INSTITUTE OF COMMERCIAL & INDUSTRIAL SECURITY EXECUTIVES

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AN INTERIM REVIEW OF PRIVACY : WHERE ARE WE GOING

The Hon. Mr. Justice M.D. Kirby
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END OF A CIRCUIT

This paper is a report on some of the main points which have emerged from a circuit of public hearings and seminars on privacy laws conducted in all parts of Australia during November 1980. The public hearings and seminars open to the public were conducted in every capital city of Australia. Their purpose was to receive the opinions and comments of experts, government officials, academics and ordinary citizens. The focus of the hearings and seminars were two discussion papers issue by the Australian Law Reform Commission in June 1980. Each paper was addressed to the important reference which the Law Reform Commission has from the Federal Government to advise on the design of new laws for the protection of privacy in Australia. The discussion papers illustrate the defects and omissions in the current state of the law on this subject. They urge specific federal legislation on a number of particular matters. They propose, tentatively, the establishment of a Federal Privacy Council to provide guidelines and establish rules, particularly in relation to fair information practices. They suggest the creation of a Federal Privacy Commissioner to receive and investigate complaints of privacy intrusion, to conciliate and mediate disputes and, with the Council, to raise community concern about and knowledge of privacy issues. A Ministerial Council is also suggested in order to encourage the harmonisation of legislative approaches to privacy at a Federal and State level throughout Australia. Certain residual rights of access to the courts are proposed for compensation and other curial relief in the case of unlawful intrusions into physical privacy or breaches of the developed codes of fair information conduct, when laid down

by the Privacy Council. As a protection against inaccurate, unfair or out of date personal information, a legally enforceable right of access to such data is suggested, with exceptions clearly spelt out by law.

Consulting the community in the design of complex laws is not the normal procedure of lawmaking in Australia. However, in matters so sensitive as the protection of privacy, there is merit in seeking out community opinion. Technical errors can be corrected. Omissions can be cured. Suggestions which go beyond current community opinion can be withdrawn or modified. The process is also one of community education. Expectations of reform are raised. The government has given a commitment to the introduction of privacy legislation. What we are talking about, then, is the actual design of future laws of our country.

In Western Australia, the Australian Law Reform Commission sat jointly with the Western Australia Law Reform Commission in the public hearing in Perth. The latter Commission has terms of reference for a State law on privacy substantially identical to that held by the federal Commission. In other States there was close co-operation with State colleagues examining privacy laws. In New South Wales, the Commission had the assistance of a detailed and thoughtful submission by the Executive Member of the N.S.W. Privacy Committee. Large numbers of busy individuals attended the sessions, ranging from senior State administrators in Perth to a Senator in Hobart, a University Pro-Vice Chancellor in Canberra, the Director of Mental Health in Melbourne and numerous representatives of interested community groups. In addition ordinary citizens came forward with their concerns about privacy. They brought comments, suggestions and criticisms based on the widely distributed discussion papers of the Commission. In this project the Commission has received literally thousands of submissions, the overwhelming number in writing. The range of issues covered is enormous. The sincerity of correspondents is undoubted. In a better educated and informed society, it is a good thing that efforts to promote what the Prime Minister has described as 'participatory law reform' are now plainly bearing fruit. The old Australian habit of leaving lawmaking 'to the experts' is now challenged by a new procedure of community participation. It is important that the lawmakers should ensure that the expectations of legal improvement raised by the involvement of so many talented, earnest and worthy citizens should not be disappointed by inaction, delay and indifference to the needs of law reform.

In the course of the public hearings and seminars few of the topics dealt with in the Law Reform Commission's discussion papers escaped comment of some kind. However, for the purpose of this review I propose to concentrate on those privacy issues which recurred in different parts of the country from Perth to Darwin and from Brisbane to Hobart. Some recurring themes and identified issues do emerge. They are :

- Privacy and intrusions
- Direct mail
- Privacy and insurance
- Criminal and child welfare records
- Privacy and credit records
- Privacy of social security claimants
- Employment and referees' reports
- Privacy and medical records
- Children's privacy
- Sanctions and remedies to defend privacy

PRIVACY AND INTRUSIONS

The discussion paper on Privacy and Intrusions is not of specific interest to computerists, so on this theme I shall be brief. The paper deals with such matters as the proliferating powers of entry, search and seizure by Commonwealth officers, the advance of secret surveillance not authorised by law, the need for controls over surveillance performed by Commonwealth officers and the possible need for attention to developing intrusions and harassment by private concerns. It was pointed out on several occasions that quite apart from eavesdropping equipment and the like, police and official powers were growing. A recent statute, the Wheat Marketing Act 1980, was cited in Melbourne for the very wide powers given to officers of the Wheat Board. The growing powers of the police to secure evidence by compulsory process, as for example by compulsory breath, blood and other analysis, was cited as a dangerous trend if unchecked. Several participants criticised the power of Justices of the Peace to issue entry and search warrants. It was said that people subject to these warrants should generally have a power to contest them, if necessary by telephone. A contrast emerged between those who felt that the rigorous preconditions proposed by the Commission were appropriate and those who felt they might impede and discourage effective action by police and customs officials to uphold the law and defend society. The Reverend Fred Nile (Festival of Light) feared the hinderance of police and customs officers to the advantage of organised crime and revolutionary groups. He asserted that good living people had nothing to fear from authority. He referred to Biblical passages in support of obedience to lawful authority. The recent experience of authority 'gone wrong' in some countries casts doubt on the universal acceptability of this approach. The tradition of our legal system is to put obstacles in the way of over-weaning and over-enthusiastic authority.

