a member of the Australian Privacy Council.

* Ministerial Council. Because of the desirability of securing common standards for privacy protection and compatible machinery for the enforcement of those standards throughout Australia it would be desirable for a Ministerial Council to be created including Federal and State Ministers concerned with information practices in their respective jurisdictions. The Commission has called to specific attention the dangers that exist, having regard to the universal nature of the technology involved, of our developing inconsistent and incompatible data protection laws in

Australia. The problems of imposing different information privacy principles in adjacent jurisdictions is already being felt in the continent of Europe. We must seek to avoid them in our country. The Law Reform Commission is working closely with State colleagues concerned with the design of new privacy laws. A Ministerial Council would facilitate ongoing co-operation.

CIVIL ACTIONS: WHY GO FURTHER?

Both for the protection of the individual against unlawful or unreasonable intrusions and for his protections against breaches of fair information practices, the Commission has suggested that Federal remedies should go further. Specifically, it is proposed that the individual should not be confined to administrative remedies offered by the Privacy Council or Privacy Commissioner, however dedicated. Instead, it is suggested that the individual who claims an invasion of privacy in the specified circumstances mentioned, should have the option of taking his claim to the courts.

There are a number of reasons why the Commission has not been convinced that a purely administrative response to the privacy problem will be adequate.

* The value at stake is an important, modern attribute of freedom. Traditionally, the courts, independent of the Executive Government, have had a role in upholding freedom. They have a role to play in relation to this important modern problem.

* Many of the invasions of privacy complained of will be by government officials. It is desirable that the individual should not be confined only to complaint to another government official, however independent he may seek to be.

* There is merit in the development of privacy protection by a dialogue between the dedicated, expert, specialist privacy bodies and the detached, generalist courts.

* Quite apart from the Executive Government and its officials, those likely to be involved in disputes about privacy, particularly information privacy, are likely to be powerful and opinionated interests. Conciliation, mediation and persuasion may sometimes prove inadequate. If the power of redress and compensation are not available, there may, on occasion, be a tendency for the privacy agencies to 'trim their sails', taking less than the desirable, for default of powers of enforcement. The experience of the N.S.W. Committee to date convinces us of the great value of effective conciliation but also of the need to go further and provide the individual citizen with access to the courts for enforceable remedies.

The provision of a right to damages for unlawful intrusion or breach of established, fair information practices is an attribute of individual rights. It may be small comfort to an individual to know that his case has been investigated and a determination made in his favour and even an undertaking against repeat of the conduct complained of, if, in the meantime, he has suffered personal loss, embarrassment, shame or ridicule which goes unredressed.

We contemplate that most claims about privacy will be dealt with in a swift, low-key and economical way by the Federal Privacy Commissioner. The very nature of privacy invasions makes it likely that this will be the preferred remedy. Having said this, there is merit in ensuring that the courts, with their unique remedies and powers and their independence from external pressure, should come to play a role in defending the individual against invasions of his privacy.

CONCLUSIONS

The proposals advanced today are put forward on a tentative basis. Discussion will be had with all those affected in the public and private sectors, indeed with all who are willing to come forward to assist the Commission in the development of its final proposals. Public hearings will be held in all parts of Australia. Seminars will be conducted in every capital city. The end result of this process of consultation will be a report, with draft legislation, which will suggest a comprehensive Federal privacy statute for Australia.

We approach 1984. How prescient some of Orwell's prognostications now seem. The society he predicted will probably not come about in Australia. But tge technology is there. There is sufficient cause for us to be concerned. The task before our lawmakers is to ensure that our legal system can meet the challenge to privacy.