THE AUSTRALIAN LAW REFORM COMMISSION

THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

AUSTRALIAN COMPUTER SOCIETY

SEMINAR ON PRIVACY

TUESDAY, 11 NOVEMBER 1980, PARMELIA HILTON, PERTH

TOWARDS EFFECTIVE PRIVACY LEGISLATION

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

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WELCOME TO SEMINAR

This seminar is one in a series, organised in conjunction with the Australian Computer Society, to present for informed debate issues relevant to the effective protection of individual privacy in Australia. In this seminar, the Australian Law Reform Commission is joined by the Law Reform Commission of Western Australia. This is the first time that such a joint seminar has been attempted by law reform bodies in Australia. The co-operative venture arises out of the fact that soon after the Federal Attorney-General asked the Australian Law Reform Commission to look into laws for privacy protection, the Attorney-General for Western Australia made a similar request of the Law Reform Commission of this State.

Yesterday we concluded a public hearing in this city. Today, we turn to a seminar. Although the public has been invited and some laymen will be present, I expect that the overwhelming number of participants will be computerists : people who are engaged in various activities associated with the rapid extension of computerisation of Australian society.

The organisation of the seminar has been largely handled by State officers of the Australian Computer Society. I pay tribute to them. I also wish to record publicly our appreciation for the co-operation with colleagues in the Law Reform Commission of Western Australia.

This is a novel way to design new laws in our country. Normally, legislation is prepared in great secrecy. The first that is known of its provisions is usually when the Bill is tabled in Parliament. The procedures of law reform are the exact antithesis of this. Because the tasks given to the Law Reform Commission tend to be complex, technical and controversial, the procedure has been adopted to engage the community in an active debate:

- Discussion papers are issued setting out tentative ideas
- Public hearings are conducted to which experts and members of the public alike are invited to have their say
- Public opinion polls are conducted on key issues to test the broad community response to law reform
- Exhaustive private consultations are carried out, not least with State colleagues working on the same or like topics
- Seminars provide an opportunity for an 'in depth' examination of key issues. These seminars are not confined to the matters raised in discussion papers, though frequently the latter can give focus, particularly where, as in privacy protection, the issues are daunting in their breadth and complexity.

PRACTICAL LAWMAKING ON TECHNOLOGICAL SUBJECTS

The Attorney-General's reference on privacy protection arose out of a special concern of the late Senator Ivor Greenwood, that modern technology could erode valuable features of our present way of life, unless legislation was provided to ensure that at least some 'zone of privacy' around the individual was guaranteed and enforced, where necessary, by law. In the election campaign of 1975, the Prime Minister, Mr. Fraser, undertook to refer the subject of federal privacy legislation to the Law Reform Commission. Subsequently, the reference was made by Attorney-General Ellicott. Later still, an undertaking was given in the Governor-General's outline of the government's programme that, upon consideration of the Law Reform Commission's report, federal privacy legislation would be introduced. The Australian Labor Party has also voiced its concern about the issues at stake. This is not a partisan debate. Nor is it confined to Australia.

Meanwhile, a Freedom of Information Bill has been introduced into Federal Parliament. Though it lapsed with the last Parliament, its reintroduction is a commitment of the Government. That Bill provided the counterpart for modern privacy legislation. It introduced the principle of a prima facie right of access to information in the hands of government, including information on oneself. Principles were laid down. Exceptions were spelt out, not without controversy. Machinery for balancing claims of access to information and assertions of confidentiality was established. In the United States, freedom of information and privacy legislation are frequently seen as two sides of the one coin.

I give this background not only because lawyers tend to be interested in history. It underlines the fact that the issues we are dealing with here today are not the nice concerns of theorists and academics. We are part of the lawmaking process of our country. A commitment is there to introduce legislation. The issue is the shape of that legislation. That issue is more likely to be answered in a practical and informed way by procedures of public debate and expert input than by the usual techniques of lawmaking in secrecy. I welcome the participation of all of you in this endeavour. It is surely the best way to prepare complex laws on sensitive subjects. Law reform commissions can provide a bridge between those who fully understand modern technology, but do not see its social implications so clearly (on the one hand) and those who, though they may see the social implications, have next to no idea about the technology (on the other). In the past there has been all together too little communication between scientists and lawmakers. The challenges of computers for so many areas of the law (to say nothing of the problems being presented by the biological sciences for the law) will require much closer communication in the future than has been the case in the past.