Mr. Nile was specifically concerned that the preconditions required for entry and search discourage intrusions in the communications area which is of specific concern to the Commonwealth. Pornography was being sent to post office boxes. Brothels were using telephones, yet the Commonwealth did nothing and the Commission's proposals

would make surveillance of the communications system virtually impossible in such cases. Mr. Nile and other participants urged the importance of protecting police informants and the need to avoid data access rights which would advantage only organised crime and political radicals who had misused such rights in the United States for their own ends.

Another participant, Mr. J. Bennett (V.C.C.L.), urged a threshold consideration of whether there should be a Federal Police at all. In Queensland, concern was expressed that federal regulation could be circumvented by the simple expedient of swearing in federal officers as State special constables. Reference was made to the fact that a number of Telecom officers had been sworn in in this way.

In Darwin it was urged that the privacy of the mail should be protected up to the point of the receipt of the mail. The practice in government and commercial concerns of opening letters, although addressed to a specific person, should be forbidden by law.

One government concern, the State Electricity Commission of Victoria, pointed to its regime by which no statutory powers for entry onto property was provided or needed. Powers of entry were negotiated as a matter of contract with recipients of supply. However, this could not be a standard relationship between government and the individual and the consent extracted as the price of power supply might not always be fully voluntary.

Numerous other issues were dealt with under this head, ranging from the interference in physical privacy by Festival of Light picketing of Family Planning Centres to the capacity of presently available equipment simply, at low cost and without trace to monitor the public telecommunications system.

By and large, the broad issues of the discussion of privacy and intrusions were neglected in the concentration of expert and community focus upon the issues of modern privacy : data protection and data security.

PRIVACY AND DIRECT MAIL

One issue of physical invasion of privacy which did agitate community submissions was the growing business of direct mail and the use of the communications systems as a means of selling goods and services or, lately, raising funds for charity. The Commission had proposed limits on these practices. The proposals were tackled at the Sydney hearing by representations of the Australian Direct Marketing Association. The notion of removing names of objectors from mailing lists was said to be counter-productive. Only if a master list of objectors was kept could removal be effective

in the numerous lists now operating. The suggested device of an asterisk beside the name of telephone subscribers not wishing to receive telephone advertising was criticised on the grounds of cost and convenience. More importantly, it was suggested that such an asterisk would identify the private emotions of people and their sensitivity to privacy. It could possibly even engender hoax and nuisance calls.

Although the Association has not conducted a survey of Australian attitudes to the receipt of direct mail or telephone canvassing, there is no doubt that some people do object most strongly and view it as a serious invasion of privacy. In Hobart, one citizen told the Commission of how at 10.30 p.m. she had been telephoned in a remote country farm to be canvassed. She objected. She favoured the Commission's proposal and did not consider it appropriate that a subscriber should have to pay extra for privacy. In Brisbane a citizen explained that the telephone is the usual link with friends and acquaintances of choice. A telephone advertiser catches the recipient off guard and at a disadvantage with a consequent feeling of embarrassment in his or her own home. There is no doubt that telephone advertising raises more ire than direct mail.

In Sydney, one submission talked of the difficulty, despite numerous requests, of getting off the mailing list of a well known direct mail publisher. It was also explained that it was not so much receipt of material (which could readily be destroyed) that people objected to. Rather it was the notion that traders were selling and using his name and address without consent. This was an impermissible use of part of his personality. Possible remedies for these strong feelings were canvassed. The Australian Direct Marketing Association urged a voluntary central register of objectors. Yet it conceded that at least a quarter of direct mailing organisations are not members of the Association, with no access to its list. The possibility that the Commonwealth should keep such a list, perhaps to be computer-matched with the lists of advertisers and canvassers, was touched on. The Commonwealth's constitutional power over communications would probably be adequate for this purpose. The possibility of requiring a statutory notice to be affixed to direct mail material, informing recipients of the entitlement to join the list, was also discussed.

Although most Australians may not feel strongly about direct marketing and some may even welcome it — even in the form of telephone canvassing, the minority's strongly-held views on this topic will be considered in a society sensitive to individual perceptions of privacy.

PRIVACY AND INSURANCE

Each of the Law Reform Commission's discussion papers have comments and suggestions relevant to insurance. The paper on intrusions addresses itself to optical surveillance, sometimes used to counter suspected fraudulent claims. Claimants for employment or other disability insurance benefits are sometimes followed and occasionally filmed. The dangers of our society giving way to proliferating optical and film surveillance are outlined by the Commission. Submissions were received in Darwin concerning the need of insurers to have a facility of surveillance and to have it without undue or cumbersome preconditions. It was pointed out that such procedures guard the interests of the wider community of policy-holders and honest claimants.

Representatives of the life insurance industry addressed themselves to the possible problem posed by the discussion paper on information privacy if a full right of access were given to an insurance file. The need for intermediary access in the case of medical records and the possible need to prevent access to investigation material were considered. The nature of the insurance contract was said to require special attention, both because of the long-term relationship often involved, especially in life insurance, and because of the need routinely to share confidential information with re-insurers, of whom the insured may be quite ignorant.

CRIMINAL AND CHILD WELFARE RECORDS

One matter which was not specifically dealt with in either discussion paper was the subject of several submissions. I refer to criminal and like official personal records and the damage they can do to personal reputations and information privacy. In the United Kingdom a Rehabilitation of Offenders Act has been passed, with a sliding scale, by which offences are removed from the record of an individual after a given interval of time. The enactment of similar legislation in the Commonwealth's sphere was urged at the public hearings both in Canberra and in Sydney. The efforts of one Australian jurisdiction to enact such a law were outlined and the efforts of the New South Wales Privacy Committee to propose a Criminal Records (Fair Practices) Bill was explained. The Privacy Committee's approach has not been accepted by the New South Wales Government. Legislation after the British model has been promised instead.

