THE UNIVERSITY OF NEWCASTLE (N.S.W.)

NEWCASTLE - 25 MAY 1981 - 4 P.M.

CONFERENCE OF UNIVERSITY ADMINISTRATORS

PRIVACY AND UNIVERSITY RECORDS

ACCESSIBLE OR CLOSED?

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

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LAW REFORM AND YOUNG PERSONS

A number of the projects of the Australian Law Reform Commission have required us to look specifically at the law as it affects young persons in Australian society. Thus, in our second report on Criminal Investigation[1] the Commission examined the particular problems which arise in the interrogation of children and young persons. Proposals were advanced for the security of investigations involving young accused, including the presence of a parent, relative, friend, lawyer, welfare officer or other responsible person.[2] The proposal was accepted by the Commonwealth Government in the Criminal Investigation Bill 1977.[3] Although that Bill has lapsed, the Attorney-General, Senator Durack, has indicated that it will be reintroduced in a revised form. It would govern only the activities of Federal Police. However most police forces, Commonwealth and State, recognise the need for special care in dealings with suspects who are young.[4]

In the Commission's report on Human Tissue Transplants[5], now adopted in the law of three jurisdictions of Australia and recommended for adoption in Victoria, one issue arose which divided the Commission. It related to the question of whether the law should ever countenance the donation of organs and tissues by legal minors, in the case of non-regenerative vital organs such as a kidney. A majority of the Commission proposed that this should be permitted within a family situation, provided certain safeguards, including judicial scrutiny, were observed. A minority of Commissioners (Sir Zelman Cowen and Sir Gerard Brennan, now a Justice of the High Court of Australia) dissented. Legislation based on the Commission's report has reflected the varying viewpoints of the majority and minority view.

The Commission's recent report, Sentencing of Federal Offenders[6] called to notice the special problems of punishing offences by young adults, including the problems of those many offenders who become caught up in the criminal justice system at an early age and find it difficult to escape.[7]

One present task before the Commission upon which it will next report relates to the child welfare laws of the Australian Capital Territory. That task requires the Commission to examine a whole range of subjects which have been lively items of contention in Victoria and indeed all States of Australia. They include:

- The differentiation in the treatment of young offenders, on the one hand, and children in need of care, such as neglected children or uncontollable children, on the other.

- The definition of the age of criminal responsibility in children.

- Whether the new Family Court of Australia should have any functions in relation to dealing with children in need of care, to take them out of the criminal courts.

- The definition and handling of cases of 'child abuse'.

- The issue of the compulsory reporting of suspected cases of child abuse, including by teachers and other school or university officers.[8]

- The issue of institutional abuse and the question of the survival of corporal punishment in schools.

- The regulation and supervision of day care services, whose importance becomes more manifest in a society of working mothers in impersonal urban communities.[9]

PRIVACY AND EDUCATIONAL RECORDS

No project has required a clearer understanding of educational administration than that which deals with the provision of new federal laws for the protection of privacy in Australia. The issues that are raised for resolution in that inquiry manifest every one of the forces for change at work in Australian society. The growth of government is reflected in the growing powers of entry, search and seizure given to increasing numbers of government officials and the growing bulk of government information systems with data upon all members of society. The changing face of business is seen in the new business practices, many of which are more intrusive than in times gone by,

including door-to-door sales and direct marketing. Changing moral and social values can be seen in the greater awareness of the importance of privacy as a human value and in the recognition of the inability of present laws adequately to protect privacy. The dynamic of science and technology is illustrated by the listening device, the long-distance surveillance camera, satellite spying and above all, the capacity of the computer to develop data profiles on all individuals, often on the basis of information provided for extraneous purposes.

In the course of our privacy inquiry we have looked at a number of special information systems. One subject of particular inquiry has been educational records. For constitutional reasons we have concentrated on the records of the educational relationship in the Australian Capital Territory. However, in broad principle the same problems arise in educational records, wherever they are kept in Australia: Federal or State, public or private schools, universities and colleges of advanced education, centralised or 'desk drawer' notes.

Unlike most other records containing personal information (such as those relating to taxation, employment, social security and so on) educational records tend to be created during an individual's earliest formative years. They generally contain some sensitive evaluative information concerning not only the individual's academic performance but also his personal qualities. They have the capacity often to affect the child's progress for the rest of his life: whether by limiting opportunities for further education and career choice, or by otherwise labelling him. Generally, this information is unknown to the student or his parents. Generally it is unavailable and almost without exception, the law at present provides no enforceable right of access.