THE DISCUSSION PAPERS

As a catalyst for public and expert reaction, the Australian Law Reform Commission has prepared two discussion papers. The first, Privacy and Intrusions (ALRC DP 13) deals with invasions of privacy in the orthodox sense : the intrusion of public officials on to one's property or into one's home or into a person's private life, and the adoption of new invasive methods of business activity, such as door-to-door sales, telephone advertising, unsolicited mail and so on. In this area of privacy invasion, new technology is also relevant. The development of sense-enhancing devices such as:

- telephone tapping equipment
- sensitive, easily hidden listening devices
- long-distances lenses
- surveillance cameras

all enhance the ability of strangers to intrude, unknown, in to the most private and intimate aspects of life. Should this ever become commonplace it would have a 'chilling effect' on the ability and inclination of people to 'be themselves' in their relations with the small circle of family and chosen friends.

Though the issues of Privacy and Intrusions are important, they may be less important, in the long run, than the issues raised in the second discussion paper, Privacy and Personal Information (ALRC DP 14). That paper deals with a new form of privacy invasion : invasion of the privacy of the individual by intrusion into his data profile. The problem of 'information privacy' is overwhelmingly a problem of new technology. The new technology I refer to has been described by, of all people, a French Minister, as 'computications'. I assume that this word was devised as a French retaliation against the English language. But it aptly describes what is involved : computers linked by telecommunication : computications.

Primarily, this new technology has developed at such a fantastic speed that ever-increasing quantities of information can be stored in ever-diminishing quantities of space. Most of these statistics will be well known to computerists. I wonder how many ordinary members of society realise the pace of change?

Perhaps some idea of the 'informatics' revolution can be gained from considering these statistics:

Medium	Capacity
Carving on Stone	Average 2 characters per inch
Modern handwriting	Average 8 characters per inch
Modern typewriter	Average 10 characters per inch
Punched paper tape	Average 10 characters per inch
Punched card	Average 80 characters per card
Magnetic stripe ledger card	Average 800 characters per card
Very large-scale integrated circuit	Average 256,000 characters
Magnetic cassette	Average 512,000 characters
Flexible diskette	Average 1,200,000 characters
Open reel magnetic tape	Average 57,600,000 characters

The miniaturisation of computers has come about by a remarkable development of silicon technology combined with advances in techniques of photo-reduction. Computer facilities and circuits which once would have filled this room can now be reduced to a tiny, almost invisible piece of silicon : the microchip. This combination of micro-technology and macro-storage is only equalled by amazing developments in the speed of delivery of information and the reduction in the cost of doing all this. The net result is an amazingly fast introduction of a new technology for handling information. Now, most of the information processed by computers is commercial, business, non-personal information. A small percentage, probably less than 1%, is information which identifies particular individuals. Among the dangers identified in the Law Reform Commission's discussion paper are:

- The ability of the computers to provide total 'profiles' of individuals from multiple sources by aggregating information given to many collectors into one composite 'image' of a person
- The ease of establishing linkages, by telecommunications, between personal information in different data banks
- The inaccessibility of much computerised information other than to specialist groups
- The tendency of computer technology to centralisation of control and manipulation
- The international dimension : the ability of computers to store overseas vital data on local citizens. This is the dimension of trans border data flows.

PUTTING IT IN CONTEXT

It could scarcely be imagined that such a revolutionary development would occur, the like of which has not been seen since the Gutenberg printing press, without posing enormous and complex social problems. A few weeks ago I attended a conference on computer and communications policies for the 1980s at O.E.C.D. Headquarters, Paris. The Conference examined:

- The impact of computerisation on the economy
- Its impact on telecommunications policies
- Computerisation and 'the public interest'
- The impact on international developments.

It was my task to report upon the third session : 'Informatisation and the Public Interest'. I believe that it is important that we should see our inquiry today in the context of the many other issues that are raised for society and its laws by the rapid advent of computerisation. Amongst the matters identified at O.E.C.D. Headquarters were seven :

- Vulnerability. The growing inter-dependence of the wired society and its greater susceptibility to widespread damage whether by deliberate acts of terrorism or by accidents, natural disasters, blackmail or strikes of key personnel

- Alienation at Work. The danger of increased alienation attending the introduction of the new technology and the special problems for identifiable groups, such as the young, displaced old workers, women and migrant workers

. Legal Gaps. The introduction of computerisation will show up many gaps in the law. Criminal law will be inadequate to cope with subtleties of computer crime. The law of theft will be inadequate for it is intangible information, not the tangible computer, that is stolen. The law of patents and copyright are inadequate. The reception of computerised evidence is a matter specifically being examined by law reform commissions throughout Australia.

. Employment. The impact of computers on employment and hence on domestic tranquility and personal fulfilment need few words from me

. Telecommunications. The rapid growth of needs for diverse new means of delivering information over great distances has led to great pressures upon the monopolies presently enjoyed by most of the world's telecommunications authorities. The introduction of the satellite presents the technical possibility of easily by-passing orthodox telecommunications lines. The haemorrhage of the monopoly may already have begun. Its social implications are by no means entirely clear.