Problems raised by consideration of criminal record privacy include problems of the security of such records from reticulation to a wide range of would-be recipients. In Queensland, for example, it was pointed out that some police and criminal records are sometimes passed on to insurance companies and others. It was suggested that a national criminal data system would have dangers and would inhibit people

'living it down'. A Canberra citizen pointed to Canadian legislation by which, after a given interval, a citizen can apply to have a criminal record removed. However, this may give an advantage to the articulate middle class whilst disadvantaging the very people who need protection from being dogged by an old criminal record. Amongst the practical problems raised were the need to scale the seriousness of punishment by the penalty actually imposed rather than the nature of the crime or the maximum penalty applicable. The issue of whether total expungement should be required or simply removal from use in subsequent criminal cases was raised, as was the extent to which employment form questions in particular should be amended to remove the need for a dishonest answer to such questions as 'Have you ever been convicted of a criminal offence?'

A clear perception of the way in which old records worry people was given to the Commission by a submission made in Sydney by a former State ward. Although his is not the case of a criminal record, it is a problem of a similar order. His wardship file had followed him from one institution to another during his youth. His every offence or suspected offence was noted down. On one occasion he illicitly saw his file and noted with astonishment and embarrassment the large number of prejudicial, unfair and cruel comments which represented his 'data profile'. This young man, now 20, wanted to know how that file could be destroyed, retaining only essential records such as physical health treatment. He mentioned how the file contained allegations of offences he never committed and suspected personal sexual inclinations he did not feel. He objected to the way institutional officers would 'see' him through the file and endeavour to strike a note of familiarity on the basis of the file information, which familiarity he did not feel inclined to accord them, at least at a first meeting. His submission was followed soon after by a representative of Dr. Bernardo's Homes in Sydney. That organisation has now adopted a principle of subject access to foster children's records. Certain hurtful material is occasionally removed, where records prepared on an expectation of non-access, would do disproportionate harm to the subject. But generally, the adoption of the principle of access has been seen as a great success. Material now recorded is less composed of gossip and innuendo and more of hard fact. The possibility of future subject access has become a discipline to staff and greater fairness in information recording is the result. According to this thoughtful officer, the principle of access has had a 'ripple' effect through the whole organisation. Though originally objected to by older members, brought up in the tradition of secrecy of records, the notion is now well accepted and indeed welcomed. There are 8,500 foster children in New South Wales alone at the present time. We are therefore not dealing here with trifling numbers. In respect of each of these children there is a file. In many cases it is a large file. Most children get through life without an annotated catalogue of their suspected joys and woes. The existence of this file worries some sensitive people. Should we be concerned?

PRIVACY AND CREDIT RECORDS

The collection of credit information has been a traditional area of legislative attention to protect privacy. This is partly because previously developed principles of bankers' secrecy. But it is also because increasingly important decisions are being made affecting the pleasures and fulfilment of life on the basis of a 'credit profile' of applicants, retrieved for the benefit of creditors. The future, with electronic fund transfers and point of sale credit transactions plainly holds in store even greater importance for credit information. In response to the demands of the credit society, credit bureaux have been established. Increasingly they are computerised. At the Hobart sitting, we were told of the establishment of a computerised credit bureau in that State within the last six months. It is not yet linked to bureaux in other States. However, such linkages are only a matter of time. Already international credit linkages for the world wide use of credit cards are capable of virtually instantaneous checking against credit worthiness and fraud. They are well established, efficient features of our society.

Credit bureaux already adopt standards both for security of their data and for its quality. It is in the interest of the bureau to offer accurate and up to date factual information. Most provide access by the data subject, either to the information held, or to the substance of it. In some States of Australia (Victoria, Queensland and South Australia) legislation has been enacted conferring on data subjects adversely affected by credit information certain legally enforceable rights of access. In New South Wales (and in part in Victoria) a voluntary scheme of access has been worked out nearly 5,000 people each year utilise the New South Wales scheme to check their credit information. There are, however defects both in the absence of schemes in some parts of Australia (including the Capital Territory) and the inadequacy of some current schemes. Furtheremore, it was pointed out at the Brisbane seminar that caution must be observed in the use made of credit information and the criteria by which credit worthiness is judged. In the United States, factors of economy and efficiency have led to the use, for example, of six credit factors only for 'scoring' of credit worthiness. Whereas this can be seen as avoiding intrusive questions from those who pass the score, it can also be seen as a denial of credit unfairly to those who, though not scoring on the six factors might, individually, be entirely credit worthy. Credit bureaux object to the notion of a 'right' to credit. But as we move to the cashless society, with increasing use of computerised credit cards in the place of anonymous cash, the social consequences must be considered. The 'credit trail' left by purchasers was the subject of several comments. Credit bureaux and certain other organisations (such as suppliers of government services) are armed with enormous

quantities of personally identifiable information. What can be used in emergencies for location of people, could also be a source of interrogation by authorities, quite unbeknown to the data subject. Thus the State Electricity Commission of Victoria told the Commission of approaches by tax, security and police officers and of the principles they adopt in responding to such enquiries. The ability of computerised data of this kind to be submitted to interrogatory rhythms so that information supplied for one purpose is put to quite a different and unexpected purpose was mentioned in several places. The need for protection of the data subject against misuse of information in this way was a recurring theme.