In all probability, educational records are the most universal of detailed personal records of Australian society. Most people in Australia have attended, do attend or will attend an educational institution. Adult migrants, visitors, some mentally handicapped people and some traditional Aborigines are virtually the only exceptions. In addition to the universality and sensitivity of educational records, their creation and maintenance is largely compulsory, though educational institutions are usually allowed considerable autonomy over their internal processes including record keeping. As a result, highly sensitive information may be collected and stored about a student. The dangers which may arise from this collection and storage may be increased by the fact that the subjects of educational records are usually unable to protect themselves against unfairness or even plain error in their content. In part, this is because of the limited understanding, vulnerability or immaturity of the student. In the case of older students in tertiary institutions, it may be the result of the feeling that any effort to assert a claim to see a record may jeopardise the student's chance of a favourable evaluation and brand him as a troublemaker.[10]

Most schools and universities in Australia keep student records cards which, at this stage, are generally not computerised, but plainly, shortly, will be. Often a separate confidential record is kept including scores on I.Q. tests and like evaluative material. Medical records are generally kept separately. Access is a privilege. If permitted at all, it will generally be confined to non-confidential records. Use within the school or university is confined to the 'need to know' basis. Practices vary in relation to maintenance of records but frequently they are destroyed after an interval of years. Problems are recognised to arise concerning official claims for access to student information and requests for information by employers or by others seeking the whereabouts of children, for example in a custody dispute, by police or Federal officials (immigration) seeking access to university information.

In the United States, major changes to the law governing access to educational records occurred as a result of the 'Buckley' Amendment to the General Educational Provisions Act 1974. The incentive for the amendment arose from concerns over the increasing computerisation of educational records[11] and perceived invasions of family privacy as a result of psychological and attitude testing and experiments in behaviour modification of children.[12] Anxiety in the United States was compounded by the revelation that many education record keepers had disclosed information to the C.I.A. and F.B.I. agents, juvenile courts and health departments, whilst in 90% of cases, completely denying parent and student access to the very same records.[13] The Buckley Amendment, as it originated on the floor of the Senate, was enacted without national debate or public hearing. After its passage through the Senate, there was a concerted effort by educators and parent and student groups to draft a revision titled 'Family Educational Rights and Privacy Act'. However, the amendment has been the subject of continuing controversy. Both administrators and affected parties remain unsure of the proper interpretation of the Act.[14] Objections are also voiced to the fact that the Act, although originally proposed to deal with problems in the primary and secondary schools, is extended to include tertiary education as well.

The United States Act applies to any school receiving federal funding through the U.S. Office of Education. It establishes minimum federal standards of privacy for educational records in the United States. Within these minimum standards, educational institutions are permitted considerable latitude in establishing procedures and formulating policies to implement the rights granted by it. The Act provides broad parent and student rights of access to student records, combined with strict disclosure restrictions. It does not control the collection of information. The emphasis is on self-regulation. Privacy infringements are to be monitored as a result of parent or student complaint. The Act requires any educational agency or institution receiving federal funds to make educational records available for inspection and review. Access is granted exclusively to parents or 'eligible' students i.e. those who are 18 years of age or attending a post-secondary institution.[15]

Certain categories of information are exempt from access, including 'desk drawer' notes, on campus law enforcement agencies' records and employer and employee records.[51] Other categories of information require indirect access, for example medical records of treatment by physicians, psychologists and psychiatrists.[16] If requested, an opportunity must be provided for a hearing to challenge the accuracy and content of information on file. No disclosure external to the institution is permitted without the written consent of the parent or eligible student.[17] This limitation is subject to certain exceptions, including directory information, school officials with a 'legitimate educational interest', officials of schools to which the data subject transfers, authorised representatives of educational authorities, financial aid authorities, educational research and development agencies, accrediting organisations, parents of a dependent student and 'appropriate persons' in emergency situations. Information may also be disclosed pursuant to a subpoena, subject to the duty to notify the parent and eligible student in advance of compliance with the subpoena.[18] To enable a check against unauthorised disclosure contrary to the Act, it is also required that the record keeper should maintain a log of disclosures. The only sanction under the Act is the withdrawal of federal funding. This is because the United States Congress does not have the constitutional power directly to regulate the activities of schools and universities. A similar inhibition exists in relation to the powers of the Federal Parliament in Australia outside the Territories.