. National Sovereignty and Security. Just as domestic society is more interdependent, so too is the international community. Many countries are fearful of the storage and processing, the diagnosis of equipment, checking and scrutiny of vital data by long distance limits in foreign countries. Some say this reduces national integrity. Others say that inter-dependence will, in turn, reduce the risks of conflict by making it technologically unthinkable.

. Privacy and Individual Liberties. For all the complexity of the other issues, the concern about the impact of computerisation on individual liberties is in the forefront of European thinking. Europeans and post-Watergate Americans are much more sensitive to the dangers that lurk in the misuse and manipulation of personal information. Europeans have gone through it all before, in living memory. They see the dangers to personal liberty more clearly than we in Australia are inclined to do. The Gestapo's remorseless pursuit of individuals is still very much alive in the collective memory of Western Europe. The efficiency of a dedicated, zealous authoritarian bureaucracy is readily recalled. They realise how infinitely more efficient, even than it was, such a bureaucracy might have been, served by computers storing personal information in great detail on all members of society.

The new technology undoubtedly makes it easier for authoritarian control of society. The inefficiencies of the old manila folder provided a certain protection for individual liberties. The aggregation of our files, now and in the future, will potentially provide the State and large business corporations with a very detailed perspective of most facets of our lives.

Just take one example. In the 'cashless' society there will be a great advantage of instant credit, available from a small magnetised credit card, accepted just about everywhere. But the record of every little purchase will leave a distinct 'credit trial'. Technically, at least, this would allow someone in authority to check up on virtually one's every movement. Potentially it would be possible to retrieve the titles of all books read or borrowed, places visited, films seen, activities engaged in. This may all seem remote. Perhaps nothing will come of it. But the fear that these technological possibilities may be misused or that they may have a 'chilling effect' on personal behaviour, has already stirred the lawmakers of Western Europe and North America into action. Data protection, data security and privacy laws have been swiftly put together and enacted. Whilst acknowledging all the advantages of computerisation, including the processing of personal information, these laws:

- Provide rules for fair information practices
- Establish bodies to clarify and elaborate these rules and arbitrate disputes
- Permit access to courts for enforcement of privacy standards, even against powerful interests in the public and private sectors
- Declare the 'right of access' to one's own personal data, provide for exceptions and establish enforcement machinery.

The Law Reform Commission's discussion papers seek no more than to do in Australia what has been done elsewhere. The Commission has suggested:

Fair Information Practices — Certain general principles of fair information practices relevant to privacy. These relate to the

- collection
- disclosure
- storage
- responsibility for

personal information

Right of Access	Adoption of the general rule that the individual should normally be entitled to access to personal information about himself and be able to challenge it on specified grounds
Sanctions and Remedies	Establishment of remedies and sanctions:

- .. Enactment of a Federal Privacy Act
- .. Creation of an Australian Privacy Council to develop codes of practice for record keeping, give advice, conciliate disputes and educate the industry and the community
- .. Provision in certain specific cases of court action, including damages for loss, damage or embarrassment caused by breaches of specific privacy standards

We can take advantage of the developments of other countries and we can learn from their mistakes. But we must design legal machinery and remedies and principles of information privacy which will be acceptable in this country. We must understand both the constitutional requirements within which laws must be drawn and the institutional and historical constraints that exist. What works in Sweden may not work here. Privacy machinery devised in Austria or the United States may not be apt for our environment. That is why the discussion papers were issued. That is why this seminar is being held. The aim is to focus our collective mind upon one only (but an important) social implication of a remarkable technological advance. The end product : a national privacy law supplemented by appropriate state laws : will not be the last word on the subject. The technology is advancing at too rapid a pace for this. By the same token a start must be made here, as it has been in almost every other country of the Western communities. Individualism, a respect for the individual as a human being and not as a mere computerised number, is the common feature of Western democracies. Therefore, it is no exaggeration to say that in dealing with effective privacy protection laws, we are dealing with the essential ingredient of Western communities. It is for this reason that it is vital that we should get our solutions right.

I now turn to the chief issue which I propose should be addressed at this seminar. I am indebted to Mr. John Bickley of the Law Reform Commission of Western Australia for suggesting these issues:

PRINCIPLES FOR PROTECTION OF PRIVACY

Collection and Storage.