PRIVACY OF SOCIAL SECURITY CLAIMANTS

Thoughtful submissions in Brisbane, Melbourne and Sydney dealt with the vulnerability to privacy invasion of social security claimants. Nearly 2 million Australians fall into this class, 1.8 million being in receipt of pensions of various kinds and 60,000 in receipt of other benefits. Those who made submissions on this issue stressed that there could be no objection to routine inquiries of the entitlement to social security benefits and that the existence of fraudulent claims necessitated and justified inquiries of this kind. However, the point was that the group under surveillance and investigation was a dissadvantaged group are made more susceptible to harm by the absence of available, pubicly stated guidelines for investigations by social security officers. It was suggested that although such investigations were not of a criminal character, their consequences, in the loss of a benefit were often devastating to the subject and the immediate family. It was therefore proposed that protections such as had grown up to prevent or deal with possible police oppression should provide a model in the area of social security. For example, some system of prior independent authorisation of investigations should be devised. There should be a need for reasonable cause to investigate a subject. Random investigations should not be permitted or should be strictly controlled. Subjects of investigation should be informed of their rights. Wherever possible investigation should take place at an office of the Department of Social security rather than at the home of the subject. Cases of investigation at the work place of third parties (neighbours, relatives and others) were cited as illustrations of insensitive investigation. The need to be specially sensitive to ethnic and Aboriginal recipients was stressed, because of the different household arrangements which such communities sometimes follow.

One of the most difficult areas here involves investigations of alleged cohabitation by social security recipients with wage earners. In the nature of such investigations, it is difficult to follow up information or to investigate suspicions, without seriously intruding into the privacy of the subject. The inference of cohabitation will be deeply hurtful to some, but in some cases will be accurate, and, in law, disentitle the recipient from benefits. It was pointed out that some recipients are the subject of malicious information to the Department. It was said that such people should have a remedy, at least against harassment, for the anxiety and distress that they suffer as a result of investigations of this kind.

A common theme in the submissions on this issue was that the suggested right of access (already in part secured through the appeals to the Social Security Appeals Tribunals and now to the Administrative Appeals Tribunal) would still the fears of many social security recipients concerning the information held on them. It would help to 'remove the climate of suspicion' which sometimes exists in the relationship between the individual and the Department. Whilst some informant and medical material might be exempt, it was generally felt that access to the file would be an important protection and would instill greater rigour and fairness in social security information system in respect of a group usually at a distinct disadvantage when it comes to asserting rights.

EMPLOYMENT AND REFEREES REPORTS

In Hobart and Canberra senior university officers came before the Commission's public hearings to express doubts about the extension of a right of access to employment and referee reports. It was suggested that a problem would exist in providing access not only in universities but also in private business and government employment. In universities it would exist both at the point of recruitment and in respect of incremental advance. In Sydney it was asserted that an employer was also entitled to the privacy of his records and that these included certain personnel information.

University representatives stressed that universities especially must be armed with frank referees' reports if they are to maintain standards of intellectual excellence. It is vital that referees should feel free to disclose derogatory and critical facts about a candidate for appointment or promotion. Fear was expressed that a right by the subject to have access to his whole personnel file, including referees' reports on him, would impede frank referee assessment, encourage bland comment, alternatively lead on to the adoption of a 'code' system by which doubts about a candidate were signalled obliquely.

In this regard, reference was made to referees' reports in United States universities and the warning which must be given there to those who write referees' reports concerning subject rights of access. The Commission has asked for more details on United States experience. The Privacy Study Protection Commission of the United States suggested that after an initial retreat to bland references and to use of the telephone, more recent experience did not justify such criticism of the right of access.

It was put to the university representatives that quite critical decisions could be made on the career of a person, on the basis of false, misleading, out of date or even malicious referee reports. Present secrecy could simply protect error. The possibility that external referees could be sought, of whom the subject knew nothing, was specially offensive. Not only might prejudice be done to the candidate. The decision-maker himself could be armed with inadequate data. In response, it was suggested that this was the regime which university people well understood. They themselves have to write many reports as referees and they understand the need for confidentiality. Use of the telephone as an alternative or supplementary source of frank assessment was unsatisfactory in the Australian university environment where an international scholarly market tends to be tapped. By the same token, it was conceded that opportunities for university advancement in Australia were declining and that non-academic staff in many institutions already enjoyed or were negotiating the right of access to personal files. Its extension to academics in some form was considered possible. The issue was : is it desirable and if so, in what form and with what limitations?

The problem is one of arming the decision-maker making a critical decision with the best possible personal information, but permitting the subject the right to respond, without unduly damaging frankness and justified criticism. There may be other ways of permitting a candidate to respond to derogatory facts. A multitude of referee reports, notice of all persons whose views have been sought or access through an intermediary, were canvassed. One of the Commission's consultants, Dr. Benn, suggested at the Canberra public hearing that just as referees owe a duty to the institution or employer, those who are to be critical may owe a commensurate duty to the data subject to warn him of this intention, especially where he has solicited their concurrence to act as a referee.

Many other issues of privacy and employment were raised, not least the implications for 'point of sale' and word processor surveillance of employees. It is perhaps unfortunate that the Commission has had little assistance on these issues from employee and employer industrial organisations. There seems little doubt that they will loom large in the industrial relations issues of the next decade and beyond.

PRIVACY AND MEDICAL RECORDS

One of the most vigorous debates aired before the Commission related to the privacy of medical records. In part, the issue is brought upon us by the increasing computerisation of medical records. Even in the Northern Territory, we were told that certain hospital records on 215,000 Territorians are now computerised. In Victoria a State-wide system of computerised hospital records is under study. Computerisation and the use of medical teams going far beyond the medical profession itself raise the possibility of a haemorrhage of private medical information which was simply not possible in the old time doctor's surgery files.

The other challenge to medical privacy emerges as the consequence of the growing government funding of health care. The involvement of health funds in medical funding raises many complex questions. These include the computer analysis and tracing of fraudulent claims by doctors and patients, with consequent need to examine patient records and even investigate patients themselves (on the one hand) and the issue of whether a health fund may ever be justified to disclosure to a patient something unfavourable discovered about the doctor (on the other). An example of the lastmentioned problem was raised in Sydney and Melbourne. Would a health fund, knowing from its records that a psychiatrist was himself receiving intensive psychiatric treatment, ever be justified in disclosing this fact to one of his patients?