Should we in Australia go down the same track in relation to legally enforceable rights of student and parent access to educational records? Many objections have been received by the Australian Law Reform Commission in the course of its inquiry from school and university authorities. It is asserted that the right of access will inhibit the frank recording of assessments and opinions, confining school records to undisputed factual data or bland, enigmatic, cryptic comments. It is asserted that such attenuated records will deprive educators of the future of the evaluative comment of educators of the past. It is feared that opinions and references about students and ex-students will depend on perishable recollection or telephone confidences rather than permanent or semi-permanent records.

On the other hand, supporters of the American legislation point to the pervasiveness of educational records, their importance in moulding attitudes to young people and their possible significance, at the crossroads, when the career prospects of the child may be in question. Especially as examinations come to play a lesser part in school and university advancement and teacher evaluation becomes more important, it is feared that secret opinions, possibly sometimes based on false,

out-of-date or unfair information, may determine the entire future of a young person. In these circumstances, supporters of the enforceable right of access contend that the best person to protect the individual is himself, or in the case of a person of tender years, his parents. The right of access is the common principle adopted in the privacy laws of North America or Western Europe for the protection of the individual in the computerised information systems of the future. If it is the general common protection, the question is posed: what is so special about educational records that the child or young person or his parent may not have access to them and a right of challenge, correction, annotation and, where appropriate, deletion? After all, the data profile is the data profile of the subject and it is his life that is principally affected by decisions made on the basis of the file. Furthermore, as education and other personal records are increasingly computerised, the risk of haemmorhage of personal data and of retention and of the use of data for composite personal profiles requires resolute action by the law to defend the individual's zone of privacy.

If an enforceable right of access is conferred by law, it is necessary to define its limits and the machinery for its enforcement. In the course of its public hearings on privacy protection, the Law Reform Commission received many submissions directed at proposals concerning rights of parental access to the medical and educational records of young persons. At what stage the child acquires an individuality and privacy of his own which the law should protect even as against a parent or guardian is an issue only raised when one begins to take seriously the application of the principle of access to educational, medical and other confidences of the child. The strong passions that were generated in this debate reflect some of the deep convictions and firmly held opinions that mark the debate concerning education generally.

FOOTNOTES

1. ALRC 2, 1975 (Interim).

2. ibid, 127 (para. 266).

3. Cl.28.

4. See Chief Commissioner of Victoria Police, Standing Orders 644(2) in ALRC 2, 126.

5. ALRC 7, 1977.

6. ALRC 15, 1980.

7. See e.g. R. v. Davis and Jones, [1977] 1 Crim LJ 49 and R. v. M. (a minor), [1977] 1 Crim LJ 160.

8. Australian Law Reform Commission, Discussion Paper No. 2, Child Welfare: Children in Trouble, 1979.

9. ibid, Discussion Paper No. 12, Child Welfare: Child Abuse and Day Care, 1980.

10. United States, Report of the Privacy Protection Study Commission, Personal Privacy in an Information Society, 1977, 410.

11. Protecting the Privacy of School Children and Their Families Through the Financial Educational Rights and Privacy Act of 1974, 14 Journal of Family Law, 255 (1975-6). Florida has a centralised computer-based record system covering its entire high school system. Similar systems are being planned for Iowa and Hawaii and other States.

12. Meriken v. Cressman, 364 F.Supp. 913, 916. In this case, a student was requested to answer questions such as 'whether one or both parents "hugged and kissed me goodnight when I was small", "tell me how much they loved me", "make me feel unloved ...'.

13. Divoky, 'Cumulative Records, Assault on Privacy', 22 Learning, 18 (1973). In a survey undertaken in 1969 by the Russell Sage Foundation, 50% of record keepers surveyed disclosed educational records, whilst only 10% gave parents or students access.

14. US Privacy Report, 413, 416-7.

15. 20 USC, para. 1232g(d).

16. ibid, para. 1232g(a)(4)(B)(iv).

17. ibid, para. 1232g(b).

18. ibid, para. 1232g(b)(2)(B).