The Australian Law Reform Commission proposes that a person should be provided with information concerning a record keeper's information practices sufficient to allow him to make a decision on whether or not to provide information sought (Summary, p.8, para 18, DP 14, para. 36). It also proposes that there should be reasonable security measures for information held and a requirement for destruction of obsolete information (Summary, p.9, paras. 24-25, DP 14, paras. 134-157).

- Should there be limits on the collection of irrelevant or sensitive information? (DP 14, paras. 40-48).

- Should a person be informed of the existence of a personal record concerning him? (DP 14, para. 75).

- Should limits be placed on the length of time for which a record can be kept? (DP 14, paras. 155-157).

Access and Challenge

The Australian Law Reform Commission proposes that, subject to strict identification procedures, there should normally be a right of access and of challenge by a person to a personal record kept about him to ensure its accuracy (Summary, p.8, paras. 19-20, DP 14, paras. 53-80).

- Should a person have a right of access and a right to obtain a copy of a record about him and should such a right apply to all such personal records or just those which are potentially harmful to his interests (DP 14, para. 56).

- What exceptions should be provided to the general right of access?

Use and Disclosure

The Australian Law Reform Commission proposes that information should be able to be used and disclosed without the subject's consent provided this is within the purposes for which the information was obtained. Disclosures outside such purposes should require the subject's consent, but there should be exceptions in the public interest (Summary, p.9, paras. 22-23, DP 14, paras, 81-89 and 101-133).

- How and when should a subject's consent be obtained? (DP 14, paras. 97-100).

- In what circumstances should disclosure without subject consent be permitted? In particular should such disclosure be permitted for —

  locator information, that is, information which enables a subject to be traced (DP 14, paras. 102-105)

  information to parents about children (DP 14, paras. 107-108)

  Government or other interdepartmental inquiries (DP 14, para. 83)

  other purposes in the public interest and emergencies where there is danger to health or property (DP 14, paras. 109-120).

SCOPE OF PRIVACY PROTECTION MEASURES

The Australian Law Reform Commission proposes that privacy protection measures should apply to all personal record systems in permanent form (Summary, p.8, para. 17, DP 14, paras. 11 and 160-161).

- Should privacy laws apply to all personal record systems whether manual or computerised in public and private sectors and whether large or small?

The A.L.R.C. proposes that the benefit of privacy protection measures should be available to residents but not at this stage to companies (DP 14, paras. 10 and 62).

. Should the benefit of privacy protection provisions apply to citizens only or all residents? Should it apply to all or some businesses, corporations and companies as well as individuals? Is there a definable notion of corporate privacy of officers and employees? Is privacy an attribute of humanness as distinct from confidentiality and secrecy which may be legitimate concerns also of businesses and non natural persons?

MACHINERY FOR IMPLEMENTATION AND REMEDIES

The Australian Law Reform Commission proposes the creation of --

(i) An Australian Privacy Council to implement principles for the protection of privacy for specific record systems (Summary, pp. 9-10, para. 27, DP 14, para. 176)

(ii) A Privacy Commissioner to act not only as a conciliator but also as a decision maker in order to resolve grievances arising from breaches of privacy principles. The Privacy Commissioner would be a member of the Privacy Council and would be able to enforce compliance with legislative privacy standards through the courts (Summary, p.10, para. 28, DP 14, para. 180)

(iii) Civil and criminal proceedings for invasions of privacy (Summary, p. 10, para. 31 and p. 11, para. 34, DP 14, paras. 210-211).

. Should implementation of privacy standards be dealt with by a single national body, a single state body, or by a number of specialist bodies? (DP 14, para. 165)

. Should record keepers be required to be registered or licensed with a privacy body? (DP 14, para. 217)

. Should the functions of setting standards and handling grievances be dealt with by one body or be separated? (DP 14, para. 180)

. Should privacy grievances be remedied only in an administrative setting, such as the New South Wales Privacy Committee, and never in courts? (DP 14, paras. 174-175)

. Should a civil remedy in tort be created for invasion of privacy and if so in what circumstances? (DP 14, paras. 205-211)

- Is the availability of civil remedies likely to be unduly prejudicial to a conciliatory approach? (DP 14, para. 211)

- Should resort to conciliation be a bar to later civil proceedings involving the same issue? (DP 14, para. 231)

- Should a privacy body be able to assist an individual to seek legal redress for an invasion of privacy? (DP 14, para. 182)

- In what circumstances should a breach of principles for privacy protection give rise to criminal liability? (DP 14, para. 210)

THANKS

I close by expressing my thanks to all involved in the organisation of this seminar. A report will be prepared on these proceedings. It will be submitted to the Commissioners of the Law Reform Commissions and to others throughout Australia working on privacy protection laws. In due course it will be available to the Australian Computer Society and to all those in Australia who are concerned with this vital topic.