Many medical witnesses appeared before the Commission to protest the steps being taken to interfere in patient privacy. The interrogation of patients, the seizure of patient records and the examination of patient health fund data all diminish the traditional confidentiality of the medical relationship, considered important for its success. Yet the community has a right to prevent fraud. Its agencies should not be forced simply to accept the say-so of a doctor under suspicion. How is fair investigation of fraud to be conducted, consistent with respect for patients, many of them, by definition, in a disadvantageous position? Some medical organisations complained about the Federal Department of Health scrutiny of alleged over-prescription of drugs. It was suggested that this scrutiny was even used as retaliation against resistence by some general practitioners to computer national health scheme prescription pads. The comment of the department is being sought. The Royal Australia and New Zealand College of Psychiatrists appeared in Melbourne to complain of the way in which investigations of doctors were being carried out by investigating not them but their patients. Police raids, removal of detailed patient files, interrogation of patients, access to fund information and computerised information were mentioned as potential dangers. The stigma which still attaches in some quarters to visiting psychiatrists and the intimate nature of the information typically given them was said to be a special reason for care in handling psychiatric information.

It was complained that some health funds do not have medical referees competent to judge medical issues. The use of subpoenas to extract unduly wide classes of information was complained about in some centres. The proliferation of statutory obligations to notify conditions (infectious diseases, child abuse and now, as proposed, cancer) was said to be a further erosion of the doctor/patient privacy.

When it came to the issue of access by patients to their own records, strong passions were raised. Many of the medical witnesses conceded that there had been excessive paternalism in the past and that the patient's interests must guide the ultimate judgment on this issue. However, reservations were expressed concerning direct access by patients to medical records. It was said that there would be a need for complex methods to ensure the identity of the applicant. It was said that records (often now contained on reel film or microfiche) could reveal the secrets of other patients. It was said that hospitals and medical facilities generally did not have premises or personnel to supervise such access.. It was feared that direct, unsupervised access might lead to tampering by the patient with the file.Some objected to any retrospective principle, given that health records until now have been prepared by officers with an expectation of confidentiality. Some feared that a right of access might discourage the notation of peripheral information, vital for a total profile of the patient. In the psychiatric area, Dr. George Lipton in Melbourne warned the Commission of the problems of records in the case of group therapy or family therapy. The rights of others would have to be respected in any later access to such group or family records. The involvement of medical teams and the need for peer review was said to be an obstacle for an unrestricted right of access.

For all these problems, generally speaking, medical witnesses were content with the notion of intermediate access i.e. through a trained medical officer who could protect patient and record-makers from undue harm, whilst at the same time giving the patient a general right of access to his medical file. It was pointed out that most medical records involve administrative material, factual material and sensitive and hypothetical material. It was only in respect of the last class that problems of access were perceived. If access were given, special attention would be needed for the rights of the blind, of persons not fluent in the English language and other disadvantaged groups.

The question of ownership of records was raised in many centres, although not addressed by the Commission. The practice of doctors and lawyers selling confidential patient and client files as a business concern, without subject consent, was referred to and criticised in Melbourne and Hobart.

CHILDREN'S PRIVACY

No issue attracted more submissions than the suggestion concerning children's privacy. The suggestion arose in the context of the Commission's view that a general rule of access should be provided so that normally the individual would have access to personal data about himself. Adoption of such a rule requires its definition of rights of access and a statement of its point of commencement. Obviously young people of tender years may not exercise a right of access to records about themselves for themselves. Access by their parents or guardians must therefore be allowed, acting on their behalf. When it comes to children moving into adolescence and adulthood, a time will be reached where the parent's right will be transferred to the child himself. A point will be reached where the integrity and privacy of the child will be respected and upheld by record-keepers who are counselling and advising the young person, upheld even as against an inquiring parent. What is that point? Can it be defined?

The Commission, in its discussion papers, suggested that before the age of 12 parents should be absolutely entitled to have a right of access. After the age of 16 the consent of the child should be required in every case. In a grey area between 12 and 16 the Commission suggested that the consent of the child should normally be required by the doctor or school counsellor but that such consent could be over-ruled in the interests of the health, safety or welfare of the child. The proposals were not fully explained. The problem of dealing with abused and ill-treated children was not instanced. The spectre of 12-year-old girls securing medical advice on termination of pregnancy and contraception, secretly withheld from their parents, agitated many sincere and concerned community groups and individual citizens.

Most of the groups which came forward had not spoken to children on this issue, although the Commission has. Most had not considered the wider issues : computers, surveillance and so on. One spokesman in Hobart saw no great advantage in asking children of 12 their views on privacy. Many groups asserted the need to uphold the Biblical ethic concerning parents' rights over children and children's duties to parents. Many even advanced a somewhat 'mercantile' approach to the problem. According to this view, so long as a child remained under the roof of a parent, eating at his table, the parent should have an absolute right of access to the child's records, however intimate, whether medical, educational or otherwise. If a parent paid the health fund fees, the claims of others (even a child) on such a fund could not be tolerated without the subscriber parent's knowledge and consent. In Hobart, one citizen put it thus : 'The family is good enough to produce but not to control its children'.

This approach was condemned by other participants. In Melbourne it was said to be symptomatic of a selfish attitude to a 'captive population'. Resignation to the rights of parents against the rights of children had too long led to disadvantages to many children. Parents' wishes concerning access to their child's personal information, at least after a certain age, could not be conclusive of the issue. Instances of unkind and cruel parental conduct was cited to the Commission. Psychological oppression and cruelty was much more common, so it was said, than physical abuse. Instances where parents were selfish and thought of themselves rather than of their children's individuality were mentioned. One witness pointed out that a case where a child, courageously against the parent, asserted a right to the privacy of confidences, was already a case where intra family communication had 'broken down'. All that was proposed that the law should protect such children as a vulnerable group. It was claimed that children were maturing earlier today than in times gone by. It was also pointed out that in reality doctors, teachers, ministers of religion and priests did observe the confidences of children between the years of 12 and 16, and indeed, on occasions, even younger.

As against these contentions, defensive of the Commission's tentative proposals, strong arguments were advanced by opponents. It was pointed out that parents are generally motivated by the best interests of their children and usually in the best position to judge those interests. They have a deeper, longer term and less superficial knowledge of the child than most doctors, school counsellors and advisors. The effort of society should be to bring parents and children together, to share information. It should be reconcile parents and children, not least because the family is usually the most efficient provider of social support. It was suggested that the Commission's approach was to deal with exceptional cases of children ill-treated, suffering incest or violent abuse and that such an approach could favour exceptional cases rather than the ordinary family relationship in Australian society. In particular, the dangers of abortion, especially on young girls, were stressed by representatives of the Right to Life Association. Certainly at the age of 12 to 16, young people were vulnerable and susceptible to assertive peer group pressure. In Darwin, it was said that many children of this age were 'bush lawyers'. Adoption of the principle proposed by the Commission might encourage children in rebellion against the legitimate efforts of parents to help them during a period of immaturity. One participant even said that the need to tell parents, for example in the case of pregnancy, would force children and parents together where the easy thing would be to avoid communication. Commenting on this, representatives of the Family Planning Association thought it an naive proposition in the context of pregnancy of a young girl. They said it was more likely that the girl would borrow from friends, steal or even seek non-expert termination of pregnancy rather than face up to parents, if they were known to be unsympathetic.

Faced with the problem of a parent's demand to have access to the confidences of a child to a minister of religion or priest, it was generally conceded by opponents of the Commission's proposal that a discretion would be required in such a case. Many were also prepared to acknowledge a discretion in the case of at least some medical and school information. It was acknowledged that there would be exceptions to the right of parents to have access, as for example parents themselves guilty of child abuse or incest or in certain other cases where parents needed education in an effective method of communicating with their child. But critics remained adamant. The whole bias of the Commission's proposal was unacceptable. Whereas normally a parent should be told, at least up to the age of 16 years, the Commission had proposed that normally a parent should not be told if a child over the age of 12 objected. This approach adopted the wrong onus, according to many participants. It ignored the fact that most parents already respect a measure of privacy for their children, and that current arrangements for professional discretion were working well in practice. It was suggested that the proposal would adjust society to the 'weakest link', as, it was claimed, had the Family Law Act. It would intrude legislation in an area of sensitive personal relationships and adopt artificial rules on a criterion no better than a birth date which may have nothing to do with actual maturity.It was said that children were already difficult to control today and that nothing should be done to diminish parental control by encouraging notions of a children's 'charter of privacy'. In Hobart reference was made to recent United States research which it was claimed showed the damage that could be done by intrusions of legislation into delicate inter-personal relationships.

The general consensus of those who made submissions to the Commission, even some who favoured a child's legal right to privacy, was that the age of 12 was too low for the beginning of any legally enforceable right of privacy. Many expressed themselves more forcefully. Some claimed to be 'horrified' at the suggestion. Debate about the appropriate age varied. The Family Planning Association in Sydney suggested 14 years, that being an average age of puberty. Others supported that age because of its connection with school leaving entitlements in some parts of Australia. In the Northern Territory one participant favoured 15 years, that being the school leaving age there. Others argued for 16 years on the basis that this was the age for consent to sexual activity. Many religious groups contended for 18 years, that being the age of adulthood, the right to vote, make wills, contracts and so forth. However, the law already provides many ages of relevance to young people. Many show no attention to a consistent criterion. Some are simply the product of history. The emergence of a child into the voting, contracting and testimentary community may come later than the development of that personal integrity which is respected in the name of privacy. Many participants said that 18 was 'far too old'.

The mean of the submissions received would appear to favour a general age of 16 years, beyond which parental insistence of access to intimate medical or educational information, or the confidences shared with a priest or minister of religion, should not be upheld against the child's objection.

Quite apart from strong submissions on the issue of privacy of medical information, numerous views were expressed on the subject of school reports and educational information. It was feared that the Commission's proposal would imperil teachers, who would not feel able to speak boldly to parents. One participant said that the proposed rule would protect the 'sloppy teacher and poor doctor'. It would be all too easy for the teacher or doctor to accept the objection of the child and avoid unpleasantness : the law would protect him. It was pointed out that children fantasized and sometimes deceived professional advisers. Against a young person's objection, the integrity of parents must be weighed. The immaturity of some teachers must be considered. One participant even suggested that the Commission's proposal could lead to blackmail by a teacher of a pupil. A teachers' organisation in the Northern Territory said that the effort of education today was to encourage parents' interest and involvement in the public activities of the school and the progress of the child.The Comission's proposal was aimed at a different target, namely the personal confidences of the child.

Plainly this controversial proposal relating to children's privacy will have to be reconsidered. A legal scholar with an international reputation, Professor G. Dworkin, told the Melbourne seminar that in the interests of securing effective privacy and data protection laws, the Commission could do well to postpone the controversial proposal on children's privacy, referees' reports and access to medical records.

SANCTIONS AND REMEDIES TO DEFEND PRIVACY

Finally, I turn to the consideration of the machinery proposed for the defence of privacy in the Commonwealth's sphere. It was at the seminars that the chief attention was given to the problems facing the Commission. In Melbourne Professor Weeramantry listed the problems of giantism in society, of apathy of the community, of mobility of highly trained (and in particular computer) personnel and the dangers of aggregate profiles. The problem of apathy was touched on in many places. In Brisbane the public hearing was told that privacy was not presently seen as 'cost-justified'. Elsewhere we were told that there was 'little interest in the subject'. The need to raise community understanding of the problem and of the subtle dangers that lie ahead was stressed at almost every seminar.

Other considerations of a general character were also stressed. Privacy is not an absolute value but must be balanced with other freedoms, including the right to information. This thought led the Victorian Society of Computers and the Law to urge the creation not of a Privacy Council and Commissioner but an Information Council which could weigh equally the claims to privacy and information. It was important to avoid an obsessive and 'over-tender' concern for privacy.

Professor Dworkin stressed that any machinery developed should be flexible and sensible because of the infinite variety of information systems in particular and the fast-developing technology which almost daily creates new problems for the slow-moving lawmaker. The role of the law was limited and its limits were recognised in all parts of the country. At the Queensland seminar that role was said to be to establish the rights of individuals and to provide effective and accessible machinery to ensure that those rights were respected.

The cost of privacy protection was mentioned in many places. Some urged that charges should be made for the suggested right of access. Others urged that any such costs should not be so unreasonable as to effectively prevent utilisation of the salutory right of access. Still others pointed out that access and data quality rules should be seen as elements in a good information system. Data cleansing and auditing should be compulsory as part of the costs of computerisation. Given the enormous efficiencies and economies, especially of the new information technology, the cost of information privacy would be modest and marginal. Strong interest was expressed in many seminars concerning the achievement of effective security of automated personal information systems. A strong mood came through that encryption would be required both in hardware and software to protect sensitive personal data in computers from 'raiders'.

By the same token, computerists constantly reminded the Commission of the limits within which any Australian legislation must be developed. Australia is overwhelmingly an importer of information and information technology. It is overwhelmingly an importer of computer hardware and softward. Satellites and the new technology make it relatively easy, technologically, to bypass national legal systems. It may even be impossible to say precisely where a data file is, if its content is moved about for reasons of economy and efficiency. By way of reassurance, it was pointed out that Australia will pick up various security measures provided for in United States legislation. Numerous participants urged the need to 'phase in' legislation and to provide machinery that would ensure that the regulation of privacy and the provision of effective data protection laws was an 'ongoing' procedure.

So far as the actual machinery for privacy protection was concerned, a difference of view emerged. On the one hand, some proponents urged that it was necessary to go no further than the model of the New South Wales Privacy Committee. Put generally, this provides a mechanism for investigating complaints and generalising to voluntary, non-enforceable 'guidelines' which are given publicity through the media. The Law Reform Commission's discussion paper urged an extra step, in the provision of a residual right of access to the courts, at least in some cases of privacy invasion, both in respect of unlawful intrusions and breaches of established fair information practices.

Nowhere did this difference of view emerge more clearly than at the Sydney public hearings of the Commission. The merits of the informal model of the Privacy Committee were well identified by the Executive Member, Mr. Orme. The Law Reform Commission's discussion paper has obviously been profoundly influenced by the areas of success of the N.S.W. Privacy Committee. Its accessibility to ordinary citizens, across the table, contrasts markedly with the relative disuse of general tort remedies provided in Canadian legislation. Nearly 10,000 complaints have been dealt with in the five year history of the N.S.W. Committee.The Committee is not opposed to specific legislation and has indeed supported legislation to forbid the use of lie detectors in New South Wales. However, its view is that legislation and court-enforced remedies are inappropriate and even counter-productive except in very rare, limited and specific cases.

The arguments on the other side have been canvassed and some of them were mentioned in the public hearings and seminars of the Commission.

- Community Confidence. It was stressed in Darwin that an Ombudsman is only as effective as community confidence in the person who holds that office. An Ombudsman-like committee is therefore very dependent upon the integrity and public acceptability of its spokesman. Access to the court provides a more regular and routine procedure and involves personnel whose integrity and judgment is traditionally not questioned. Administrative remedies do not always enjoy the same trust.

- International Perspectives. No other overseas privacy law has been content to stop short at persuasion, mediation and conciliation, as the New South Wales Privacy Committee model does. The great majority of the countries of the O.E.C.D. community have now enacted privacy or data protection laws. All of these provide enforceable remedies and legal 'rights' which go beyond mere conciliation. This is not to say that the mediation model is not appropriate for Australia. But it does require us to pause and consider whether our problems are so different to those overseas, given that the technology is common so far as computer and surveillance privacy issues are concerned.

. Right to a Hearing. In Melbourne, a complaint was made by a person who had himself been investigated by the N.S.W. Privacy Committee in respect of an alleged breach of privacy in surveying techniques. He denounced what he saw as 'Star Chamber' tactics. He complained that he was never given the opportunity of a public hearing nor to confront his accusers, nor to test their assertions before the full Privacy Committee. He condemned what he called 'trial by media'.

. 'Trial by Media'. The need to rely upon the media to encourage recalcitrant privacy invaders (whether in government or the private sector) to comply with fair standards has disadvantages. In one State the media has complained to the Commission that, though the material of the Privacy Committee was usually 'good copy' they resent being virtually used as an instrument of government or community law enforcement. Furthermore, reliance on the media is problematical. It depends upon a story catching a sub-editor's eye. It may be a blunt instrument which tempts its users in inter-partes conflicts to 'headline grabbing' rather than a balanced reflective assessment as may be required in privacy issues. It also relies on widespead publicity which may not always be appropriate for privacy concerns. It is an unorthodox and extraordinary sanction and one which, in the view of some, is fundamentally inconsistent with privacy, uncertain and uncontrolled in operation with a tendency to abbreviate, over-simplify and sensationalise delicate balances of interests and rights.

. Trimming the Sails. Without reliance on courts of law with their resolute and independent remedies, the need to concentrate on mediation and agreement may cause an advisory body, at least sometimes, to 'trim its sails' to achieve the possible rather than the objectively desirable result. Though mediation may solve the majority of disputes, and indeed be suitable for wider adoption in legal procedures generally, cases will arise where an effective and enforceable determination may be appropriate. Yet the Privacy Committee model provides no enforceable rights, except by pressure in the media.

. Criticising Governments. The answerability of a government appointed committee to government of the day, if only by dint of limited appointments and subtle pressures, make it undesirable that such a body should be deprived of effective enforcement of its decisions. As has been stressed in many seminars and public hearings, a major potential intruder into privacy, including information privacy, is government and its agencies. A body which is constantly criticising the government or its powerful officers and relies upon the media to do so, will soon bring itself

into disfavour. In the Commonwealth's sphere at least, it is unlikely that members of the Privacy Council or the Privacy Commissioner would be permanent public servants. They would be appointed for a term. Pressure could arise, especially towards the end of a term, to curb criticism. This possibility must be acknowledged frankly and cannot be cloaked by brave statements about the personal integrity of office holders. It is a problem acknowledged in the constitutional guarantees to judges against removal. It may be safer to provide access, in at least some cases, to the courts of the land. This would also be more consonant with the constitutional doctrine of the separation of powers.

- Wider Remedies in Court. That doctrine prevents a Commonwealth agency from offering some of the remedies which could be useful for privacy protection. I refer to the remedy of damages which may be apt where actual loss has been suffered or special hurt inflicted by privacy invasion. But there is also the remedy of injunction and the remedy of declaration of legal right. Under the Australian Constitution, these remedies can normally only be provided in a court of law. They are not available to an administrative agency. The Commonwealth is used to having the activities of its officers scrutinised in the courts. The recent Administrative Decisions (Judicial Review) Act, proclaimed in October 1980, acknowledges and furthers this judicial review.

- Judicial not Administrative Review. The Law Reform Commission Act specifically provides that the Commission, in making its proposals, should ensure that they 'do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions' (s.7(a)). This consideration and the need on occasion to tame even a powerful, opinionated and determined privacy invader makes it possibly inapt to rely solely upon administrative machinery, especially where such machinery is limited to persuasion and mediation and the respective power of privacy invader and privacy invaded may be so profoundly unequal.

- National Approach. Many submissions to the Commission have stressed the importance of a national approach to privacy protection which avoides inconsistencies and incompatibilities in Commonwealth and State laws. In these circumstances resort to the courts, at least in some cases, to develop a body of law relevant for our time, is more likely to command national acceptance than the exclusive reliance upon a new and exclusively Commonwealth agency.

The issue is not whether a body such as the New South Wales Privacy Committee should be created. The Commission has already recommended this. The issue is whether that model goes far enough. Many of the persons who have made submissions to the Commission or who have spoken at public hearings have indicated that in their view self-regulation is inappropriate and inadequate. Specifically, Professor Montgomery told the Melbourne seminar that it was inappropriate and would be ineffective in the area of data protection and data security. Other participants said that the ultimate existence of a right to recover damages would make privacy invaders more careful than they would be if the worst that could happen was a public rebuke by an Ombudsman-like body. Those who oppose the provision of damages to those who suffer damage, in a legal regime which normally compensates those who suffer unlawful damage, bear the onus of showing that the provision of damages is unwarranted. Though a right to damages may be criticised as a rich man's remedy, legal aid is available and may be considered likely to be available in appropriate cases. Furthermore, the history of English-speaking people has been one of determined resolute litigants taking test cases to the court. The tradition of the legal profession has been frequently one of providing services free of charge in cases of manifest unfairness, injustice or oppression.

CONCLUSIONS

These are only some of the issues that have been raised for the consideration of the Law Reform Commissioners, the Australian community and ultimately the Parliament as a result of our national inquiry into privacy. Though there have been many Royal Commissions, Parliamentary Committees and Inquiries in the past, and though the Commission has itself engaged in many national inquiries, there must be few which have attracted such a variety of community and expert attention. That this attention is well merited is made plain by the issues discussed in the Commission's consultative documents debated at the public sessions. Those issues concern the future of the individual in Australian society. Are we to become a society of virtually unlimited official powers of entry upon our property, of optical devices in every room, of unrestricted personal and commercial use of eavesdropping machinery and unlimited intrusions by canvassers and telephone advertisers? Are we to have no enforceable rules for the security, quality, accuracy, fairness, up-to-dateness of computerised personal information? Are we to rely on good manners and fair dealing in disciplining such important and powerful new technologies?Is the data subject of the 21st century to be able normally to see how others are perceiving him in his computer profile? Or are decisions increasingly to be made in an impersonal scientific world on automated information of which the subject knows nothing, which he cannot see and of which he suspects the worst?

This is no longer an Orwellian spectre. This is a world which is already in embryo. Undoubtedly the new technology will change our perceptions of privacy. Undoubtedly our values will be changed as we embrace the plain economic and social advantages of computerisation. But the debate in which the Law Reform Commission is engaged is one of immense concern to those who would seek, even in a technological age, to defend the individual's ultimate right to a zone of privacy as would-be intruders seek to look at him, directly, through surveillance and above all through a 'data profile'.

The issues before the Law Reform Commission are complex. But they will not go away. In the end we will deliver our report, to which will be attached draft legislation. Hopefully the end product of all these labours will be effective laws that will stand up for individual privacy. Whether we are a computerist or a judge; whether we are a customs official or a cleric; whether we are a member of the Family Planning Association or of the Festival of Light, we all have a concern to defend a zone of personal privacy, without which creative individualism cannot flourish.